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COURT OF APPEALS CASES

McNEILL-MARKS v MIDMICHIGAN MEDICAL CENTER-GRATIOT

Docket No. 326606. Submitted June 8, 2016, at Lansing. Decided June 16, 2016, at 9:00 a.m. Leave to appeal sought.

Tammy McNeill-Marks brought an action in the Gratiot Circuit Court against MidMichigan Medical Center-Gratiot (MMCG), alleging that MMCG's decision to terminate her employment violated both the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and Michigan public policy because MMCG terminated her for either reporting a violation of a personal protection order (PPO) to her attorney or for being about to report that violation to the circuit court. Plaintiff, a clinical manager at MMCG, had adopted three children. The children's grandmother, Marcia Fields, had threatened to kill plaintiff, plaintiff's adopted children, and plaintiff's biological children during the adoption process. Plaintiff sought and was granted a series of PPOs against Fields. The PPO at issue ordered Fields, among other things, to refrain from stalking plaintiff as defined under MCL 750.411h and MCL 750.411i. Plaintiff subsequently encountered Fields in a hallway at MMCG. Fields was in a wheelchair and said, "Hello, Tammy," in a sing-song vocal tone that plaintiff described as "the cat that just ate the canary," indicating to plaintiff that Fields knew she had "gotten away with something she's not supposed to do." Plaintiff informed her supervisor about the situation and then called her attorney to tell him that Fields had appeared at MMCG; however, at no time did plaintiff tell her attorney that Fields was a patient at MMCG. Later that evening, while Fields was still a patient at MMCG, a process server from the attorney's law office served Fields with the PPO in her hospital room. Fields and her family reported the incident to MMCG as a suspected violation of the Health Insurance Portability and Accountability Act (HIPAA), 29 USC 1181 *et seq*.; 42 USC 300gg; 42 USC 1320d *et seq*. Plaintiff moved to have Fields held in contempt for violating the PPO, but plaintiff did not include her encounter with Fields in the hospital as an alleged violation. MMCG began an investigation into Fields's HIPAA complaint, and plaintiff alleged that MMCG's privacy officer threatened that plaintiff would be terminated if plaintiff testified regarding her interaction with Fields at MMCG at the hearing on

plaintiff's motion to hold Fields in contempt for violating the PPO. Following the investigation, MMCG concluded that plaintiff violated both HIPAA and MMCG's privacy policy, terminated plaintiff's employment, and gave plaintiff a "Corrective Action and Disciplinary Form" that cited plaintiff's telephone conversation with her attorney as a violation of HIPAA policy. Plaintiff then brought this action. MMCG moved for summary disposition, arguing that plaintiff had failed to establish a prima facie case under the WPA because plaintiff never reported the alleged violation to a "public body" as defined under the WPA and because plaintiff could not have reasonably suspected that Fields's conduct violated the stalking prohibition in the PPO. Additionally, MMCG argued that the WPA claim preempted the public policy claim. The court, Randy L. Tahvonen, J., granted MMCG's motion, concluding that plaintiff's telephone conversation with her attorney was not a communication to a public body, that Fields's conduct did not violate the PPO, and that the hospital did not attempt to conceal a crime. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.2950(1)(j) prohibits stalking, which MCL 750.411h(1)(d) defines as a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(e) defines unconsented contact as any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. MCL 750.411h(1)(d) requires a willful course of conduct; however, even if Fields's initial encounter with plaintiff in the hallway at MMCG was not willful, and was instead accidental, Fields's subsequent verbal communication with plaintiff constituted willful, unconsented contact under MCL 750.411h(1)(e). Even if Fields could not have planned her contact with plaintiff or avoided such contact, after she saw plaintiff, Fields made a deliberate choice to speak to her, and such deliberation made the communication willful, particularly in light of the tone in which Fields spoke—a tone indicating that she knew she had "gotten away with something she's not supposed to do." Fields's conduct, in concert with her prior unconsented contacts with plaintiff, qualified as "stalking" in violation of the PPO.

2. MCL 15.362 provides, in relevant part, that an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to the law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false. To establish a prima facie case under MCL 15.362, a plaintiff must show that (1) the plaintiff was engaged in a protected activity as defined by the WPA, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge. "Protected activity" consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation. Under MCL 15.363(4), an employee asserting that he or she was "about to report" a violation must support that claim with clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation to a public body. Reporting or being about to report a violation or a suspected violation to a public body is protected if the report is or is about to be made in good faith. Under MCL 15.361(d)(*iv*), a "public body" includes any body that is created by state or local authority or that is primarily funded by or through state or local authority, or any member or employee of that body. Under MCL 600.904, the Supreme Court is empowered to provide for the organization, government, and membership of the State Bar of Michigan (SBM) and to adopt rules and regulations concerning the conduct and activities of the SBM and its members, which includes the schedule of membership dues. In this case, the trial court erred by concluding that, because Fields's conduct did not violate the PPO, it was immaterial whether plaintiff made a report or was about to make a report regarding Fields's conduct to a public body before she was terminated. Even assuming that Fields's conduct did not actually violate the PPO, plaintiff was still afforded the protection of the WPA so long as she, in good faith, reported, or was about to report, Fields's conduct to a public body as a suspected violation of the PPO. There was no evidence that plaintiff acted in bad faith, i.e., that she did not actually believe that Fields's conduct violated the PPO. If plaintiff reported such conduct to a public body, or was about to do so, she was engaged in a protected activity under the WPA. Furthermore, it was undisputed that plaintiff's attorney was a licensed Michigan attorney and a member in good standing

of the SBM when plaintiff called him and reported her contact with Fields. The attorney's licensure and active membership in the SBM were both mandatory. Under the plain language of the WPA, specifically MCL 15.361(d)(*iv*), plaintiff's attorney qualified as a member of a public body for WPA purposes. As a practicing attorney and member of the SBM, plaintiff's attorney was a member of a body "created by" state authority, which, through the regulation of the Supreme Court, is also "primarily funded by or through" state authority. The trial court erred by holding that plaintiff's attorney was not a member of a public body for WPA purposes, and the trial court further erred by concluding that a report to a public body is a necessary prerequisite to establish a prima facie case under the WPA because a report to a public body is only one of three types of protected activity under the WPA. Plaintiff established a prima facie case under the WPA because (1) her report to her attorney was a report to a member of a public body and therefore a protected activity under the WPA, (2) plaintiff was discharged, and (3) plaintiff presented direct evidence of the causal connection between the discharge and the report to her attorney: the "Corrective Action and Disciplinary Form" that explicitly cited plaintiff's telephone conversation with her attorney as a factor that motivated MMCG's discharge decision. Plaintiff's direct evidence was sufficient to survive summary disposition despite the legitimate reason that MMCG offered for its action—that it suspected plaintiff of violating HIPAA—because a reasonable fact-finder could still conclude that plaintiff's protected activity was a motivating factor for MMCG's decision. The trial court erred by granting summary disposition in favor of MMCG.

3. When a plaintiff alleges discharge in retaliation for engaging in activity protected by the WPA, the WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public policy claims arising from the same activity. Plaintiff's public policy claim arose out of the same activity as the WPA claim for preemption purposes. Plaintiff's refusal to conceal Fields's violation of the PPO was effectuated by plaintiff's report to her attorney, and there was no record evidence that plaintiff was instructed to conceal such activity before plaintiff's telephone conversation with her attorney. There was no logical distinction between the refusal to conceal and the report by which that refusal manifested itself. Summary disposition of the public policy claim was proper because the WPA claim preempted the public policy claim.

Trial court ruling regarding plaintiff's public policy claim affirmed; summary dismissal of the WPA claim reversed; case remanded to the trial court for further proceedings.

1. MICHIGAN PENAL CODE — AGGRAVATED STALKING — WORDS AND PHRASES — "UNCONSENTED CONTACT."

MCL 600.2950(1)(j) prohibits stalking, which MCL 750.411h(1)(d) defines as a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested; MCL 750.411h(1)(e) defines unconsented contact as any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued; even if an initial encounter was not willful, a person's subsequent verbal communication may constitute willful, unconsented contact under MCL 750.411h(1)(e).

2. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — WORDS AND PHRASES — "PUBLIC BODY."

MCL 15.362 provides that an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to the law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false; under MCL 15.361(d)(*iv*), a public body includes any body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body; a licensed Michigan attorney with active membership in the State Bar of Michigan qualifies as a member of a public body for purposes of the Whistleblowers' Protection Act.

The Mastromarco Firm (by *Victor J. Mastromarco, Jr.*, and *Russell C. Babcock*) for Tammy McNeill-Marks.

Miller Johnson (by *Sarah K. Willey*) for MidMichigan Medical Center-Gratiot.

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

WILDER, J. In this employment matter, plaintiff, Tammy McNeill-Marks, appeals as of right the trial court's order granting summary disposition to defendant, MidMichigan Medical Center-Gratiot (MMCG). We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case arises out of plaintiff's discharge from her position at MMCG. In 1991, plaintiff was hired as a registered nurse at a different MidMichigan Medical Center, which is located in Midland. She subsequently transferred to the Gratiot location, where she began to serve as clinical manager of perioperative services and ambulatory care.

Between 2006 and 2008, plaintiff adopted two children and had a third placed in her custody (collectively, the children). Each child has a different father, but the biological mother of all three is Sandi Lee Freeze, who is plaintiff's second cousin. Freeze's mother—the children's grandmother—is Marcia Fields. According to plaintiff, Fields suffers from several psychiatric disorders, including "paranoid schizophrenia, multiple personality disorder," and "bipolar depression." During the adoption process, Fields began to threaten plaintiff. She threatened to kill plaintiff, the children, and plaintiff's biological children. Such threats led plaintiff to seek a personal protection order (PPO) against Fields, which was eventually granted on an ex parte basis.

It is unclear from the record precisely when the initial PPO was issued, but presumably because it had

expired, on December 19, 2012, plaintiff, through her legal counsel, Richard Gay, filed a petition again seeking an ex parte PPO against Fields. That same day, a circuit court judge granted plaintiff's ex parte petition, entering a PPO that prohibited Fields from having any contact with the children and from "posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s."

After its entry, Fields allegedly violated the PPO on several occasions by sending electronic messages to plaintiff. When plaintiff contacted local police regarding Fields's purported violations of the PPO and attempted to file a police report, the police "told [her] that [she] needed to contact [her] attorney, not [the police]," because the PPO had never been properly entered in the Law Enforcement Information Network (LEIN). On January 14, 2013, the circuit court entered an amended PPO, this time ordering Fields, among other things, to refrain from "stalking" plaintiff, as that term is "defined under MCL 750.411h and MCL 750.411i, which includes but is not limited to" (1) "following or appearing within sight of" plaintiff, (2) appearing at plaintiff's workplace or residence, and (3) "approaching or confronting [plaintiff] in a public place or on private property." The amended PPO explicitly noted that it would "remain[] in effect until 12/31/2013." Ignoring the amended PPO, Fields continued to contact plaintiff.

On December 27, 2013—four days before the expiration date of the amended PPO—plaintiff filed a motion, through Gay, to extend the amended PPO for another year. Later that day, the circuit court granted plaintiff's motion on an ex parte basis. The court entered a new PPO, which again ordered Fields to

refrain from "stalking" plaintiff, as that term is "defined under MCL 750.411h and MCL 750.411i," and which specified that the order was "effective when signed, enforceable immediately," and would "remain[] in effect until 12/31/2014."

While at work roughly two weeks later, on January 13, 2014, plaintiff encountered Fields in a hallway at MMCG. At her deposition, plaintiff described the encounter as follows:

> *Q*. . . . Okay. You were walking down the hallway?
>
> *A*. I came out of the operating room door . . . . I said "Hello" because you're trained to always speak to people. I didn't even realize who she [Fields] was or who the transporter was that was transporting her. I got three steps down the hallway and [Fields] said, "Hello, Tammy," in one of those little voices she does, and my stomach sank.
>
> *Q*. She was being transported, in the sense that she was not walking herself?
>
> *A*. Correct. She was in a wheelchair. . . .
>
> * * *
>
> *Q*. Do you know what area of the hospital she had been admitted into?
>
> *A*. No, I do not. Nor did I at that time.
>
> *Q*. Did you understand that she was inpatient?
>
> *A*. No, I did not.
>
> *Q*. You didn't know, or you understood something different than that?
>
> *A*. No, I had no way of knowing where [Fields] had came from [sic] in the hospital. Those transporters transport from ER, the tower, all outpatient services, she could have came from [sic] anywhere and be going anywhere.
>
> * * *

Q. After you had passed, [Fields] said, "Hello, Tammy"?

A. Yes.

Q. In whatever voice you had described?

A. A little sing-songy voice she has when she feels she has passed something over on you like a little kid. It's very specific.[1]

Q. Were any other words exchanged?

A. No. I immediately went into another door.

Q. Do you have any reason to think that she somehow planned that encounter with you, meaning that she knew that you were going to be coming down the hallway in the moment that she was getting wheeled to a procedure?

[Plaintiff's counsel places an objection to foundation on the record, then instructs plaintiff to answer.]

A. I believe on more than one occasion she has admitted herself in the hospital with the hopes that she could . . . make contact with me, yes.

Q. Well, I'm talking about with regard to this particular encounter, and then if you want we can expand on that; okay?

A. Okay.

Q. So with this particular encounter, the two of you passed each other in the hallway.

A. I don't believe that . . . that anybody could necessarily -- that wouldn't be a reasonable expectation, that she could plan to pass me in the hallway.

Q. After that encounter in the hallway, did you see her again at [MMCG]?

A. No, I did not.

After encountering Fields, plaintiff immediately went into an employee break room. She was "visibly upset

[1] Plaintiff later described Fields's vocal tone metaphorically as the tone of "the cat that just ate the canary"—a tone that indicated Fields knew she had "gotten away with something she's not supposed to do."

and shaking," so much so that a coworker voiced concern, asking plaintiff what was wrong. Plaintiff was particularly upset that, through their encounter, Fields had learned "specifically where in the hospital" plaintiff worked. She feared that such knowledge would make Fields a danger to not only plaintiff but also her fellow employees. A short time later, plaintiff called her supervisor, Theresa Baily, who was already aware that plaintiff held a PPO against Fields, and informed Baily about what had transpired.

After speaking with Baily, plaintiff called her attorney, Gay, and told him, "[Fields] showed up today at my workplace." According to plaintiff, Gay never asked for further explanation about what plaintiff "meant" when she said that Fields "showed up" at MMCG. At no time did plaintiff inform Gay that Fields "was there in any form as a patient" or that Fields had been in a wheelchair. Likewise, plaintiff said nothing to Gay about the possibility of serving Fields with the latest PPO while Fields was at MMCG. Rather, questioning whether it was advisable to serve the PPO, plaintiff instructed Gay "not to serve [Fields] at all . . . ." Gay confirmed that, through his conversation with plaintiff, he "was aware that . . . Fields had approached [plaintiff] at the hospital in violation of the PPO," but he "did not have any information from [plaintiff] that [Fields] was a patient at the hospital . . . ."

It is undisputed, however, that later that evening, while still a patient at MMCG, Fields was served with the PPO in her hospital room. According to plaintiff and Gay, Fields's service occurred as a matter of happenstance that bore no causal relationship to the encounter between plaintiff and Fields earlier that day. At the time, Gay's secretary, Deborah Brown, was dating Gay's process server, Lynn Beetley. Brown was

at MMCG visiting another patient when "she thought she saw . . . Fields as a patient" there. Brown called Gay, asking whether "it would be okay to serve [Fields] at the hospital" despite the fact that Fields was a patient. Gay responded, "[I]t sounds okay to me . . . ." Brown evidently informed Beetley of the opportunity because, according to Gay, Beetley went to MMCG "during regular visiting hours, . . . went to the desk," identified himself, asked for and received Fields's room number, then went to her room and served her.

Fields and her family reported the incident to MMCG as a suspected violation of federal privacy regulations, specifically those set forth by the Health Insurance Portability and Accountability Act (HIPAA).[2] Fields alleged that, after encountering Fields at MMCG, plaintiff must have "accessed her record somehow electronically," used such access to obtain Fields's room number, and then informed Gay of Fields's patient status and room number. An electronic audit later revealed that plaintiff did not improperly access Fields's electronic records.

On January 16, 2014, which was three days after plaintiff encountered Fields at MMCG, Gay filed, on plaintiff's behalf, a motion seeking to have Fields held in contempt for alleged violations of the PPO; however, the motion did not include Fields's encounter with plaintiff at MMCG as an alleged violation. A motion hearing was scheduled, but it was subsequently adjourned at Fields's request.

In reaction to Fields's HIPAA complaint, MMCG began an investigation, which involved several staff members, including MMCG's privacy officer, Suzanne Broudbeck. During the investigation, plaintiff admit-

[2] HIPAA is codified at 29 USC 1181 *et seq*., 42 USC 300gg, and 42 USC 1320d *et seq*.

ted that she told Gay that Fields was "at the hospital" on January 13, 2014, but plaintiff denied ever revealing Fields's patient status to Gay. According to plaintiff, when she explained to Broudbeck how Fields had been located and served—without plaintiff divulging Fields's patient status—Broudbeck called plaintiff "a liar." Moreover, in the course of the investigation, after learning of the upcoming hearing on plaintiff's motion to hold Fields in contempt for violating the PPO, Broudbeck "threatened" that plaintiff would be terminated if she testified at the hearing, as planned, regarding her interaction with Fields at MMCG:

> I was told by . . . Broudbeck that if I even mentioned . . . seeing [Fields] in the hallway . . . that would be grounds for being fired. And at that time I was still . . . employed at [MMCG].
>
> * * *
>
> I said, "If the judge asks me outright if I saw [Fields], am [I] allowed to answer truthfully?" And [Broudbeck] said no, that I am not allowed to answer that, or it would be grounds for termination.
>
> * * *
>
> And she said . . . if you answer those questions you will be fired.

At her deposition, Broudbeck categorically denied making such statements or ever discussing the circuit court proceedings with plaintiff.

Following her investigation, Broudbeck concluded that plaintiff had violated both HIPAA and MMCG's privacy policies by disclosing Fields's "protected health information" (PHI) to Gay, specifically by "disclos[ing] that the patient [Fields] was here at the hospital." As a result, plaintiff was terminated on February 14, 2014.

The "Corrective Action and Disciplinary Form" that she was given at the time of termination cited plaintiff's telephone conversation with Gay as a "severe breach of confidentiality and violation[] of HIPAA privacy/practices," which was the reason for her discharge.

Several months later, a motion hearing took place regarding plaintiff's motion to hold Fields in contempt for violating the PPO. Fields pleaded guilty to violating the PPO. According to plaintiff, at the hearing, Fields admitted that she "violated the PPO by being present" at MMCG.

II. PROCEDURAL BACKGROUND

Plaintiff instituted this action by filing a two-count complaint against MMCG. She alleged that her termination violated both the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and Michigan public policy because MMCG terminated her for either reporting Fields's violation of the PPO to Gay or being about to report that violation to the circuit court.

Following discovery, MMCG moved for summary disposition under MCR 2.116(C)(10). In support, MMCG argued that plaintiff had failed to establish a prima facie case of unlawful retaliation under the WPA because (1) plaintiff never reported Fields's alleged violation of the PPO to a "public body" as defined under the WPA and (2) plaintiff could not have reasonably suspected that Fields's conduct—encountering plaintiff by accident while being transported in a wheelchair—violated the "stalking" prohibition in the PPO. MMCG further argued that, even if plaintiff could state a prima facie case under the WPA, she had failed to introduce any evidence that MMCG's stated reason for terminating her—i.e., its

conclusion that she had violated HIPAA privacy regulations—was pretextual. With regard to plaintiff's public policy claim, MMCG argued that the WPA preempts any such claim. In any event, MMCG argued, plaintiff had presented no evidence that her termination was based on her refusal to violate the law or conceal a crime in contravention of this state's established public policy.

In response, plaintiff argued that (1) under the WPA, Gay qualifies as a member of a "public body" because he is, as an attorney, an officer of the court and therefore a "member or employee of the judiciary," (2) likewise, Gay qualifies as a member of a "body which is created by state . . . authority," specifically the State Bar of Michigan, (3) as such, plaintiff's telephone conversation with Gay constituted a report to a member of a "public body" of a violation, or suspected violation, of law, (4) plaintiff's activity was also protected under the WPA because, at the time she was terminated, she was "about to report" Fields's conduct to the circuit court, was threatened with termination if she did so, and was subsequently terminated under circumstances from which a reasonable inference of retaliation could be drawn, and (5) the stated reason for plaintiff's termination was pretextual because there is no evidence that plaintiff violated HIPAA by revealing Fields's patient status. Regarding her public policy claim, plaintiff argued that (1) the claim was not preempted by the WPA, (2) she had presented sufficient evidence to create a genuine issue of material fact about whether she was, contrary to Michigan public policy, discharged for refusing to conceal a criminal act, and (3) as with the WPA claim, the stated reason for plaintiff's termination was pretextual.

The trial court ultimately granted MMCG's motion for summary disposition of both claims. The trial court

reasoned that plaintiff's telephone conversation with Gay was not "a communication to a public body," further reasoning that, "[a]bsent such a communication, there is no [WPA] claim . . . ." The trial court also concluded that, as a matter of law, Fields's conduct at MMCG did not violate the PPO and that it was unreasonable for plaintiff to suspect that such conduct violated the PPO. Finally, concerning the public policy claim, the trial court held that there was, in its "judgment, no request by the hospital . . . to conceal or hide the existence of a, quote, crime, close quote, even if that, quote, crime, close quote, was simply the misdemeanor violation of a criminal contempt [PPO]."

III. ANALYSIS

A. STANDARD OF REVIEW

We review de novo "[a] trial court's decision on a motion for summary disposition." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). "A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint, with the trial court considering the entire record in a light most favorable to the nonmoving party." *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 34; 852 NW2d 78 (2014). "The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003) (quotation marks and citation omitted). Judgment as a matter of law is appropriate when the evidence demonstrates that no genuine issue of material fact remains. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69

(2001) (citation omitted). Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient. *Id*. at 97-98 (citation omitted). We also review de novo, as legal questions, the proper interpretation of the WPA, *Wurtz v Beecher Metro Dist*, 495 Mich 242, 249; 848 NW2d 121 (2014), and issues regarding preemption, *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

B. WHISTLEBLOWER CLAIM

Section 2 of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362.]

To establish a prima facie case under the above provision, "a plaintiff must show that (1) the plaintiff was engaged in a protected activity as defined by the WPA, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). " 'Protected activity' under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule; (2) being about to report such a violation to a public body; or (3) being asked by a public body to participate in an investiga-

tion." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). An employee asserting the second type of claim—an "about to report" claim—must support that claim with "clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation . . . to a public body." MCL 15.363(4); see also *Chandler*, 456 Mich at 400. "The first two types of activity are protected, 'unless the employee knows that the report is false.' " *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010), quoting MCL 15.362. "In other words, reporting or being about to report violations or suspected violations is protected if the report is or is about to be made *in good faith*." *Id*. (emphasis added). The violation or suspected violation at issue need not be one committed by the employer or one of the plaintiff's coworkers; rather, the scope of the WPA is "broad enough to cover violations of the law by a third person." *Chandler*, 456 Mich at 404; see also *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008) ("There is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law *by the employer* or to investigations *involving the employer*.").

To establish a prima facie case, a plaintiff can rely on either direct evidence of retaliation or indirect evidence. See *Debano-Griffin v Lake Co*, 493 Mich 167, 176; 828 NW2d 634 (2013), citing *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001). " 'Direct evidence' is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Powers v Post-Newsweek Stations*, 483 Mich 986, 987 n 3 (2009) (KELLY, C.J., concurring), citing *Hazle*, 464 Mich at 462. If the plaintiff establishes a prima facie case, a pre-

sumption of retaliation arises, which the employer can rebut by offering "a legitimate reason for its action . . . ." *Debano-Griffin*, 493 Mich at 176. To avoid summary disposition after the employer offers such a reason, the plaintiff must "show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a 'motivating factor' for the employer's adverse action," i.e., that the employer's articulated "legitimate reason" was a pretext disguising unlawful animus. *Id*., quoting *Hazle*, 464 Mich at 465.

> A plaintiff can establish that a defendant's articulated legitimate . . . reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. [*Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).]

The germane inquiry is whether the employer was motivated by retaliatory animus, "not whether the employer is wise, shrewd, prudent, or competent." *Hazle*, 464 Mich at 476 (quotation marks and citation omitted).

In dismissing plaintiff's WPA claim, the trial court concluded, *inter alia*, that it was immaterial whether plaintiff made a report regarding Fields's conduct to a "public body" before she was terminated, or was about to make such a report, because Fields's conduct did not violate an existing PPO. The trial court further found that plaintiff could not have reasonably believed that Fields's conduct violated an existing PPO.

By so ruling, the trial court erred. Among other things, the December 27, 2013 PPO ordered Fields to refrain from "stalking" plaintiff, as that term is "de-

fined under MCL 750.411h and MCL 750.411i," and specified that it was both "effective when signed" and "enforceable immediately."

> MCL 600.2950(1)(i) prohibits stalking, which MCL 750.411h(1)(d) defines as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."
>
> "Harassment" is defined in MCL 750.411h(1)(c) as
>
> > conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
> >
> > "Unconsented contact" is defined as
> >
> > *any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued*. Unconsented contact includes, *but is not limited to*, any of the following:
> >
> > (*i*) Following or appearing within the sight of that individual.
> >
> > (*ii*) Approaching or confronting that individual in a public place or on private property.
> >
> > (*iii*) Appearing at that individual's workplace or residence.
> >
> > (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.
> >
> > (*v*) Contacting that individual by telephone.
> >
> > (*vi*) Sending mail or electronic communications to that individual.

> (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411h(1)(e).]
>
> There must be evidence of two or more acts of unconsented contact that caused the victim to suffer emotional distress and that would cause a reasonable person to suffer emotional distress. MCL 750.411h(1)(a). [*Hayford v Hayford*, 279 Mich App 324, 329-330; 760 NW2d 503 (2008) (emphasis added).]

It is true that, to constitute stalking, there must be a "*willful* course of conduct." MCL 750.411h(1)(d) (emphasis added). But even if Fields's initial encounter with plaintiff in the hallway at MMCG was not willful, and was instead accidental, Fields's subsequent verbal *communication* with plaintiff constituted willful, unconsented contact under MCL 750.411h(1)(e); it was "contact with [plaintiff] that [was] initiated or continued without [plaintiff's] consent or in disregard of [her] expressed desire that the contact be avoided or discontinued." Plaintiff has been granted a series of PPOs against Fields—on an ex parte basis—because Fields persists in contacting plaintiff against her wishes, and in such communications Fields has threatened the lives of both plaintiff and her children. Even if Fields could not have planned her contact with plaintiff or avoided such contact, after she saw plaintiff, Fields made a deliberate choice to speak to her, and such deliberation made the communication willful. Moreover, the record establishes that Fields did so in a decidedly willful tone—a tone indicating that she knew she had "gotten away with something she's not supposed to do." Thus, viewing the evidence in the light most favorable to plaintiff, Fields's conduct, in concert with her prior unconsented contacts with plaintiff, qualified as "stalking" in violation of the PPO.

Furthermore, even assuming for the sake of argument that Fields's conduct did not *actually* violate the PPO, plaintiff is still afforded the protection of the WPA so long as she, in good faith, reported, or was about to report, Fields's conduct to a public body as a *suspected* violation of the PPO. See *Truel*, 291 Mich App at 138 ("The first two types of activity are protected, 'unless the employee knows that the report is false.' MCL 15.362. In other words, reporting or being about to report violations or suspected violations is protected if the report is or is about to be made in good faith."). There is no evidence that plaintiff acted in bad faith, i.e., that she did not actually believe that Fields's conduct violated the PPO. Hence, if plaintiff reported such conduct to a public body, or was about to do so, she was engaged in protected activity under the WPA.

Thus, the crucial inquiry is whether plaintiff reported Fields's conduct to a public body before she was terminated or was about to do so at the time of termination. The trial court decided that she did not, reasoning that plaintiff's telephone conversation with Gay was not "a communication to a public body." Plaintiff argues that the trial court's decision was erroneous because, as a licensed Michigan attorney, Gay qualifies as a member of a "public body" for WPA purposes. We agree.

In *Hoffenblum v Hoffenblum*, 308 Mich App 102, 109; 863 NW2d 352 (2014), this Court reiterated certain principles of statutory construction that are germane to our instant analysis:

> The primary goal when interpreting a statute is to ascertain and give effect to the Legislature's intent. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. Statutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole. If

> statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. An unambiguous statute must be enforced as written. [Quotation marks, citations, and brackets omitted.]

"If a statute specifically defines a term, the statutory definition is controlling." *City of Holland v Consumers Energy Co*, 308 Mich App 675, 684; 866 NW2d 871 (2015).

The phrase "public body" is statutorily defined by the WPA as "all of the following":

> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (*iv*) *Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body*.
>
> (*v*) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (*vi*) The judiciary and any member or employee of the judiciary. [MCL 15.361(d) (emphasis added).]

It is undisputed that Gay was a licensed Michigan attorney and a member in good standing of the State Bar of Michigan (SBM) when plaintiff called him and reported her contact with Fields. Indeed, as a practicing attorney, Gay's licensure and active membership in the SBM were both mandatory. See MCL 600.916(1); see also *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 49; 672 NW2d 884 (2003) ("A person engaged

in the practice of law in Michigan must be an active member of the State Bar."), quoting SBR 3(A). Moreover, under MCL 600.901,

> [t]he state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

And under MCL 600.904, our Supreme Court is empowered "to provide for the organization, government, and membership of the [SBM], and to adopt rules and regulations concerning the conduct and activities of the [SBM] and its members," including "the schedule of membership dues therein . . . ."

Hence, under the plain language of the WPA, specifically MCL 15.361(d)(*iv*), Gay qualified as a member of a "public body" for WPA purposes. As a practicing attorney and member of the SBM, Gay was a member of a body "created by" state authority, which, through the regulation of our Supreme Court, is also "primarily funded by or through" state authority.[3] By holding otherwise, the trial court erred. It further erred by concluding that a report to a public body is a necessary prerequisite to establish a prima facie case under the WPA. A report to a public body is only one of the three types of "protected activity" under the WPA. *Chandler*, 456 Mich at 399.

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[3] Having concluded that Gay was a member of a public body as defined under MCL 15.361(d)(*iv*), we need not consider plaintiff's alternative argument that, as a licensed attorney and officer of the court, Gay also qualified as a "member or employee of the judiciary" under MCL 15.361(d)(*vi*).

Having reviewed the record evidence in the light most favorable to plaintiff, we conclude that she presented sufficient evidence to establish a prima facie case under the WPA. As we have already discussed, her report to Gay was a report to a member of a public body, and therefore it was protected activity under the WPA, which satisfies the first element for a prima facie case. Moreover, the second element is satisfied by the fact that plaintiff was discharged. Finally, plaintiff has presented direct evidence supporting the third element—i.e., a causal connection between the discharge and the report to Gay—specifically the "Corrective Action and Disciplinary Form," which explicitly cites plaintiff's telephone conversation with Gay as a factor motivating MMCG's discharge decision. Given such direct evidence of unlawful retaliation, plaintiff is not required to proceed under the *McDonnell Douglas*[4] framework. See *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001) ("Where direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* framework, and the case should proceed as an ordinary civil matter.") (quotation marks and citation omitted). Likewise, the direct evidence presented by plaintiff is sufficient to survive summary disposition despite the legitimate reason MMCG offers for its action—that it suspected plaintiff of violating HIPAA by disclosing Fields's patient status. Given the record evidence, even if HIPAA concerns were *part* of MMCG's ultimate decision, "a reasonable factfinder could still conclude that . . . plaintiff's protected activity was a 'motivating factor' for [MMCG]'s adverse action." See *Debano-Griffin*, 493 Mich at 176, quoting *Hazle*, 464 Mich at 465.

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[4] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

Therefore, regarding plaintiff's WPA claim, the trial court erred by granting summary disposition to MMCG under MCR 2.116(C)(10). A genuine issue of material fact remains about whether plaintiff's report of Fields's conduct to Gay was a motivating factor in MMCG's decision to terminate plaintiff.

C. PUBLIC POLICY CLAIM

"[T]he remedies provided by the WPA are exclusive and not cumulative." *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 532; 854 NW2d 152 (2014). Thus, when a plaintiff alleges discharge in retaliation for engaging in activity protected by the WPA, "[t]he WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity." *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011).

Plaintiff alleges that she was discharged for reporting a violation of the law, or being about to report such a violation, to a public body or a member of such a body. Both activities constitute protected activity under the WPA. *Chandler*, 456 Mich at 399. And contrary to plaintiff's argument on appeal, her public policy claim arises out of the "same activity" as the WPA claim for preemption purposes. Plaintiff argues that, aside from discharging her for reporting Fields's conduct to Gay and for being about to report that conduct to the trial court, MMCG also discharged her for refusing to conceal Fields's violation of the PPO. Plaintiff further argues that her refusal to *conceal* the violation is different than the affirmative act of reporting it or being about to report it. But plaintiff's refusal to conceal the violation was effectuated by her report to

Gay, and there is no record evidence that plaintiff was instructed to conceal such activity before her telephone conversation with Gay.

Under the circumstances, we see no logical distinction between the refusal to conceal and the report by which that refusal manifested itself; rather, the two are flip sides of the same coin. Because plaintiff's public policy claim arises out of the same activity as her WPA claim, the trial court properly concluded that the latter claim preempts the former. Therefore, summary disposition of the public policy claim was appropriately granted.

IV. CONCLUSION

We affirm the trial court's ruling regarding plaintiff's public policy claim, reverse its summary dismissal of the WPA claim, and remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. Each having prevailed in part, the parties may not tax costs under MCR 7.219.

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

LUCE v KENT FOUNDRY COMPANY

Docket No. 327978. Submitted May 3, 2016, at Grand Rapids. Decided May 17, 2016. Approved for publication June 16, 2016, at 9:05 a.m.

Andrew R. Luce filed an action in the Montcalm Circuit Court against Kent Foundry Company to recover damages for injuries he suffered while working for defendant on a large piece of equipment called a wheelabrator. Plaintiff sustained the injuries when his hand was crushed between a 10,000-pound door and a steel I-beam. The wheelabrator had operated for a long time during which the dangerous condition that led to the accident periodically arose, and no employee had previously been injured while operating the machine during those times. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not produce evidence that defendant intended to injure plaintiff as required by the intentional-tort exception to the exclusive-remedy rule of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The court, Suzanne Hoseth Kreeger, J., granted defendant's motion because there was no genuine question of material fact regarding defendant's intent. Plaintiff appealed.

The Court of Appeals *held*:

1. Establishing the intentional-tort exception, MCL 418.131(1), to the exclusive-remedy rule of the WDCA requires that a plaintiff show that the defendant specifically intended to injure the plaintiff and engaged in a deliberate act or omission that caused the injury. An employer intends to injure an employee when the employer willfully disregards knowledge that the employee would certainly be hurt. An employer does not possess actual knowledge of certain injury simply because it houses a wheelabrator that periodically runs without door stoppers intended to prevent the injuries that would occur if an employee was caught in a pinch point created by the wheelabrator's door and an I-beam. The trial court properly granted summary disposition to defendant because plaintiff could not produce evidence that defendant specifically intended to injure him.

2. An employer may be liable for injuries caused by a continuously operative dangerous condition if the employer had knowledge of the condition and failed to inform the employees of the condition so that they were not aware of the need to take precautions. In this case, plaintiff cannot rely on this theory of recovery because he was aware of the dangerous condition and had reported it to the maintenance supervisor. In addition, he had previously gotten his glove pinched in the pinch point and was keenly aware of the danger presented by the piece of machinery when it was without working door stops.

Affirmed.

WORKER'S DISABILITY COMPENSATION ACT — EXCLUSIVE REMEDY — EXCEPTION — INTENTIONAL TORT.

The Worker's Disability Compensation Act, MCL 418.101 *et seq*., provides the exclusive remedy for workplace injuries with one exception under MCL 418.131(1)—when the injuries are caused by the employer's intentional tort; to invoke the intentional-tort exception, a employee must show that an employer actually intended to injure him or her and that the injury resulted from the defendant's deliberate act or omission; a plaintiff may establish a defendant's intentional tort by showing that the defendant had actual knowledge that an injury was certain to occur, yet the defendant disregarded that knowledge; a defendant's knowledge of a dangerous condition, its failure to correct the condition, and the probability of injury if the dangerous condition was encountered does not establish that an employee was certain to be injured as a result of the dangerous condition, especially when the dangerous condition had been an ongoing problem and no employee had yet been injured.

Merriman Law Office, PLC (by *J. Andrew Merriman*), for plaintiff.

Garan Lucow Miller, PC (by *John E. McSorley* and *David M. Shafer*), for defendant.

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

PER CURIAM. Plaintiff brought a personal injury suit against defendant, his employer, to recover damages under the intentional-tort exception in MCL 418.131(1)

for injuries he sustained at his workplace. Plaintiff appeals the trial court's summary dismissal of his suit pursuant to MCR 2.116(C)(10), and for the reasons provided, we affirm.

The objective of Michigan's workers' compensation laws is to promote prompt and sure compensation for workplace injuries regardless of fault. In exchange for this benefit, the Legislature eliminated civil suits in tort for such injuries, with the very limited exception of intentional torts. MCL 418.131(1). To ensure that this exception would be applied very narrowly, the Legislature defined "intentional tort" in this context to require that the employer actually intend to injure its employee. Here, plaintiff attempts to fit his tort claim within this narrow exception. Accordingly, the sole issue before us is whether defendant actually intended plaintiff's injury, which if true, would constitute an exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The record shows that the hazardous condition of the machinery that caused plaintiff's injury persisted (periodically) for a long time and never caused an injury to any employee who operated the machine during these hazardous periods. Therefore, it is clear that as a matter of law, defendant did not intend to injure plaintiff, and dismissal of plaintiff's suit is appropriate.

I. BASIC FACTS

During his employment with defendant, plaintiff was trained to work on a large machine called a wheelabrator.[1] The wheelabrator was used continu-

[1] A wheelabrator is a machine that cleans and surface treats industrial parts by blasting steel pellets at the parts placed inside the wheelabrator cabinet. The wheelabrator in this case was very large—its

ously, five to seven days per week, with the exception of a two-hour maintenance period between 4:30 a.m. and 6:30 a.m. While plaintiff was not a main operator of the wheelabrator, he nonetheless operated the machine at least two hours each day he worked.

Testimony showed that the doorstops on the wheelabrator's west door regularly would break off. Steve Miller, the main wheelabrator operator during plaintiff's shift, estimated that these breakages occurred every month or so. Importantly, although these breakages occurred frequently, until plaintiff's injury, no one had ever gotten caught between the door and the I-beam and been injured while operating the machine without the doorstops.

In early August 2012, Miller noticed that one of the doorstops had broken off and notified defendant's maintenance personnel. Plaintiff also noticed that the doorstop was missing and brought it to the attention of David Leary, the maintenance supervisor. However, approximately two weeks elapsed and the doorstops had yet to be repaired. On August 17, 2012, as plaintiff worked on the wheelabrator, his hand was crushed between the door and the I-beam, which caused extensive damage and resulted in the amputation of a portion of a finger.

Plaintiff filed the instant suit and alleged that he was entitled to the recovery of damages under the intentional-tort exception to the exclusive-remedy rule

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two doors were more than 11 feet tall and weighed more than 10,000 pounds each. The two doors were referred to as the "east" door and the "west" door. When the west door was opened, it swung and traveled approximately 180 degrees until it struck a vertical steel I-beam, which created a "pinch point." To alleviate this, defendant installed doorstops along the door's hinges. When the doorstops were in place and functional, the door's range of movement was limited and when it opened, it stopped before striking the I-beam, thereby eliminating any pinch point.

of the WDCA. Defendant moved for summary disposition under MCR 2.116(C)(10) and argued that there was insufficient evidence to prove that defendant specifically intended to cause plaintiff's injury. The trial court agreed with defendant and granted its motion.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant. We disagree.

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). Summary disposition under MCR 2.116(C)(10) is appropriate if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "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 deciding a motion under MCR 2.116(C)(10), the trial court considers, in the light most favorable to the nonmoving party, affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties. *Maiden*, 461 Mich at 120. Further, issues of statutory interpretation and whether an act was an "intentional tort" under the WDCA are questions of law that we review de novo. *Gray v Morley (After Remand)*, 460 Mich 738, 742-743; 596 NW2d 922 (1999); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396; 605 NW2d 685 (1999).

B. DISCUSSION

The pertinent section of the WDCA is MCL 418.131(1), which provides as follows:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

Thus, ordinarily, an employee's sole remedy against an employer for a workplace-related injury is provided by the WDCA. *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). In essence, the WDCA "may be viewed as providing 'immunity' from suit." *Harris v Vernier*, 242 Mich App 306, 314; 617 NW2d 764 (2000); see also *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 92-93; 614 NW2d 862 (2000). In *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000), we described the rationale for limiting an employee's remedies:

> Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault. In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer. [Quotation marks and citations omitted.]

Consequently, "[t]he only exception to [the exclusive-

remedy] rule is when the employee can show that the employer committed an intentional tort." *Bagby*, 308 Mich App at 491. And "to recover under the intentional tort exception of the WDCA, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury." *Id*., citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996) (opinion by BOYLE, J.). A plaintiff can prove that a defendant had an intent to injure through circumstantial evidence if he establishes that (1) the employer has actual knowledge (2) that an injury is certain to occur (3) yet disregards that knowledge. *Bagby*, 308 Mich App at 491, citing *Travis*, 453 Mich at 180 (opinion by BOYLE, J.).

Because it is undisputed that defendant was aware that the doorstops were missing at the time of plaintiff's injury and had not made any attempt to repair the doorstops, the key to the resolution of this motion is the element regarding the certainty of the injury, i.e., was there evidence that operating the west door without the functional doorstops made plaintiff's injury *certain* to occur?

"This element establishes an 'extremely high standard' of proof that cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts." *Palazzola v Karmazin Prod Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). We hold that there is no question of fact regarding whether defendant knew that plaintiff's injury was certain to occur. The undisputed evidence is that the doorstops routinely broke and became ineffectual, and during these times when there were no functioning doorstops, the wheelabrator was nonetheless operated without any injury to any

employee. Clearly, there was nothing to inform defendant that an injury was "certain" to occur. As this Court has explained, "The existence of a dangerous condition does not mean an injury is certain to occur. An employer's awareness of a dangerous condition, or knowledge that an accident is likely, does not constitute actual knowledge that an injury is certain to occur." *Bagby*, 308 Mich App at 492-493 (citation omitted); see also *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004) ("An injury is certain to occur if there is no doubt that it will occur . . . ."); *Palazzola*, 223 Mich App at 150. Here, the evidence merely demonstrates that defendant was aware of a dangerous condition—it was not aware that injury was certain to occur.

Plaintiff's reliance on Leary's averment that an injury was just "a matter of time" is misplaced. Plaintiff posits that because Leary does not mention any "probability, chance, or doubt," then his statement should be viewed as one of certainty, i.e., he believed that someone definitely would be injured. We disagree.

First, Leary later explained that, in his opinion, one would only get injured "if you were doing it and not paying attention." The introduction of such a condition negates any concept of certainty. Second, assuming no such qualification existed, this is precisely the type of evidence that this Court has cautioned would be insufficient to prove this "extremely high standard." *Palazzola*, 223 Mich App at 149. Leary's failure to mention any explicit chance or probability does not transform his opinion into one of certainty. Notably, Leary's statement did not provide that when someone next used the wheelabrator with the doorstops missing that the person was *certain* to get injured. Instead, his statement clearly reflected his reasoned view that the

condition was indeed dangerous and that common sense dictated that, due to the laws of probability, *eventually* someone would get hurt. But these types of dangerous conditions fall well short of establishing a condition that is *certain* to cause injury when the condition is encountered. See *Johnson v Detroit Edison Co*, 288 Mich App 688, 697-698; 795 NW2d 161 (2010) (stating that an employer's knowledge that an accident was likely is insufficient); *Oaks v Twin City Foods, Inc*, 198 Mich App 296, 298; 497 NW2d 196 (1993) ("[I]t is not enough that the employer acted recklessly and even envisioned the type of accident that did in fact occur.").

Plaintiff alternatively relies on the principle that a continuously operative dangerous condition may form the basis for a claim under the intentional-tort exception. However, it is not enough that such a dangerous condition merely exists. The employer must have knowledge of the condition *and refrain from informing the employee about it*. *Johnson*, 288 Mich App at 698, citing *Travis*, 453 Mich at 178 (opinion by BOYLE, J.). The key is that the employee is left in the dark about the danger he or she will encounter and is therefore "unable to take steps to keep from being injured." *Id*. But in this case, there was no need for defendant to notify plaintiff of the dangerous condition or the nature of the danger because plaintiff brought the danger to defendant's attention a week or two before the accident. Indeed, plaintiff was prompted to notify defendant after plaintiff got part of his glove caught between the door and the I-beam in that very same pinch point. At the time of his accident, plaintiff was clearly aware of the danger and the potential for severe injury. For starters, with the 11-foot high, 10,000-pound door slamming into the steel I-beam every time the doorstops were missing, the potential for serious harm to

plaintiff was obvious. Moreover, assuming arguendo that plaintiff was somehow unaware of the danger he faced, any doubt was erased after his glove got caught in the pinch point, which prompted him to notify management of the dangerous condition. Plaintiff acknowledged that, at the time, he was lucky that no part of his hand was caught between the door and the I-beam in that instance. Therefore, the record is clear that plaintiff's situation is distinguishable from the hypothetical employee described in *Travis* who is unaware of the danger and unable to take steps to protect himself. As a result, plaintiff cannot invoke the continuously operative dangerous condition doctrine to establish that defendant committed an intentional tort.

As the trial court correctly held, plaintiff failed to present any evidence under MCL 418.131(1) that defendant specifically intended to harm him. As a result, the court did not err when it granted defendant's motion for summary disposition.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

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

BERRY v GARRETT

Docket No. 333225. Submitted June 10, 2016, at Detroit. Decided June 17, 2016, at 9:00 a.m.

Carl Berry, a registered voter and resident of Plymouth, brought an action in the Wayne Circuit Court against Cathy M. Garrett, the Wayne County Election Commission, the Plymouth Township Clerk, and the Plymouth Township Election Commission, alleging that two candidates running in the August 2, 2016 primary election in Plymouth Township—Donald F. Schnettler and Kurt L. Heise, intervening defendants in this case—failed to provide a precinct number in their affidavits of identity as required by MCL 168.558(2), and therefore defendants had a clear legal duty not to place Schnettler and Heise's names on the ballot for the August 2, 2016 primary election. Plaintiff sought a writ of mandamus, arguing that he had a clear legal right to performance of defendants' statutory duties regarding the primary election. The court, Brian R. Sullivan, J., held that plaintiff had not shown that he had a clear legal right to the performance of the alleged duty and therefore denied plaintiff's request for a writ of mandamus. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 168.558(1) requires that, when filing an affidavit of candidacy for a township office in any election, a candidate shall file with the officer with whom the petitions, fee, or affidavit is filed two copies of an affidavit of identity. MCL 168.558(2) provides, in relevant part, that an affidavit of identity shall contain the candidate's name, address, and ward and precinct where registered if qualified to vote at that election. MCL 168.558(4) provides, in relevant part, that an officer shall not certify to the board of election commissioners the name of a candidate who failed to comply with MCL 168.558. Pursuant to MCL 168.559, the county election commission prepares and furnishes the official primary ballots. MCL 168.550 provides that no candidate shall have his or her name printed upon any official primary election ballot of any political party in any voting precinct in this state unless that candidate shall have filed nominating petitions according to the provisions of the Michigan

Election Law act, MCL 168.1 *et seq*., and all other requirements of the act have been complied with in his or her behalf, except in those counties qualifying candidates upon the payment of fees. Finally, MCL 168.567 provides that the boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of the corrected ballots shall be sent to the secretary of state by the county clerk.

2. To obtain a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. A private person as relator may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public. Whether a private person should be permitted to do so is a matter within the discretion of the court. In this case, because the trial court failed to recognize that it had discretion, it abdicated its discretion to decide whether plaintiff should be permitted, as an elector, to vindicate public election rights by mandamus, and such abdication constituted an abuse of discretion. Because a remand order would have likely rendered plaintiff's action moot before the trial court would have had an opportunity to rule, consideration of the substantive merits of the case was necessary under MCR 7.216(A)(7). The public had a clear legal right to the due enforcement of MCL 168.558 against Schnettler and Heise. As an elector, plaintiff was entitled to vindicate the public's clear legal right. Furthermore, because Schnettler and Heise failed to comply with the requirement under MCL 168.558(2) that candidates provide a precinct number in their affidavits of identity, the Wayne County defendants had a clear legal duty under MCL 168.558(4) not to certify to the board of election commissioners the names of those two candidates. Because the Wayne County defendants failed to perform their clear legal duty under MCL 168.558(4), the Wayne County defendants had a clear legal duty under MCL 168.567 to correct errors found in the resulting improper ballots. The action that plaintiff sought to compel was decidedly ministerial in nature because the duty to correct ballots under MCL 168.567 is set forth with such precision and certainty as to leave nothing to the exercise of discretion or judgment. By doing nothing more than the ministerial task of completing a facial review of the affidavits, defendants would have undertaken to perform their clear legal duty under MCL 168.558(4) not to certify to the board of election commissioners the names of candidates who failed to

comply with MCL 168.558(2). Finally, plaintiff lacked an adequate legal or equitable remedy that would have achieved the same result as mandamus.

3. A writ of mandamus could not be issued against the Plymouth Township defendants because the submission of the affidavits of identity to Garrett ended the Plymouth Township defendants' role in this matter. Even if the Plymouth Township defendants mishandled the affidavits of identity, the Plymouth Township defendants lacked authority to take action regarding the ballots after the submission of the affidavits of identity to Garrett; therefore, the trial court properly denied plaintiff's request for a writ of mandamus against the Plymouth Township defendants.

Trial court's denial of plaintiff's request for a writ of mandamus against the Plymouth Township defendants affirmed; trial court's denial of plaintiff's request for a writ of mandamus against the Wayne County defendants reversed; Wayne County defendants ordered to take the necessary steps to perform their duties, particularly their duties under MCL 168.567 to remove Schnettler's and Heise's names from the ballot before the August 2, 2016 primary election.

Warner Norcross & Judd LLP (by *John J. Bursch*) and *Kirk, Huth, Lange & Badalamenti, PLC* (by *Robert S. Huth, Jr.*, and *Scott M. Sierzenga*), for Carl Berry.

Zenna Elhasan and *Janet Anderson-Davis* for the Wayne County Election Commission.

Zausmer, August & Caldwell, PC (by *Gary K. August* and *Matthew G. McNaughton*), for the Plymouth Township Clerk and the Plymouth Township Election Commission.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Andrea L. Hansen*, *Arthur T. O'Reilly*, and *Andrew M. Pauwels*) for Kurt L. Heise.

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. Plaintiff appeals as of right the circuit court's order denying his requested writ of mandamus against defendants.[1] We affirm in part and reverse in part.

This case arises out of affidavits of identity filed by intervening defendants Donald F. Schnettler and Kurt L. Heise regarding the August 2, 2016 primary election in Plymouth Township (Plymouth). Schnettler and Heise sought, respectively, the positions of township trustee and township supervisor. It is undisputed that, in their affidavits of identity, neither Schnettler nor Heise provided a precinct number as required by MCL 168.558(2), nor did either timely cure that defect.

Plaintiff is a registered voter and a resident of Plymouth. He instituted this action on May 13, 2016, by filing a three-count complaint. In relevant part, the complaint sought a writ of mandamus against defendants. Plaintiff also filed an ex parte motion to show cause why a writ of mandamus should not issue. Plaintiff alleged that, because of the defect in Schnettler's and Heise's affidavits of identity, defendants had a clear legal duty not to place Schnettler's and Heise's names on the ballot for the August 2, 2016 primary election. Plaintiff further alleged that he had a clear legal right to performance of defendants' statutory duties regarding the primary election. Defendants responded, arguing that they had no clear legal duty to "investigate" the accuracy of the information in the affidavits at issue. Defendants further argued that, in any event, the relief sought by plaintiff was inappropriate because (1) even assuming that he could dem-

[1] When used alone in this opinion, the term "defendants" refers to the original defendants in this case (that is, the Wayne County and Plymouth Township defendants responsible for elections in Plymouth Township). It does not refer to the intervening defendants.

onstrate the existence of a clear legal duty on behalf of defendants, plaintiff had no clear legal right to *performance* of that duty, (2) plaintiff was barred from seeking mandamus because he had an adequate remedy at law in quo warranto, and (3) plaintiff lacked standing. Ultimately, the trial court agreed with defendants that plaintiff "ha[d] not shown he has a clear legal right to the performance of the alleged duty . . . ." Thus, the trial court denied plaintiff's request for a writ of mandamus and dismissed the case.

On appeal, plaintiff argues that the trial court erred by so ruling. We agree.

We review de novo, as questions of law, whether defendants have a clear legal duty to perform and whether plaintiff has a clear legal right to performance of any such duty. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). Related issues of statutory interpretation are also reviewed de novo. *Beach v Lima Twp*, 489 Mich 99, 105-106; 802 NW2d 1 (2011). Contrastingly, because mandamus is a "discretionary writ," *Owen v Detroit*, 259 Mich 176, 177; 242 NW 878 (1932), we review for an abuse of discretion a trial court's decision regarding whether to grant mandamus relief, *Rental Props*, 308 Mich App at 518.

> To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. [*Id*. at 518-519 (quotation marks and citations omitted).]

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted).

Several provisions of Michigan election law are at issue here. In pertinent part, MCL 168.558 provides:

> (1) When filing a[n] . . . affidavit of candidacy for a . . . township . . . office in any election, a candidate shall file with the officer with whom the petitions, fee, or affidavit is filed 2 copies of an affidavit of identity. . . .
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> (2) An affidavit of identity *shall* contain the candidate's name, address, *and ward and precinct where registered, if qualified to vote at that election* . . . .
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> (4) An affidavit of identity shall include a statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid; and a statement that the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both. *If a candidate files the affidavit of identity with an officer other than the county clerk or secretary of state, the officer shall immediately forward to the county clerk 1 copy of the affidavit of identity by first-class mail. The county clerk shall immediately forward 1 copy of the affidavit of identity for state and federal candidates to the secretary of state by first-class mail. An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section* [i.e., MCL 168.558]. [Emphasis added.]

Thereafter, as stated in MCL 168.349(2):

> Within 4 days after the last day for filing nominating petitions, the township clerk shall deliver to the county clerk a list setting forth the name, address, and political affiliation and office sought of each candidate who has qualified for a position on the primary ballot.

The county clerk then certifies to the proper board(s) of election the name and address "of each party candidate whose petitions meet the requirements of this act, together with the name of the political party and the office for which he or she is a candidate." MCL 168.552(1). Section 552 includes detailed procedures for investigating and resolving complaints about nominating petitions, but the resolution of challenges to affidavits of identity is not addressed.

Pursuant to MCL 168.559, the county election commission prepares and furnishes the official primary ballots. Notably, MCL 168.550 provides:

> No candidate shall have his name printed upon any official primary election ballot of any political party in any voting precinct in this state unless he shall have filed nominating petitions according to the provisions of this act, and all other requirements of this act have been complied with in his behalf, except in those counties qualifying candidates upon the payment of fees.

Further, MCL 168.567 provides:

> The boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk.

In this case, contrary to defendants' arguments both below and on appeal, we conclude that the pertinent statutory provisions create a clear legal duty on behalf

of the Wayne County defendants.[2] Under MCL 168.558(4), those defendants had a clear legal duty to "not certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply" with the requirement, under § 558(2), of duly including the precinct number where the candidate was registered to vote.[3] It is undisputed that Schnettler and Heise failed to comply with § 558(2). Hence, the Wayne County defendants had a clear legal duty not to certify Schnettler's and Heise's names. The language in § 550—"[n]o candidate shall have his name printed upon any official primary election ballot . . . unless he shall have filed nominating petitions according to the provisions of this act"—underscores the existence of such a clear legal duty on behalf of the Wayne County defendants. Finally, § 567 demonstrates that, because the Wayne County defendants failed to perform their clear legal duty under § 558(4), they now have a clear legal duty to "correct" such errors as may be found in the resulting, improper ballots. Thus, the "clear legal duty" element for mandamus is plainly met.

Moreover, the action that plaintiff now seeks to compel is decidedly "ministerial" in nature. The duty to correct the ballots under § 567 is set forth "with such precision and certainty as to leave nothing to the

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[2] We agree with the Plymouth Township defendants that a writ of mandamus cannot now issue against them because, since the affidavits of identity have already been submitted to Garrett, the Plymouth Township defendants now lack authority to take any action regarding the ballots. Mandamus is not directed at ascertaining whether an error occurred in the *past*. In other words, even if the Plymouth Township defendants mishandled the affidavits of identity, their role in the matter has ended; ergo, mandamus will not lie against them.

[3] Because it is entirely inconsistent with the plain language of the statute, we reject defendants' argument that the Legislature intended the final sentence of § 558(4) to apply only to that *sub*section rather than the entire "section."

exercise of discretion or judgment." See *Hillsdale*, 494 Mich at 58 n 11. Because the affidavits of identity filed with the Plymouth Township defendants and delivered by the Plymouth Township defendants to the Wayne County defendants[4] were defective on their face, defendants' assertion that they had no authority to review the affidavits is misplaced. Rather, by doing nothing more than the ministerial task of completing a facial review of the affidavits, defendants would undertake to perform their clear legal duty under § 558(4) to "not certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply" with § 558(2).

We further conclude that plaintiff lacks an adequate legal or equitable remedy that might achieve the same result as mandamus. Although a writ of quo warranto might have been an appropriate remedy to seek in this action, before seeking such a writ, plaintiff would have been forced to seek "special leave of the court." See *Hanlin v Saugatuck Twp*, 299 Mich App 233, 240; 829 NW2d 335 (2013). Given the time constraints and procedural limitations, we cannot conclude that quo warranto was an adequate remedy to achieve the *same* result that plaintiff could achieve by utilizing mandamus.

Having concluded that the other three elements for mandamus are satisfied, we turn to the first element, i.e., whether plaintiff has a clear legal right to performance of the Wayne County defendants' statutory duties. We conclude that he does.

Although our courts will generally "deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is

[4] See MCL 168.558(4).

not possessed by citizens generally," *Rental Props*, 308 Mich App at 519 (quotation marks and citations omitted), "[i]t is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public," *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987), quoting 26 Am Jur 2d, Elections, § 367, p 180. Whether a private person should be permitted to do so under the facts of a given case "is a matter within the discretion of the court." *Amberg v Welsh*, 325 Mich 285, 291; 38 NW2d 304 (1949), overruled in part on other grounds by *Wallace v Tripp*, 358 Mich 668; 101 NW2d 312 (1960). See also *Thompson v Secretary of State*, 192 Mich 512, 522; 159 NW 65 (1916) (noting that whether electors have "such interest as entitles them to institute [mandamus] proceedings . . . is a matter of discretion on the part of the court, and not of law," and holding that "[t]he relators are electors of this State interested in the proper administration of the law; and, under the circumstances of this case and the public importance of the questions raised, the objection to their instituting these proceedings will not be sustained"). As discussed in *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 429-430; 4 NW 274 (1880),

> [t]he rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the State, and it is not usually allowed, unless under circumstances where the public injury by its refusal will be serious. In the case of *People ex rel. Drake v. Regents of the University*, 4 Mich., 98 [(1856)], and *People ex rel. Russell v. Inspectors of the State Prison*, [4 Mich] 187 [(1856)], the court took pains to guard against any decision that would prevent complaint by a private relator, where the public

> interests require prompt action, and where the public prosecutors will not interfere. There is, as there shown, more liberality in some States than in others. But we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases concerning the relief as well as other questions.

Moreover, our Supreme Court's decision in *Martin v Secretary of State*, 482 Mich 956 (2008) (*Martin II*), which reversed *Martin v Secretary of State*, 280 Mich App 417; 760 NW2d 726 (2008) (*Martin I*), also supports our holding. In *Martin I*, a candidate for judicial office, Martin, sought, *inter alia*, a writ of mandamus against the Board of State Canvassers and the Secretary of State that would permit him to appear on the ballot. *Martin I*, 280 Mich App at 421-422. Two incumbent judges for the same office (i.e., the office Martin wished to win in the election) sought and were denied leave to intervene in the circuit court. *Id*. Ultimately, the circuit court granted Martin's request, ordering the Secretary of State to take steps that permitted Martin to appear on the ballot. *Id*. at 422-423. The Secretary of State did not appeal, but the incumbent judges did, arguing that they should have been granted leave to intervene in the circuit court. *Id*. at 418. The *Martin I* majority affirmed the circuit court, reasoning that the incumbent judges were not "aggrieved parties" with standing to challenge the circuit court's ruling:

> [O]ur opinion must be narrowly construed and limited to the unique facts of this case. This narrow holding stands solely for the conclusion that pursuant to the dictates set forth by our Supreme Court in *Federated Ins Co* [*v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006)] and *Nat'l Wildlife* [*Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (*LSEA*)], a candidate for judicial office has not suffered an injury and therefore is not an

> aggrieved party and does not have standing solely because the candidate is required to run in a contested judicial election. [*Id*. at 430.]

The *Martin I* majority "emphasize[d] that nothing in [its] opinion should be construed to limit citizens' access to our courts to ensure that the election laws of this state are enforced." *Id*. at 429-430. Judge O'CONNELL dissented:

> The majority concludes that appellants [the incumbent judges] are not aggrieved parties and, therefore, lack standing as Michigan citizens to intervene in the underlying election dispute in this case. I respectfully disagree. I believe that appellants were wrongfully denied their opportunity to intervene in this case, both in their capacities as private citizens and as candidates for public office. By concluding otherwise, the majority has essentially determined that Michigan citizens do not automatically have standing to ensure that the election laws of this state are properly enforced.
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> [T]he trial court incorrectly focused solely on appellants' status as judicial candidates and completely disregarded their status as voters in the district with a direct interest in the proper application of the election laws being upheld. Plaintiffs argue that appellants' status as voters is irrelevant because they have suffered no harm that the general public did not suffer. However, this Court has recognized that "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505-506, 688 NW2d 847 (2004). Because the improper implementation of election laws affects the process by which citizens normally exercise their collective voice to uphold the status quo or effectuate change, "ordinary citizens have standing to enforce the law in election cases." *Id*. at 506. See also *Helmkamp*[, 160 Mich App at 445] (holding that the plaintiffs in an election case "were

> not required to show a substantial injury distinct from that suffered by the public in general"). "[T]he right to vote is an implicit ' "fundamental political right" ' that is ' "preservative of all rights." ' " *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16, 740 NW2d 444 (2007) (citation omitted). . . . Given that this case concerns a trial court's application of equity to enter an injunction that permits an end run around election laws, appellants, in their capacity as ordinary citizens and voters, have suffered an injury and have standing to bring their claim to remedy this injury. *Helmkamp*, [160 Mich App] at 445. Having suffered an injury as a result of the trial court's actions, appellants are aggrieved parties. *Manuel v Gill*, 481 Mich 637, 643-644; 753 NW2d 48 (2008). [*Martin I*, 280 Mich App at 430-433 (O'CONNELL, P.J., dissenting).]

The incumbent judges sought leave to appeal in our Supreme Court, which, in lieu of granting leave to appeal, reversed "the judgments of the Court of Appeals and the . . . [c]ircuit [c]ourt for the reasons stated in [Judge O'CONNELL's] dissenting opinion, but only as to the issues of candidate standing and the trial court's application of equity." *Martin II*, 482 Mich at 956.

Although *Martin II* limited its decision "to the issues of candidate standing and the trial court's application of equity," we do not conclude that the Supreme Court, through its one-paragraph decision in *Martin II*, intended to *tacitly* overrule more than a century of settled election-law precedent, including *Helmkamp*, *Amberg*, *Thompson*, *Ayres*, *Deleeuw*, *Drake*, and *Russell*. Rather, by limiting its holding to candidate standing, we believe the *Martin II* Court simply ruled on the narrowest issue by which that appeal could be fully resolved. See *Kent Co Prosecutor v Kent Co Sheriff (On Rehearing)*, 428 Mich 314, 325; 409 NW2d 202 (1987) (noting that our Supreme Court will "adopt[] the most

narrow holding in deciding the constitutional issues before it").[5]

In this case, because the trial court failed to recognize that it *had* discretion, it abdicated its discretion to decide whether plaintiff should be permitted, as an elector, to vindicate public election rights by mandamus. Such abdication constitutes an abuse of discretion. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998).

Having concluded that the trial court failed to exercise its discretion to decide this issue, we would ordinarily remand this matter to the trial court for further proceedings. Given the exigencies of this election matter, however, and the reality of the trial court's docket, a remand order at this time would likely render plaintiff's action moot before the trial court would have an opportunity to rule. Hence, we feel compelled to consider the substantive merits and render a decision. See MCR 7.216(A)(7) ("The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just . . . enter any judgment or order or grant further or different relief as the case may require[.]").

The situation before us is one in which the public interest requires prompt action and in which the public prosecutors will not interfere. As explained earlier, defendants have neglected their clear legal duty to ensure compliance with MCL 168.558. As a result, despite the fact that Schnettler and Heise are not entitled to appear on the ballot, they will nevertheless do so absent judicial intervention. Defendants suggest that the public right plaintiff seeks to vindicate in this action is trivial. They contend that Schnettler's and

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[5] At the time *Martin II* was decided, standing was considered to be a constitutional question. See *LSEA*, 487 Mich at 359-361.

Heise's noncompliance with § 558(2) is a "small detail" that should be overlooked. That argument is misplaced. It is not our role to make policy decisions regarding which of the Legislature's mandates can be ignored as insignificant. See *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012). See also *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 622; 822 NW2d 159 (2012) (YOUNG, C.J., concurring in part and dissenting in part); *id*. at 635-636 (MARKMAN, J., concurring in part and dissenting in part). In summary, we hold that the public has a clear legal right in the due enforcement of MCL 168.558 against Schnettler and Heise. We further hold that, as an elector, plaintiff is entitled in this case to vindicate the public's clear legal right.

We therefore affirm the trial court's ruling regarding the Plymouth Township defendants but reverse its denial of plaintiff's request for a writ of mandamus against the Wayne County defendants.[6] The Wayne County defendants are hereby ordered to take whatever steps are necessary to perform their duties as described in this opinion, particularly their duties under MCL 168.567.[7] A public question being involved, no costs may be taxed under MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

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[6] Given our decision that plaintiff has asserted a valid cause of action, we reject defendants' argument that plaintiff lacked standing to institute this action. "[A] litigant has standing whenever there is a legal cause of action." *LSEA*, 487 Mich at 372. Additionally, we deny as moot the motion of Thomas Parrelly to intervene in this Court as an appellant.

[7] Those duties necessarily include taking the steps necessary to remove Schnettler and Heise from the ballot for the August 2, 2016 primary election before that election occurs. See *Michigan v Wayne Co Clerk*, 466 Mich 640; 648 NW2d 202 (2002).

PEOPLE v TAYLOR

PEOPLE v WATKINS

Docket Nos. 330497 and 330499. Submitted June 9, 2016, at Detroit. Decided June 21, 2016, 9:00 a.m.

Robbie D. Taylor and Edward L. Watkins were charged in the Wayne Circuit Court with first-degree murder, MCL 750.316, four counts of assault with intent to murder, MCL 750.224, and possession of a firearm during the commission of a felony, MCL 750.227b. In the circuit court, defendants moved to quash the information, and the circuit court denied the motion, concluding that reasonable inferences from the evidence presented at the preliminary examination supported the magistrate's probable cause determination. Both defendants moved to remand the case for a further preliminary examination on the ground that a Michigan State Police ballistics report prepared after the preliminary examination showed that at least three guns were used during the incident for which defendants were charged. Defendants argued that the report could have been used to cross-examine prosecution witnesses, including Terry Williams, who testified that he heard only one gun fired during the incident. Defendants further asserted that the ballistics report supported their theory that it was impossible for defendant Watkins to have fired the bullet that killed Paige Neal-Walker because she was sitting in a car on the other side of the van from which Williams saw Watkins shooting. The court, Bruce U. Morrow, J., granted the motion to remand to the district court for an opportunity to engage in meaningful cross-examination at the preliminary examination in the event that witnesses became unavailable at trial. The prosecution appealed.

The Court of Appeals *held*:

1. The circuit court erred when it remanded the case for a continued preliminary examination. Defendants did not establish any appropriate grounds for remanding the case. The circuit court denied defendants' motions to quash, thereby upholding the district court's finding of probable cause, making it unnecessary to remand for the prosecution to remedy any shortcoming in the proofs. Defendants did not waive their right to a preliminary

examination, so there was nothing that could be deemed defective about a waiver. The prosecution had not sought to add any new charges, and the circuit court had not found any violations of relevant rules related to the conduct of the preliminary examination or the probable cause determinations. Because those were the only four possible grounds for remand and none of them existed, the circuit court erred.

2. The emergence of potentially favorable evidence does not, by itself, entitle a defendant to a second, or continued, preliminary examination because the magistrate is not the ultimate finder of fact. Trial is generally the appropriate forum in which to present such evidence. In this case, the ballistics report being prepared after the preliminary examination did not establish any recognized ground for granting a remand. Moreover, defendants' claim that the ballistics report was new evidence was completely undermined because they already had discovery material before the preliminary examination that indicated that three guns were used in the incident. Indeed, defendant Taylor's attorney explicitly referred to this fact at the preliminary examination. Therefore, although the ballistics report was prepared after the preliminary examination, defendants' attorneys were well aware of the key fact contained therein before the preliminary examination.

Reversed and remanded.

CRIMINAL LAW — DISCOVERY — PRELIMINARY EXAMINATIONS — REMAND.

The emergence of potentially favorable evidence after the preliminary examination does not, by itself, entitle a defendant to a second, or continued, preliminary examination; trial is generally the appropriate forum in which to present that evidence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Law Offices of David S. Steingold, PLLC (by *David S. Steingold*), for Robbie D. Taylor.

David Cripps for Edward L. Watkins.

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

PER CURIAM. In these consolidated interlocutory appeals from the same lower court file, the prosecutor appeals an order that sought to remand the case to the 36th District Court for a continued preliminary examination. We reverse and remand for further proceedings consistent with this opinion.

The prosecutor argues that the circuit court erred when it remanded the case to the district court. We agree. This Court reviews de novo questions of law, including jurisdictional issues. *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996).

"Where a criminal prosecution is initiated by the filing of an information rather than by indictment, the accused has a statutory right to a preliminary examination." *People v McGee*, 258 Mich App 683, 695; 672 NW2d 191 (2003), citing MCL 766.1. The district court is vested with jurisdiction to conduct preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court. MCL 600.8311(e). "If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial." MCR 6.110(E); see also MCL 766.13. "The magistrate's bindover to the circuit court, after a preliminary examination or a defendant's waiver of an examination, authorizes the prosecutor to file an information. Indeed, it is the filing of the magistrate's return, following an examination or waiver by the defendant, that confers jurisdiction on the circuit court." *McGee*, 258 Mich App at 695 (citations omitted). And just as the filing of the magistrate's return confers jurisdiction on the circuit court, *id*., it has the effect of divesting the

district court of jurisdiction, *People v Sherrod*, 32 Mich App 183, 186; 188 NW2d 221 (1971).

Once a criminal case has been bound over and jurisdiction has been vested in the circuit court, there are only limited circumstances in which the circuit court may properly remand the case for a new or continued preliminary examination. If a motion to quash is filed and the circuit court determines that the evidence is insufficient to support the bindover, the circuit court is permitted to remand the case for a further examination at which the prosecutor may seek to remedy the shortcoming in the proofs needed to establish probable cause. See *People v Miklovich*, 375 Mich 536, 538-539; 134 NW2d 720 (1965); *People v Salazar*, 124 Mich App 249, 251-252; 333 NW2d 567 (1983). Further, a circuit court may remand the case if the defendant waived the right to a preliminary examination and a defect in the waiver exists (for example, if the waiver was made without the benefit of counsel). See *People v Reedy*, 151 Mich App 143, 147; 390 NW2d 215 (1986); *People v Skowronek*, 57 Mich App 110, 113; 226 NW2d 74 (1975). The circuit court may also remand the case if the prosecutor adds a new charge on which the defendant did not have a preliminary examination. See *People v Iaconis*, 29 Mich App 443, 463; 185 NW2d 609 (1971), aff'd sub nom *People v Bercheny*, 387 Mich 431, 434; 196 NW2d 767 (1972);[1] MCR 6.110(H) (permitting the circuit court to remand the

[1] See also *People v Stafford*, 434 Mich 125, 138; 450 NW2d 559 (1990) (RILEY, C.J., dissenting) (citing *Bercheny* for the proposition that our Supreme Court has "acknowledged the authority of the circuit court to remand when it amends an information to include a new charge on which a defendant did not have a preliminary examination" and noting that "[i]n *Bercheny*, the Court found that the amendment of the information addressed form rather than substance and that therefore remand or rearraignment was not required").

case if there was a violation of certain rules governing the conduct of the preliminary examination or the probable cause determination).

In this case, a preliminary examination was held, and the district court elaborated in detail its findings that probable cause existed and bound defendants over for trial. The magistrate's return to the circuit court was then filed, thereby conferring jurisdiction on the circuit court, *McGee*, 258 Mich App at 695, and divesting the district court of jurisdiction, *Sherrod*, 32 Mich App at 186. In the circuit court, defendants moved to quash the information, and the circuit court denied the motions to quash and concluded that reasonable inferences from the evidence presented at the preliminary examination supported the magistrate's probable cause determination. Both defendants then moved to remand the case to the district court for a further preliminary examination on the ground that a Michigan State Police ballistics report prepared after the preliminary examination showed that at least three guns were used during the incident for which defendants were charged. Defendants contended that the ballistics report could have been used to cross-examine prosecution witnesses, including witness Terry Williams, who testified that he heard only one gun fired during the incident. Defendants further asserted that the ballistics report supported their theory that it was impossible for defendant Edward Lee Watkins to have fired the bullet that killed Paige Neal-Walker because she was sitting in a car on the other side of the van from which Williams saw Watkins shooting. The circuit court granted the motion to remand and emphasized that defendants should have an opportunity to engage in "meaningful cross-examination" at the preliminary examination in the event that witnesses became unavailable at trial.

The circuit court erred when it remanded the case for a continued preliminary examination. Defendants did not establish any of the appropriate grounds for remanding the case. Notably, the circuit court denied defendants' motions to quash and thereby upheld the district court's finding of probable cause. It was therefore unnecessary to remand for the prosecutor to seek to remedy any shortcoming in the proofs. Nor was there a waiver by defendants of the right to a preliminary examination that could be deemed defective. The prosecutor did not seek to add new charges. The circuit court did not find a violation of any of the relevant rules related to the conduct of the preliminary examination or the probable cause determination. Accordingly, no grounds for remanding the case to the district court existed.

The fact that the ballistics report was prepared after the preliminary examination does not establish any of the recognized grounds for granting a remand. It bears emphasis that by denying defendants' motions to quash, the circuit court upheld the district court's finding of probable cause. See *People v Henderson*, 282 Mich App 307, 312-313; 765 NW2d 619 (2009) (noting that a district court's bindover decision is reviewed for an abuse of discretion and that "[i]n reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and may not substitute its judgment for that of the district court"); *Reedy*, 151 Mich App at 147 ("[A] finding of probable cause at the preliminary examination is a prerequisite to the proper filing of an information[.]"). With the circuit court having already denied the motions to quash, it was unnecessary for either the circuit court or the district court to revisit the probable cause determination.

The emergence of potentially favorable evidence after the preliminary examination does not, by itself, entitle a defendant to a second, or continued, preliminary examination. Instead, the trial is generally the appropriate forum in which to present such evidence. The purpose of a preliminary examination is to determine whether a crime was committed and whether there is probable cause to believe that the defendant committed it. *Laws*, 218 Mich App at 451-452. "[T]he role of the magistrate is not that of ultimate finder of fact; where the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over." *Id*. at 452; see also *People v Bosca*, 310 Mich App 1, 29-31; 871 NW2d 307 (2015) (holding that the defendant's failure to obtain purportedly exculpatory evidence before the preliminary examination was irrelevant given that the district court was not the ultimate finder of fact), appeal held in abeyance 872 NW2d 492 (2015).[2]

[2] We also note that defendants' premise for a new preliminary examination—that they have discovered new evidence that warrants a new look at the probable cause determination—is completely undermined because *before* the preliminary examination, defendants' attorneys had already been presented with discovery material that indicated that three guns were used in the incident. The crime scene investigation report prepared by the Detroit Police Department stated that "72 spent casings were recovered at the scene from 3 different firearms." Indeed, defendant Robbie DeShawn Taylor's attorney explicitly referred to this fact *at the preliminary examination itself* when he told the district court that "the evidence techs have determined that there were three guns that were used at the scene." In short, then, although the Michigan State Police ballistics report was prepared after the preliminary examination, the record indisputably establishes that defendants' attorneys were well aware at the preliminary examination of the key underlying fact referred to in the ballistics report that comprised the basis of their subsequent request to remand the case for a continued preliminary examination.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CRAMER v VILLAGE OF OAKLEY

Docket No. 330736. Submitted June 9, 2016, at Lansing. Decided June 23, 2016, at 9:00 a.m. Part III vacated, case remanded for dismissal of plaintiff's claims, and leave to appeal denied in all other respects 500 Mich 964.

Brandi Cramer, formerly known as Brandi Bitterman, filed a six-count complaint on May 28, 2015, in the Shiawassee Circuit Court to compel the production of information she requested from the village of Oakley (the Village) under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. On May 15, 2015, Cramer sent the Village six separate requests for information having to do with the Village's reserve police department. Five days later, the Village sent Cramer six letters granting her requests and informing her that the Village would search its records and send Cramer whatever information it could locate. Cramer's attorney notified the Village by e-mail that the letters granting Cramer's requests for information were not sufficient to comply with FOIA requirements. The e-mail indicated that the Village should provide Cramer with the information by May 22, 2015, or Cramer would initiate legal action. Cramer did not receive the requested information by the deadline stated in the e-mail, and she filed a six-count lawsuit on May 28, 2015, to compel production. Cramer informed the Village that its failure to provide her with the information within the period established by MCL 15.235(2) constituted a denial of her requests and that its failure to comply entitled her to an award of reasonable attorney fees, costs, disbursements, and $3,000 in punitive damages. Cramer moved for summary disposition on October 13, 2015, despite having received in early June 2015 the information she requested. The trial court, Matthew J. Stewart, J., granted Cramer's motion and concluded that Cramer was entitled to attorney fees, costs, and disbursements. The Village appealed.

The Court of Appeals *held*:

FOIA does not require that the actual information requested under the act be provided within the statutory period for responding to an individual's FOIA request. FOIA requires only that the public body from which the information is sought respond within that period to the individual and inform the individual whether his or her FOIA request is granted or denied in full or in part.

"Granting" a FOIA request is not synonymous with "fulfilling" a FOIA request. The information requested under FOIA may be provided to the individual who requested it after the statutory deadline for responding to an individual's request as long as the public body responds within the designated period and makes a good-faith effort to produce the information promptly. In this case, the Village responded within the five business days allowed under FOIA for granting or denying a request in full or in part, and it provided the requested information to Cramer within a few weeks after formally granting her requests. Therefore, the trial court erred by granting Cramer's motion for summary disposition, and the court abused its discretion by awarding Cramer attorney fees, costs, and disbursements.

Reversed and remanded. Award of attorney fees, costs, and disbursements vacated.

FREEDOM OF INFORMATION ACT — STATUTORY DEADLINE FOR RESPONSE TO A REQUEST FOR INFORMATION — TIMELY PRODUCTION OF REQUESTED INFORMATION.

"Granting" a request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., is not synonymous with "fulfilling" a FOIA request; FOIA does not require that the actual information requested under the act be provided within the statutory period for responding to a FOIA request; FOIA requires only that the public body from which the information is sought have responded to the individual making the request within that period and that the response indicate whether the individual's request for information is granted or denied in full or in part; the information requested under FOIA may be provided after the statutory deadline for a response to an individual's request as long as the public body has responded within the designated period and has made a good-faith effort to produce the information promptly.

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

Richard A. Hamilton for the village of Oakley.

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

BOONSTRA, J. In this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., defendant village of Oakley appeals by right the order of the trial

court granting plaintiff Brandi Cramer's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on all six counts of plaintiff's complaint. Defendant also challenges the trial court's order awarding plaintiff attorney fees, costs, and disbursements. Plaintiff cross-appeals, requesting an award of appellate attorney fees, costs, and disbursements. We reverse the grant of summary disposition in favor of plaintiff, remand for the issuance of an order granting summary disposition in favor of defendant, and vacate the award of attorney fees, costs, and disbursements. Finally, we decline to award plaintiff appellate attorney fees, costs, and disbursements.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On May 15, 2015, plaintiff sent defendant six separate FOIA requests, each seeking information pertaining to defendant's reserve police department unit. On May 20, 2015, defendant sent plaintiff six letters stating that the FOIA requests were "granted" and that it would "conduct a search of the Village records and provide you a copy of any documents we are able to locate." All of the responses were signed, "Cheryl Bolf[,] Village FOIA Coordinator." That same day, plaintiff's counsel sent an e-mail to Bolf acknowledging receipt of the letters, but stating that simply providing a written statement granting the requests was not sufficient to comply with FOIA; defendant also needed to produce the requested documents. The e-mail further stated that the documents should be provided by May 22, 2015, and if they were not, further legal action would follow. On May 28, 2015, just three business days after the May 22, 2015 deadline, plaintiff filed suit. She alleged that because defendant had granted her FOIA requests, actual production of the documents

was due on May 22, 2015, and that defendant's failure to provide the documents by that date was a wrongful denial of her requests. The complaint included six counts, each separately alleging the wrongful denial of plaintiff's six FOIA requests. Plaintiff requested an order directing defendant to immediately produce the requested documents, an order awarding reasonable attorney fees, costs, and disbursements, and an award of $3,000 in punitive damages.

Plaintiff moved for summary disposition on October 15, 2015, notwithstanding her admission in the motion that in early June 2015 defendant informed her that certain requested documents did not exist and that she had received from defendant the requested documents that did exist. In responding to the motion, defendant submitted an affidavit, signed by Bolf, stating that "after researching and assembling the documents requested, she transmitted copies of the documents to the party making the request on June 2, 2015."[1] The trial court concluded that defendant's May 20, 2015 responses did not comply with MCL 15.235(2) because the requested documents were not themselves produced within the statutory time frame for a response, suggested that the responses therefore effectively constituted denials of the requests, and granted plaintiff's motion for summary disposition. The court also concluded that plaintiff was entitled to an award of attorney fees, costs, and disbursements. Plaintiff was awarded $6,048.50. This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

We "review[] the grant or denial of summary disposition de novo to determine if the moving party is

[1] The trial court concluded that the documents were sent on June 3 or 4, 2015.

entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). An award of attorney fees under FOIA is reviewed for an abuse of discretion. *Prins v Mich State Police*, 299 Mich App 634, 641; 831 NW2d 867 (2013). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *King v Mich State Police Dep't*, 303 Mich App 162, 175; 841 NW2d 914 (2013). A trial court's factual findings are reviewed for clear error; that is, this Court must defer to the trial court unless we are "left with the definite and firm conviction that a mistake has been made." *Id*. at 174-175. We review questions of statutory interpretation de novo. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009).

III. SUMMARY DISPOSITION

Defendant argues that it did not violate FOIA by sending letters granting plaintiff's requests and producing the requested documents a short time later and that the trial court therefore erred by granting summary disposition to plaintiff. We agree.

MCL 15.235(2) states:

> Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.

> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

Failure on the part of a public body to respond to a FOIA request in the manner provided in Subdivisions (a) through (d) "constitutes a final determination to deny the request." *King*, 303 Mich App at 188-189, citing MCL 15.235(3).

We conclude that defendant complied with MCL 15.235(2), and that MCL 15.235(2) does not mandate that a FOIA recipient, after granting a FOIA request, deliver the requested documents within the period statutorily specified for responding to the FOIA request.

The trial court interpreted MCL 15.235(2), as does plaintiff, to mean that a public body can only "grant" a request by delivering the requested documents within the period specified by the statute for a response. We disagree. The first step in interpreting a statute is to "focus on the language of the statute itself." *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009). "The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute." *Id*. A court construing a statute should "avoid a construction that would render any part of the statute surplusage or nugatory." *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 399; 662 NW2d 695 (2003) (quotation marks and citation omitted). Accordingly, the various "parts of a statute must be harmonized to discern and carry out the intent of the Legislature." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315-316; 683 NW2d 148 (2004).

The term "grant" is not defined in FOIA. This Court may use a dictionary to aid in the interpretation of undefined terms. See *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005). The word "grant," in the context of a request, is defined by *Random House Webster's College Dictionary* (2001), p 572, as "to agree to: *to grant a request*." This definition is not synonymous with completion of the task to which the one to whom the request was made agreed. *Id*. Compare, e.g., *id*. at p 530 (defining the word "fulfill" as "to carry out, or bring to realization, as a prophecy or promise").

Further, in amendments that took effect after plaintiff's FOIA requests were made, the Legislature did, in a different subsection of FOIA, indicate that the words "granted" and "fulfilled" with regard to a FOIA request are not synonymous.[2] MCL 15.234(11) refers in relevant part to a public body's having "*granted and fulfilled* a written request from an individual under this act . . . ." (Emphasis added.) The Legislature's use of two separate terms suggests that the terms have different meanings. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009); see also *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) (indicating that "[w]ords . . . are given meaning by context or setting"). Its use of the conjunctive phrase "granted and fulfilled" indicates that the Legislature was aware, at the time of the amendments to MCL 15.235, that a public body may grant a request without fulfilling it. To hold that "grant" is synonymous with "fulfill" in MCL 15.235(2)(a) would render the phrase "and fulfilled" in MCL 15.234(11) nugatory.

[2] See 2014 PA 563, effective July 1, 2015, which also amended MCL 15.235.

American Federation, 468 Mich at 399. In addition, MCL 15.234(8) now expressly provides that a public body's "response" under MCL 15.235 "shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor." This subsection provides further evidence that the Legislature intended that granting a request under MCL 15.235 be distinct from the fulfillment of that request.[3] Further, in light of the remainder of our analysis, as well as the fact that the nature of the amendment to MCL 15.234 was to substantially revise the procedures relating to charging fees and deposits for FOIA requests, we do not construe the Legislature's amendment of MCL 15.234 to reflect a change in the meaning of the words "grant" or "response." Rather, the Legislature's language in these revised subsections supports our conclusion that the Legislature did not intend the word "grant" in MCL 15.235 to be synonymous with "fulfill." See *Bush*, 484 Mich at 167, 169.

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[3] Although MCL 15.234 principally deals with charging fees and deposits related to FOIA requests, the quoted language of MCL 15.234(8) is not limited to a response that involves charging a fee. Rather, like certain other subsections of MCL 15.234, e.g., MCL 15.234(4) (providing that public bodies "shall establish procedures and guidelines to implement this act"), MCL 15.234(8) applies more broadly, and provides that for "either the public body's initial response or subsequent response as described under section 5(2)(d)," the public body "shall" provide "in good faith" a best efforts time estimate for fulfilling the request. The provision of this good-faith time estimate, although "nonbinding," *id*., is mandatory. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (noting that "the term shall is clearly mandatory"). The fact that defendant did not provide a time estimate because it was not required to do so at the time of plaintiff's requests does not affect our analysis of the proper interpretation of MCL 15.235, and in any event, defendant did produce the requested documents in short order.

Federal courts have also drawn a distinction between granting a federal FOIA request and fulfillment of that request. See *Nat'l Security Archive v Central Intelligence Agency*, 564 F Supp 2d 29, 34 (D DC, 2008) (holding that the plaintiff's case for a federal FOIA violation was moot because the defendant granted the requests and placed them in the "FOIA queue" for processing).[4]

Finally, we note that plaintiff and the trial court have suggested that unless the grant of a FOIA request is interpreted to require its immediate fulfillment, a public body could grant a request yet never actually fulfill it. However, our holding does not afford a public body *carte blanche* to not produce responsive documents. As we have stated in the past, courts will look past a public body's label of its response to a FOIA request. *King*, 303 Mich App at 189.[5] Thus, nothing precludes a plaintiff, if faced with an inordinate delay in the production of requested documents, from filing suit on the ground that a public body's actions in response to a FOIA request effectively constitute a denial in whole or in part, notwithstanding that body's labeling of a response as a "grant" of the request. See MCL 15.240(1)(b). Indeed, FOIA allows a trial court to award punitive damages for arbitrarily and

[4] While decisions of lower federal courts are not binding on this Court, they may be persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

[5] We note that in *King*, this Court held that a response from a public body purporting to grant a FOIA request but distinguishing between exempt and nonexempt material was effectively a grant of the request with respect to nonexempt material and a denial of the request with respect to exempt material. See *King*, 303 Mich App at 189-190. See also *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 386; 872 NW2d 223 (2015). However, this Court did not hold that failure of a public body to produce nonexempt material within the statutory time frame effectively constituted a denial of the request.

capriciously refusing to disclose or provide public records or delaying their disclosure or provision. MCL 15.240(7). And, as stated earlier, the public body is required to provide a good-faith time estimate, MCL 15.234(8), and a public body's failure to meet an estimate (although it is nonbinding) may in some circumstances tend to show that a public body's response was effectively a denial notwithstanding its choice of labels.[6]

In sum, we conclude that the trial court erred by holding that defendant failed to comply with MCL 15.235(2) and by determining that defendant's responses to plaintiff's FOIA requests were effectively denials of those requests because the requested documents were not produced in the period provided for a response. We accordingly reverse the trial court's grant of summary disposition in favor of plaintiff and remand for issuance of an order granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2).[7]

IV. ATTORNEY FEES, COSTS, AND DISBURSEMENTS

Regarding attorney fees, costs, and disbursements, FOIA provides:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails

[6] Under the circumstances of this case, we conclude that defendant's responses were not effectively denials of plaintiff's requests.

[7] We note that even if the trial court's analysis was not erroneous, the court should have dismissed plaintiff's claims as moot because of defendant's subsequent production of the requested documents. See *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 270-271; 568 NW2d 411 (1997) ("When the [FOIA] disclosure that a suit seeks has already been made, the substance of the controversy disappears and becomes moot.").

> in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7). [MCL 15.240(6).]

In light of our determination that defendant was entitled to summary disposition, plaintiff was not entitled to attorney fees, costs, and disbursements. *Amberg v City of Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014). Although a party may be entitled to attorney fees when his or her action is rendered moot by subsequent disclosure, see *Thomas v City of New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002), such entitlement is still based on proof of an underlying FOIA violation. See *id*. at 205, quoting *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 733-734; 415 NW2d 292 (1987):

> "[W]e believe that a plaintiff 'prevails' in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA, even though the action has been rendered moot by acts of the public body in disposing of the documents. An otherwise successful [FOIA] claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body."

Additionally, "[t]o 'prevail' in a FOIA action within the meaning of MCL 15.240(6), a court must conclude that 'the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff.' " *Amberg*, 497 Mich at 34,

quoting *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002) (second and third alterations in *Amberg*; emphasis in *Scharret* omitted).

In this case, there is no evidence in the record, apart from the mere fact that the requested documents were produced after suit was filed, to support the contention that this action was necessary or had a substantial causative effect on defendant's production of the requested documents. *Amberg*, 497 Mich at 34. To the contrary, Bolf's uncontested affidavit indicates that defendant had the intent to fully grant the requests and provide the requested documents once it had time to sort through its records—which it accomplished within 10 days of submitting its responses (and less than a week after the complaint was filed). Thus, the record shows that defendant intended in good faith to fulfill plaintiff's requests, produced the requested documents promptly, and took no action that could be seen as an attempt to withhold any documents from disclosure. See *Scharret*, 249 Mich App at 414. Yet plaintiff filed suit immediately after the period provided in MCL 15.235(2) for a response had lapsed. Nothing other than the mere fact that plaintiff's suit was initiated before the documents were delivered supports plaintiff's argument that a lawsuit was necessary to compel production of the documents. Under these circumstances, we conclude that the trial court in this action abused its discretion by awarding attorney fees, costs, and disbursements to plaintiff. *King*, 303 Mich App at 175.

Because we conclude that plaintiff did not violate FOIA, that plaintiff's suit in the lower court was not necessary to compel defendant's production of documents, and that the lawsuit did not have a substantial causative effect on production of the docu-

ments, we also decline to award appellate attorney fees, costs, or disbursements in plaintiff's cross-appeal. See *Rataj v City of Romulus*, 306 Mich App 735, 756; 858 NW2d 116 (2014).

We reverse the grant of summary disposition in favor of plaintiff, remand for the issuance of an order granting summary disposition in favor of defendant, and vacate the award of attorney fees, costs, and disbursements. We do not retain jurisdiction.

MARKEY, P.J., and OWENS, J., concurred with BOONSTRA, J.

In re MARTIN

Docket Nos. 330231 and 330232. Submitted June 10, 2016, at Detroit. Decided June 23, 2016, at 9:05 a.m. Leave to appeal denied 499 Mich 1002.

The Department of Health and Human Services petitioned the Wayne Circuit Court, Family Division, to terminate the parental rights of respondent-mother and respondent-father to their minor child, alleging that a DVD of the child's videorecorded conversation with a forensic interviewer provided evidence of respondent-father's act of sexual penetration against the child and that testimony of two FBI agents provided evidence of respondent-mother's confession that she engaged in a sex act with a stranger in the presence of the child as well as planned to participate in a sex act with the child himself in the presence of a stranger. The court, Karen Y. Braxton, J., found by a preponderance of the evidence that it had jurisdiction over the child under MCL 712A.2(b) and entered an order terminating both parents' parental rights pursuant to MCL 712A.19b(3)(b)(*i*) (parent sexually abused child), (b)(*ii*) (parent failed to prevent sexual abuse), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if child returned to parent) at the initial disposition, which was an adjudication trial in combination with a termination hearing. Respondents appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. MCR 3.972(C)(2)(a) provides that, for purposes of a trial with respect to adjudication, a statement by a child under the age of 10 concerning and describing an act of sexual abuse performed on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement, regardless of the child's availability, but only if the court finds at a hearing before trial that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. MCL 712A.17b addresses, in part, videorecorded statements made by a witness under the age of 16 in a forensic interview undertaken by the state in connection with proceedings concerning the alleged abuse and neglect of the

witness, and MCL 712A.17b(5) provides that such videorecorded statements shall be admitted instead of the live testimony of the witness at all proceedings except the adjudication stage. A videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement. In this case, before the actual trial/hearing began, the trial court conducted a tender-years hearing and watched the DVD of the child speaking with the forensic interviewer, and the court concluded that the DVD was admissible under both MCR 3.972(C)(2)(a) and MCL 712A.17b. The trial court later effectively relied on the child's videorecorded statements contained in the DVD, not live testimony, in determining that it had jurisdiction over the child relative to respondent-father; however, pursuant to MCL 712A.17b(5), the trial court was not permitted to substantively consider the DVD for purposes of adjudication, and, because the forensic interviewer who heard the child's statements regarding sexual abuse by respondent-father did not testify at the trial/hearing, MCR 3.972(C)(2)(a) could not have been relied on in relation to adjudication, even assuming that there were adequate indicia of trustworthiness. The proper procedure would have entailed having the forensic interviewer testify at the adjudication stage, assuming compliance with MCR 3.972(C)(2)(a), followed by substantive consideration of the forensic interview displayed on the DVD at the termination stage, assuming compliance with MCL 712A.17b. The trial court erred by substantively using the DVD to adjudicate respondent-father instead of employing the DVD to determine whether the forensic interviewer should have been allowed to testify under MCR 3.972(C)(2)(a). Because adjudication in relation to respondent-father was determined solely on the basis of the DVD, the order of adjudication and order terminating respondent-father's parental rights were reversed. With respect to respondent-mother, the child's videorecorded statements were essentially irrelevant to the allegations against her, which were established through the FBI agents' testimony. Therefore, respondent-mother could not establish prejudice because any error was harmless, and she was not entitled to reversal.

2. To establish ineffective assistance of counsel, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness and that (2) the deficient performance prejudiced the respondent. Respondent-mother's argument that counsel should have moved to suppress her statements made to the FBI because the statements were invol-

untary, coercive, and violated her Fifth Amendment rights failed. Even assuming a constitutional violation, which was not supported by the record, respondent-mother failed to cite any authority providing that the exclusionary rule was applicable in the context of abuse and neglect proceedings, and she failed to establish the requisite prejudice. Respondent-mother's arguments that counsel should have objected to hearsay statements made by the FBI agents that were attributed to the stranger and that counsel should have objected on hearsay and foundational grounds to the agents' testimony concerning text messages exchanged between respondent-mother and the stranger also failed. The agents' testimony was not offered to prove the truth of the matters asserted but rather to explain how the FBI came to be involved in the matter and to explain the course of the investigation, and the foundational argument was wholly undeveloped and thus waived. Additionally, respondent-mother did not establish any prejudice given her admissions to the FBI agents. Respondent-mother's argument that counsel was ineffective for failing to elicit and introduce favorable evidence regarding the child's best interests failed because respondent-mother could not overcome the strong presumption that counsel's performance constituted sound trial strategy. Additionally, reversal was not warranted on the claim that counsel should have submitted more best-interest evidence because evidence of respondent-mother's willingness to engage in a sex act with her child constituted a perversion and abdication of her parental role as the child's caregiver, and testimony of the foster-care worker established the child's emotional turmoil and desire not to be returned to his parents. Finally, given the nature of respondent-mother's conduct and the testimony of the foster-care worker, respondent-mother could not establish that counsel's performance was deficient in failing to seek enforcement of the trial court's order that the child receive a trauma assessment.

3. 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 is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3)(b)(*i*) requires a showing that a child has suffered sexual abuse. Respondent-mother effectively conceded that her confession to the FBI agents constituted evidence of sexual abuse by referring to her statements as coerced and involuntary, and no error was established regarding the admission of the FBI agents' testimony. MCL 712A.19b(3)(b)(*ii*) addresses a failure by a parent to prevent sexual abuse of a child. There was

inadequate evidence of respondent-mother's failure to prevent the act of sexual penetration allegedly perpetrated by respondent-father because respondents, who were divorced, were not living together, and the alleged sexual act by respondent-father against the child supposedly occurred out of state while respondent-mother was in Michigan. Therefore, the trial court clearly erred by relying on MCL 712A.19b(3)(b)(*ii*) as to respondent-mother. The evidence of respondent-mother's conduct with respect to her interactions with the stranger as testified to by the FBI agents easily supported termination under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (likelihood of harm to the child if returned to parent's care), and the trial court did not clearly err by relying on those grounds to support termination. The trial court did not clearly err by finding that the statutory grounds for termination in MCL 712A.19b(3)(b)(*i*), (g), and (j) were proved by clear and convincing evidence, and because only a single statutory ground need be established in support of termination, the error in regard to MCL 712A.19b(3)(b)(*ii*) was irrelevant. Finally, the trial court did not clearly err by finding that termination of respondent-mother's parental rights was in the child's best interests.

Trial court order terminating respondent-mother's parental rights affirmed; trial court order terminating respondent-father's parental rights reversed; case remanded for further proceedings with respect to respondent-father.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — EVIDENCE — VIDEO-RECORDED STATEMENTS.

A videorecorded statement taken in compliance with MCL 712A.17b, which addresses videorecorded statements made by a witness under the age of 16 in a forensic interview undertaken by the state in connection with proceedings concerning the abuse and neglect of the witness, must be admitted at a tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, but the videorecorded statement cannot be used substantively for purposes of adjudication; the proper procedure entails having the witness who took the videorecorded statement testify at the adjudication stage, followed by substantive consideration of the videorecorded statement at the termination stage.

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

Legal Counsel, and *Lesley C. Fairrow*, Assistant Attorney General, for the Department of Health and Human Services.

Susan K. Rock for respondent-mother.

Jeffrey Ehrlichman for respondent-father.

Eleanor Rabior for the minor child.

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

MURPHY, P.J. Respondent-mother and respondent-father appeal as of right the order terminating their parental rights to the minor child, a boy born in 2007, at the initial disposition (adjudication trial in combination with termination hearing) pursuant to MCL 712A.19b(3)(b)(*i*) (parent sexually abused child), (b)(*ii*) (parent failed to prevent sexual abuse), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if child returned to parent). We affirm the order terminating respondent-mother's parental rights, reverse the order terminating respondent-father's parental rights, and remand for further proceedings with respect to respondent-father.

Petitioner alleged that respondent-father perpetrated an act of penile-anal penetration against the child. A medical record was entered into evidence containing this accusation as made by the child to the attending doctor, but no medical personnel testified at the trial/hearing. The evidence relied on by petitioner in support of the allegation was a DVD of a videorecorded interview of the child by an adolescent forensic interviewer in which the child, upon questioning, claimed that respondent-father had performed the

alleged act of sexual penetration. Neither the forensic interviewer nor the child testified at the trial/hearing.[1]

Respondent-mother was alleged to have performed a sexual act with a male stranger for money in front of the child in the stranger's van after having exchanged text messages with the stranger to arrange the encounter. An FBI agent testified that respondent-mother came to his attention when he was investigating the stranger. The FBI had arrested the stranger for attempting to have sex with an unrelated minor, and the execution of a search warrant attendant to the arrest resulted in the discovery of the text messages between the stranger and respondent-mother. A second FBI agent testified that he took respondent-mother in for questioning and that respondent-mother admitted to the sexual act in the van in her son's presence. Respondent-mother told the agent that the stranger had initially responded by phone to a used-bike advertisement that she had posted on Craigslist and that the discussion quickly became sexual, eventually leading to the text messages and the sex act in the van. Petitioner also asserted that respondent-mother subsequently was prepared to commit a sexual act on the child in the presence of that same stranger for remuneration. The second FBI agent testified that after the first encounter in the stranger's van, the stranger and respondent-mother exchanged further text messages and spoke together on the phone. The FBI agent stated

[1] Respondent-mother did testify that a child protective services (CPS) worker had informed her of the alleged sexual abuse by respondent-father and that the child thereafter told respondent-mother "what happened and why he didn't tell me . . . ." The CPS worker testified at the trial/hearing, but she did not discuss the nature of any statements that the child made to her, and the full extent of respondent-mother's testimony on the subject of statements made by the child to her is reflected in the preceding sentence.

that respondent-mother informed him that one of the phone calls was on speakerphone with the child present, and the stranger had asked whether she would be willing to touch her son's penis in the man's presence. Respondent-mother told the FBI agent that at the end of the phone call, she asked the child if he would be willing to participate in the requested sex act, but the child declined. The FBI agent further testified that respondent-mother conceded that a follow-up phone call occurred, that the stranger offered her $300 to engage in the sex act with her son, and that the child now agreed to participate because he knew that the family needed money. The agent was unaware of whether the planned act ever transpired; respondent-mother did not tell him that it occurred. We note that there is nothing in the record indicating that the planned act took place.

The trial court found by a preponderance of the evidence that it had jurisdiction over the child under MCL 712A.2(b) given the sexual abuse by respondent-father as established by the child's claim of anal penetration made in the child's forensic interview captured on the DVD and given the sexual abuse by respondent-mother as established by the FBI testimony of her admitted engagement in a sex act in the presence of the child and her plan to participate in a sex act with the child himself in the presence of the aforementioned stranger. Having established jurisdiction relative to adjudication, the trial court next found that there existed clear and convincing evidence supporting termination under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j), effectively relying on the same evidence of sexual abuse by respondents. Finally, the trial court found that termination of parental rights was in the child's best interests in light of the trauma caused by the sexual abuse, the child's adamant desire

not to see respondents and absolute fear of being returned to them, the child's placement in a safe and secure environment with persons willing to plan long-term for the child, and the child's need for permanence essential to his continued growth and development.

On appeal, both respondents contend that the trial court erred by admitting the DVD into evidence. Evidentiary rulings are reviewed for an abuse of discretion; however, we review de novo preliminary questions of law affecting the admission of evidence, e.g., whether a statute or rule of evidence bars admissibility. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). For purposes of a trial with respect to adjudication, a statement by a child under the age of 10 concerning and describing an act of sexual abuse performed on the child by another person may be admitted into evidence "through the testimony of a person who heard the child make the statement," regardless of the child's availability, but only if the court finds at a hearing before trial "that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2)(a); see *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 630; 853 NW2d 459 (2014); *In re Archer*, 277 Mich App 71, 80-81; 744 NW2d 1 (2007).[2] In this case, as mentioned earlier, the forensic interviewer who heard the child's statements regarding sexual abuse by respondent-father did not testify at the trial/hearing. Rather, the interview of the child had been videorecorded, put on a DVD, and admitted into evidence in that format. Accordingly, the child's statements were not admitted in accordance with MCR 3.972(C)(2)(a).

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[2] MCR 3.972(C)(2)(a) also provides that the "statement may be received by the court in lieu of or in addition to the child's testimony."

MCL 712A.17b addresses, in part, videorecorded statements made by a witness under the age of 16 in a forensic interview undertaken by the state in connection with proceedings concerning the alleged abuse and neglect of the witness. MCL 712A.17b(5) provides that such "videorecorded statement[s] shall be admitted at all proceedings *except the adjudication stage* instead of the live testimony of the witness." (Emphasis added.)[3] Before the actual trial/hearing in the instant case got under way, the trial court conducted a tender-years hearing and watched the DVD, and the court concluded that the DVD was admissible under both MCR 3.972(C)(2)(a) and MCL 712A.17b.[4] The trial court later effectively relied on the child's videorecorded statements contained in the DVD, not live testimony, in determining that it had jurisdiction over

[3] MCL 712A.17b(6) mandates the following:

> In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:
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> (a) The time and date of the alleged offense or offenses.
>
> (b) The location and area of the alleged offense or offenses.
>
> (c) The relationship, if any, between the witness and the respondent.
>
> (d) The details of the offense or offenses.
>
> (e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses.

[4] The hearing did not pertain to any evidence other than the child's videorecorded statements. There was no effort to seek admission under MCR 3.972(C)(2)(a) of any statements made by the child to the CPS worker, to respondent-mother, or to medical personnel who had examined the child.

the child relative to respondent-father. But pursuant to MCL 712A.17b(5), the trial court was not permitted to substantively consider the DVD for purposes of adjudication, and, as noted earlier, MCR 3.972(C)(2)(a) could not have been relied on in relation to adjudication—even assuming that there were adequate indicia of trustworthiness—because the forensic interviewer did not testify about the child's statements.

It is plain to us that MCR 3.972(C)(2)(a), which expressly applies to adjudication trials, and MCL 712A.17b, which expressly does not apply to the adjudication stage, work in tandem. MCR 3.972(C)(2)(a) forces petitioner to produce at trial any witness claiming that a child victim made statements of abuse heard by the witness if petitioner wishes to rely on such statements in its case, subject to the existence of circumstances indicating trustworthiness. This allows the accused parent the opportunity to at least cross-examine that witness. MCL 712A.17b(5) not only permits but mandates admission of a videorecorded statement ("shall be admitted") in regard to any proceeding other than one at the adjudication stage, which would necessarily include a termination hearing, as long as the prerequisites set forth in MCL 712A.17b(5) and (6) are satisfied, e.g., the questioning must be in accordance with forensic interview protocol.[5] In a situation such as the case at bar, the proper procedure would entail having the forensic interviewer testify at the adjudication stage, assuming compliance with MCR 3.972(C)(2)(a), followed by substantive consideration of the forensic interview displayed on the DVD at the termination stage, assuming compliance with MCL 712A.17b.

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[5] When termination is sought at the initial disposition, "clear and convincing legally admissible evidence" must be presented to establish the grounds for termination. MCR 3.977(E)(3).

To be clear, "MCL 712A.17b(5) requires a trial court to admit videorecordings of a child's forensic interview during a nonadjudicatory stage," such as "a tender-years hearing" conducted before trial. *In re Brown Minors*, 305 Mich App at 632. And a trial court does not commit error in admitting a DVD under MCL 712A.17b(5) at a pretrial tender-years hearing for the purpose of determining "whether the circumstances surrounding the giving of . . . children's statements provided adequate indicia of trustworthiness to warrant their admission at trial *through the testimony* of [the DVD forensic interviewer] under MCR 3.972(C)(2)(a)." *In re Archer*, 277 Mich App at 83 (emphasis added). Stated otherwise, a videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether "the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness." MCR 3.972(C)(2)(a). The problem in the instant case is that the forensic interviewer did not testify at trial with respect to the child's statements made in the interview. The trial court did not employ the DVD to determine whether the forensic interviewer should be allowed to testify under MCR 3.972(C)(2)(a). Rather, the trial court substantively used the DVD, in and of itself, to adjudicate respondent-father.

In sum, the trial court erred by relying on the videorecorded statements contained in the DVD for purposes of adjudication. In *In re Sanders*, 495 Mich 394, 400-401; 852 NW2d 524 (2014), our Supreme Court declared that the one-parent doctrine, which permitted "a court to interfere with a parent's right to

direct the care, custody, and control of the children solely because the other parent is unfit," was "unconstitutional under the Due Process Clause of the Fourteenth Amendment." The Supreme Court held "that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Id*. at 422. Because adjudication in relation to respondent-father was determined solely on the basis of the DVD, we must reverse the order of adjudication and the order terminating his parental rights, which flowed from the adjudication order. We remand for new adjudication proceedings in compliance with MCR 3.972(C)(2)(a) and other applicable law in regard to the pending authorized termination petition concerning respondent-father.[6]

However, with respect to respondent-mother, the child's videorecorded statements contained in the DVD were essentially irrelevant to the allegations against her, which were established through the testimony of the FBI agents. Accordingly, in connection with either adjudication or termination, assuming for the sake of argument that the DVD was inadmissible for purposes of the termination stage of the proceedings, respondent-mother cannot establish prejudice because any presumed error was harmless, and she is therefore not entitled to reversal.[7] MCR 2.613(A); *In re Williams*, 286

[6] On appeal, counsel for the child agrees that there was error and that respondent-father is entitled to a remand for proper adjudication. Given our ruling, which effectively results in the deprivation of the trial court's jurisdiction, it becomes unnecessary to address respondent-father's arguments challenging the trial court's findings in regard to the statutory grounds for termination and the child's best interests.

[7] Respondent-mother concedes that the forensic interview of the child benefitted her for the most part, considering that the child indicated that he was not aware of the circumstances surrounding respondent-

Mich App 253, 273; 779 NW2d 286 (2009) (applying harmless-error analysis in termination case).

Respondent-mother next alleges multiple instances of ineffective assistance of counsel. The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394. Respondent-mother first contends that counsel should have moved to suppress her statements made to the FBI because the statements were involuntary and coerced, violating her Fifth Amendment rights. Assuming a constitutional violation, which is not in fact supported by the existing record, respondent-mother fails to direct us to any authority providing that the exclusionary rule is applicable in the context of abuse and neglect proceedings; therefore, she has failed to establish the requisite prejudice.[8]

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mother's alleged interactions with the stranger and given that the child denied knowing the man when shown his picture. Nevertheless, respondent-mother argues that she was prejudiced because some of the child's statements during the interview regarded a male friend who was living with the child and respondent-mother, and the child indicated that the male friend used marijuana, had a gun, and beat respondent-mother. Contrary to respondent-mother's argument on appeal, the trial court, while reciting the child's statements concerning the male friend, never relied on that evidence when ruling on the statutory grounds or the child's best interests.

[8] We note that in *In re T Minors*, 143 NM 75, 78; 172 P3d 1287 (NM App, 2007), the New Mexico Court of Appeals, in rejecting application of the exclusionary rule in child protective proceedings, observed:

> We have found no cases, and the parties do not cite to any, in which any other jurisdiction has applied the exclusionary rule in

Respondent-mother next argues that counsel was ineffective for failing to object to hearsay statements attributed to the stranger as testified to by the FBI agents and for failing to object on hearsay and foundational grounds with respect to the agents' testimony concerning the text messages. The record reflects that the testimony by the two FBI agents that briefly touched on statements made by the stranger and on the substance of the text messages was not offered to prove the truth of the matters asserted, but rather to explain how the FBI came to be involved in the matter and to explain the course of the investigation. See MRE 801(c) (" '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."). "Counsel is not ineffective for failing to make a futile objection." *In re Archer*, 277 Mich App at 84. Respondent-mother's foundational argument under MRE 901 is wholly undeveloped and thus waived. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Moreover, the text messages were not admitted into evidence, and a sufficient foundation was presented so as to allow the testimony of the FBI agents regarding the text messages. Additionally, respondent-mother has not established any prejudice, assuming deficient performance by counsel, given her admissions to the FBI agents.[9]

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the context of abuse and neglect proceedings. Other jurisdictions that have addressed the issue have held that the exclusionary rule should not apply in civil abuse and neglect proceedings because it may thwart the State's interest in the protection of children.

[9] We note that respondent-mother invoked her Fifth Amendment right against self-incrimination when asked whether she participated in the sexual conduct at issue, and her invocation was indisputably permissible. *In re MU*, 264 Mich App 270, 283 n 5; 690 NW2d 495 (2004). That said, invoking the Fifth Amendment in an abuse and neglect

Respondent-mother also maintains that counsel was ineffective for failing to elicit and introduce favorable evidence regarding the child's best interests, relying in part on an affidavit by respondent-mother that is not part of the lower court record. Even accepting consideration of that affidavit, respondent-mother has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Regardless, any deficiency by counsel in introducing testimony or evidence relative to the child's best interests was harmless. Respondent-mother was prepared to partake in a sex act with her child for money in front of the stranger after already having had sex with the stranger in front of the child. Respondent-mother was ready and willing to engage in the sex act with her child because the eight-year-old boy "agreed" to the sex act on the basis that the family needed money. This perversion and abdication of respondent-mother's parental role as the child's caregiver dictated that it was in the child's best interests to terminate respondent-mother's parental rights. Absent the FBI's investigation of the stranger that led the agency to respondent-mother, the potential of additional harm to the child is incalculable. A foster-care worker testified that the child did not want to be returned to his parents, that he had been traumatized by the ongoing court proceedings and the possibility of being returned to their care, and that the child had been undergoing intense therapy to address his emotional turmoil. Further, the foster-care worker testified that the child's needs were being met in a very safe and suitable environment as part of a potential preadoptive placement. In the face

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proceeding, as opposed to a criminal proceeding, gives rise to "an adverse inference against the respondent in th[e] proceeding . . . ." *Id*.

of these circumstances, reversal is unwarranted on the claim that counsel should have submitted more best-interest evidence.

Finally, respondent-mother argues that counsel was ineffective for failing to insist that the child receive a trauma assessment that had been ordered by the trial court but apparently never conducted. Given the nature of respondent-mother's conduct and the testimony by the foster-care worker regarding the child's traumatized state, respondent-mother fails to convince us that counsel's performance was deficient in failing to seek enforcement of the court's decision, nor has she established the requisite prejudice. The result of a trauma assessment, under the circumstances and existing record, could potentially have been more favorable to petitioner than respondent-mother. Therefore, we are not prepared to fault counsel for shying away from pushing the trial court to enforce its decision. Counsel's performance was not deficient, nor, once again, can we find the necessary prejudice.

Lastly, respondent-mother contends that the trial court clearly erred by finding that the statutory grounds for termination were proved by clear and convincing evidence and by finding that termination was in the child's best interests.[10] With respect to MCL

[10] 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 is mandated to terminate a 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; 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

712A.19b(3)(b)(*i*), which requires a showing that a child "has suffered . . . sexual abuse," respondent-mother argues that there was no evidence that she sexually abused the child other than her "coerced and involuntary statements" made to the FBI. She thus effectively concedes that her confession made to the interviewing FBI agent constituted evidence of sexual abuse, and no error has been established regarding the admission of the testimony by the FBI agent concerning the confession.

In regard to MCL 712A.19b(3)(b)(*ii*), which addresses a failure by a parent to prevent sexual abuse, the record, while a bit unclear, appears to indicate that respondent-mother was alleged to have failed to protect the child from respondent-father's alleged sexual abuse and that respondent-father was alleged to have failed to protect the child from respondent-mother's sexual abuse. Assuming that the DVD of the forensic interview was admissible relative to the termination stage of the proceedings, there is inadequate evidence of respondent-mother's failure to prevent the act of anal penetration allegedly perpetrated by respondent-father. Respondents, who were divorced, were not living together, and the alleged sexual act by respondent-father against the child supposedly occurred out of state while respondent-mother was in Michigan. The trial court clearly erred by relying on MCL 712A.19b(3)(b)(*ii*) as to respondent-mother.

The evidence of respondent-mother's conduct with respect to her interactions with the stranger as testi-

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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).

fied to by the FBI agents easily supported termination under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (likelihood of harm to the child if returned to parent's care), and the trial court did not clearly err by relying on those grounds to support termination. In sum, we hold that the trial court did not clearly err by finding that the statutory grounds for termination in MCL 712A.19b(3)(b)(*i*), (g), and (j) were proved by clear and convincing evidence. Because only a single statutory ground need be established in support of termination, MCL 712A.19b(3); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), the error in regard to MCL 712A.19b(3)(b)(*ii*) is irrelevant.

Finally, for the reasons stated by the trial court and those set forth in our earlier discussion of the child's best interests, there was no clear error in the trial court's finding that termination of respondent-mother's parental rights was in the child's best interests. See *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).

We affirm the order terminating respondent-mother's parental rights, reverse the order terminating respondent-father's parental rights, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAAD and BORRELLO, JJ., concurred with MURPHY, P.J.

O'CONNELL v DIRECTOR OF ELECTIONS

Docket No. 332132. Submitted June 7, 2016, at Lansing. Decided June 23, 2016, at 9:10 a.m.

Plaintiff, Judge PETER D. O'CONNELL, filed a complaint for mandamus in the Court of Claims against the Director of Elections, the Bureau of Elections, and the Department of State, asserting that the Court of Claims had exclusive jurisdiction over demands for an extraordinary writ against state officials and departments after the Secretary of State rejected plaintiff's Affidavit of Candidacy and Affidavit of Identity for purposes of qualifying for the office of Judge of the Court of Appeals. Plaintiff had been reelected in November 2012 to serve a six-year term as a judge on the Court of Appeals in the fourth district; however, rather than serving the entirety of that term, plaintiff sought to be reelected to the Court of Appeals for the 2017 to 2023 term in a seat that was occupied by Judge MICHAEL GADOLA because plaintiff would have attained the age of 70 before the general election in November 2018 and therefore would have been ineligible under MCL 168.409b(6) and Const 1963, art 6, § 19, to run for reelection to a new term of office in his original seat. In response to plaintiff's complaint, defendants agreed that the Court of Claims had jurisdiction, but defendants asserted that the Court of Appeals also had jurisdiction and that review would be more efficient in the Court of Appeals. The Court of Claims, CYNTHIA D. STEPHENS, J., dismissed plaintiff's complaint, determining that the Court of Claims did not have subject-matter jurisdiction because Article 6, § 13 of the 1963 Constitution gave circuit courts exclusive jurisdiction to issue prerogative and remedial writs, including writs of mandamus, that could not be delegated to the legislatively created Court of Claims. Plaintiff appealed.

The Court of Appeals *held*:

1. Challenges to subject-matter jurisdiction cannot be waived, and a court must entertain such challenges regardless of when they are raised, or even raise such challenges sua sponte. Article 6, § 13 of the 1963 Constitution provides that the circuit court shall have original jurisdiction in all matters not prohibited by law;

appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear, and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the Supreme Court; and jurisdiction of other cases and matters as provided by rules of the Supreme Court. MCL 600.605 provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except when exclusive jurisdiction is given in the Constitution or by statute to some other court or when the circuit courts are denied jurisdiction by the Constitution or statutes of this state. MCL 600.6419(1)(a) provides, in relevant part, that the jurisdiction of the Court of Claims, as conferred upon it by the Court of Claims Act, MCL 600.6401 *et seq*., also known as Chapter 64 of the Revised Judicature Act, MCL 600.101 *et seq*., is exclusive, that all actions initiated in the Court of Claims shall be filed in the Court of Appeals, and that except as otherwise provided in MCL 600.6419, the Court of Claims has the power and jurisdiction to hear and determine any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. MCL 600.6419(6) states that the Court of Claims Act does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with Const 1963, art 6, § 13. Before 1977, the Legislature expressly limited original jurisdiction over mandamus actions against state officers to the Court of Appeals and the Supreme Court; however, as of January 1, 1977, circuit courts were granted concurrent jurisdiction over such actions under MCL 600.4401(1), as enacted by 1976 PA 317, which provides that an action for mandamus against a state officer shall be commenced in the Court of Appeals, or in the circuit court in the county in which venue is proper, or in Ingham County, at the option of the party commencing the action. A degree of tension exists between MCL 600.4401(1) and MCL 600.6419(1)(a): in isolation, MCL 600.4401(1) seems to indicate that an action for mandamus against a state officer is only properly instituted in the Court of Appeals or the appropriate circuit court; however, such an interpretation fails to harmonize that provision with portions of the Court of Claims Act—specifically MCL 600.6419, which suggests that exclusive jurisdiction over demands for extraordinary writs against the state or the state's departments or officers rests with the Court of Claims. To harmonize these conflicting provisions, MCL 600.6419(1)(a) should be read to expand the original jurisdiction of the Court of Claims to include any demand for an extraordinary writ against the state or any of its

departments or officers such that the Court of Claims now possesses jurisdiction over mandamus claims that had previously been within the jurisdiction of the circuit court pursuant to MCL 600.4401(1). This interpretation of MCL 600.6419 is consistent with the need to harmonize it with MCL 600.4401(1) under the doctrine of *in pari materia*. The plain language of MCL 600.6419(1)(a) specifically addresses the question of precedence, stating that its grant of exclusive jurisdiction is effective "notwithstanding another law that confers jurisdiction of the case in the circuit court." Such language expresses a sufficiently clear intent that, to the extent that MCL 600.6419 and MCL 600.4401(1) conflict, the Legislature intended MCL 600.6419 to supersede MCL 600.4401(1). Defendants' arguments to the contrary failed. The Court of Claims erred by holding that it lacked subject-matter jurisdiction to hear and decide this matter.

2. The Court of Claims never addressed or decided whether plaintiff was entitled to mandamus relief; therefore, the issue was unpreserved and had to be addressed on remand.

Reversed and remanded.

COURTS — COURT OF CLAIMS — JURISDICTION — EXTRAORDINARY WRITS AGAINST THE STATE OR THE STATE'S DEPARTMENTS OR OFFICERS — MANDAMUS CLAIMS.

Article 6, § 13 of the 1963 Constitution grants the circuit court original jurisdiction to issue, hear, and determine prerogative writs; MCL 600.4401(1) provides that an action for mandamus against a state officer shall be commenced in the Court of Appeals, or in the circuit court in the county in which venue is proper, or in Ingham County, at the option of the party commencing the action; MCL 600.6419(1)(a) provides, in relevant part, that the jurisdiction of the Court of Claims, as conferred upon it by the Court of Claims Act, MCL 600.6401 *et seq*., is exclusive, that all actions initiated in the Court of Claims shall be filed in the Court of Appeals, and that except as otherwise provided in MCL 600.6419, the Court of Claims has the power and jurisdiction to hear and determine any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court; to harmonize these conflicting provisions, MCL 600.6419(1)(a) should be read to expand the original jurisdiction of the Court of Claims to include any demand for an extraordinary writ against the state or any of its departments or officers such that the Court of Claims now possesses jurisdiction over mandamus claims that had previously been within the jurisdiction of the circuit court pursuant to MCL 600.4401(1); to the

extent that MCL 600.6419 and MCL 600.4401(1) conflict, the Legislature intended MCL 600.6419 to supersede MCL 600.4401(1); MCL 600.6419(1) is not contrary to Article 6, § 13 of the 1963 Constitution.

Allan Falk, PC (by *Allan Falk*), for Judge PETER D. O'CONNELL.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Denise C. Barton*, *Erik A. Grill*, *Joseph Ho*, *Adam Fracassi*, and *Josh Booth*, Assistant Attorneys General, for the Director of Elections, the Bureau of Elections, and the Michigan Department of State.

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

PER CURIAM. Plaintiff appeals as of right the Court of Claims order dismissing his mandamus complaint for want of subject-matter jurisdiction. We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The underlying facts are undisputed and are largely a matter of public record. In November 2012, plaintiff was reelected to serve a six-year term as a judge on the Court of Appeals in the fourth district. The term of office to which plaintiff was reelected will expire January 1, 2019. However, because plaintiff will have attained the age of 70 before the general election occurring in November 2018, plaintiff will be ineligible to run for reelection to a new six-year term of office in that seat on the Court.[1] Judge MICHAEL GADOLA was

[1] See Const 1963, art 6, § 19; MCL 168.409b(6).

appointed to this Court in November 2014 to fill the vacancy left by the resignation of his predecessor, Judge WILLIAM WHITBECK. Because Judge WHITBECK's term would have expired on January 1, 2017, Judge GADOLA is eligible to run for the 2017 to 2023 term as an incumbent judge of the Court. Rather than serving the entirety of his current term of office, plaintiff seeks to be reelected to the Court of Appeals in a different term of office, the 2017 to 2023 term, in other words, in the seat currently occupied by Judge GADOLA. Despite the fact that this particular seat on the Court is currently occupied by Judge GADOLA, plaintiff asserts that because he is currently an incumbent judge of the Court of Appeals, he is not required to complete his current term of office but instead may seek to be reelected to the Court for the 2017 to 2023 term of office as an incumbent. Plaintiff filed an Affidavit of Candidacy pursuant to Const 1963, art 6, § 22 and MCL 168.409b(6), asserting that he "will not have attained the age of 70 years by November 8, 2016," and an Affidavit of Identity stating that he seeks the office entitled "Judge, Michigan Court of Appeals, Fourth District."

After correspondence between plaintiff and Christopher Thomas, the state of Michigan's Director of Elections, Thomas notified plaintiff in correspondence dated February 5, 2016, that the Bureau of Elections had rejected plaintiff's Affidavit of Candidacy and Affidavit of Identity. In additional correspondence dated February 5, 2016, the Secretary of State wrote to plaintiff:

> On this date, the Hon. Peter O'Connell, Judge of the Court of Appeals, tendered an Affidavit of Candidacy and Affidavit of Identity for the purpose of qualifying as a candidate for the office of Judge of the Court of Appeals, 4th District, Regular Term Incumbent Position.
>
> Judge O'Connell's Affidavit of Candidacy and Affidavit of Identity were rejected by the Secretary of State on this

date for the reasons stated in a letter from Christopher M. Thomas, Director of Elections to Judge O'Connell dated January 21, 2016.

Following the Secretary of State's rejection of his Affidavit of Candidacy and Affidavit of Identity, plaintiff filed a Verified Complaint for Mandamus, Ex Parte Motion for Order to Show Cause, and Brief in Support of Complaint for Mandamus in the Court of Claims. Relevant to this appeal, plaintiff asserted that the Court of Claims has exclusive jurisdiction over demands for an extraordinary writ against the state or the state's departments or officers. In their answer to the complaint, defendants agreed that the Court of Claims had jurisdiction, but asserted that this Court also had jurisdiction, and that jurisdiction "may be more time-efficient in the Court of Appeals because in elections cases, time is of the essence."

The Court of Claims determined that it did not have subject-matter jurisdiction over plaintiff's complaint for a writ of mandamus. Concluding that Article 6, § 13 of the 1963 Constitution conferred on the circuit courts exclusive jurisdiction to issue prerogative and remedial writs, including writs of mandamus, the Court of Claims ruled that circuit courts held "plenary jurisdiction in matters of mandamus . . . which may not be abrogated by statute." The Court of Claims considered and rejected plaintiff's argument that MCL 600.6419, as amended by 2013 PA 164, extended the Court of Claims' jurisdiction to actions for mandamus. Quoting MCL 600.6419(6), which provides that " '[t]his chapter does not deprive the circuit court of *exclusive* jurisdiction to issue, hear, and determine *prerogative and remedial writs* consistent with section 13 of article VI of the state constitution of 1963,' " the Court of Claims concluded that the Legislature could not delegate the

circuit court's constitutional powers, including with respect to prerogative and remedial writs, to the legislatively created Court of Claims. (Emphasis added by the Court of Claims.) The Court of Claims dismissed plaintiff's complaint, and this appeal ensued.

II. STANDARD OF REVIEW

"A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 6; 818 NW2d 337 (2011). We also review de novo questions regarding the proper interpretation of our 1963 Constitution. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014).

III. PRINCIPLES OF CONSTRUCTION

The issue at bar revolves around the correct interpretation of several statutes and constitutional provisions.

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. This rule of "common understanding" has been described by Justice COOLEY in this way:
>
> > A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great* mass *of the people themselves, would give it*. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and

> *ratified the instrument in the belief that that was the sense designed to be conveyed.*
>
> In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.
>
> This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification. But if the constitution employs technical or legal terms of art, we are to construe those words in their technical, legal sense. [*Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004) (quotation marks and citations omitted).]

"The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015) (quotation marks and citation omitted). "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Id*. "[I]f the intent of the Legislature is not clear, courts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Haynes v Village of Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014) (quotation marks and citation omitted).

"Judicial interpretation of statutes should construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Id*. (quotation marks and citation omitted). When there is "tension, or even conflict, between sections of a statute," this Court has a "duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). If the provisions of a statute cannot be entirely harmonized without some violation of the

rules of statutory interpretation, the Court should adopt the interpretation that "does the least damage to what otherwise appears to be plain language in the statute . . . ." *Niggeling v Dep't of Transp*, 183 Mich App 770, 781; 455 NW2d 415 (1990). "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of Office of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010) (quotation marks and citation omitted). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes." *Id*. (quotation marks and citation omitted). "When there is a conflict between statutes that are read *in para* [sic] *materia*, the more recent and more specific statute controls over the older and more general statute." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007).

"[A] general rule of statutory construction is that the Legislature is presumed to know of and legislate in harmony with existing laws." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 592 n 13; 810 NW2d 110 (2011) (quotation marks and citation omitted). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

IV. ANALYSIS

A. SUBJECT-MATTER JURISDICTION

Plaintiff argues that the Court of Claims erred by concluding that it lacked subject-matter jurisdiction to hear and decide this matter. Specifically, plaintiff con-

tends that MCL 600.6419, as amended by 2013 PA 164, properly delegates to the Court of Claims jurisdiction over actions for mandamus against state officials and departments. We agree.

Challenges to subject-matter jurisdiction cannot be waived, and a court must entertain such challenges regardless of when they are raised, or even raise such challenges sua sponte. *In re Contempt of Dorsey*, 306 Mich App 571, 581; 858 NW2d 84 (2014); see also *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002) ("[A] court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford . . . ."); *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 479 n 2; 795 NW2d 797 (2010) (YOUNG, J., dissenting) ("All courts 'must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists . . . .' "), quoting *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). "Generally, subject-matter jurisdiction is defined as a court's power to hear and determine a cause or matter. More specifically, subject-matter jurisdiction is the deciding body's authority to try a case of the kind or character pending before it, regardless of the particular facts of the case." *Dorsey*, 306 Mich App at 581 (citation omitted).

Mandamus is properly categorized as both an "extraordinary" and a "prerogative" writ. MCR 3.301(A)(1)(c); *LeRoux v Secretary of State*, 465 Mich 594, 606-607; 640 NW2d 849 (2002); *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519; 810 NW2d 95 (2011). At issue here is whether the Court of Claims can properly exercise subject-matter jurisdiction over such writs when mandamus is sought against a state officer or department.

"The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit." *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 5; 495 NW2d 152 (1992). Conversely, the circuit court is "a court of general equity jurisdiction," *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992), and its subject-matter jurisdiction is generally set forth by our 1963 Constitution:

> The circuit court shall have *original jurisdiction in all matters not prohibited by law*; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; *power to issue, hear and determine prerogative and remedial writs*; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; *and jurisdiction of other cases and matters as provided by rules of the supreme court*. [Const 1963, art 6, § 13 (emphasis added).]

MCL 600.605 provides:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

"Thus, the circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute expressly prohibits it from exercising jurisdiction or gives to another court exclusive jurisdiction over the subject matter of the suit." *Teran v Rittley*, 313 Mich App 197, 206; 882 NW2d 181 (2015).

Before 1977, the Legislature expressly limited original jurisdiction over mandamus actions against state officers to this Court and our Supreme Court. *Water-*

ford Sch Dist v State Bd of Ed, 98 Mich App 658, 664-665; 296 NW2d 328 (1980), holding limited by *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 270 (1998); *Schweitzer v Bd of Forensic Polygraph Examiners*, 77 Mich App 749, 753 n 5; 259 NW2d 362 (1977). But as of January 1, 1977,[2] our circuit courts were granted concurrent jurisdiction over such actions under MCL 600.4401(1), which provides, "An action for mandamus against a state officer shall be commenced in the court of appeals, *or* in the circuit court in the county in which venue is proper *or* in Ingham county, at the option of the party commencing the action." (Emphasis added.) Thus, in isolation, and as the Court of Claims decided, MCL 600.4401(1) seems to indicate that an action for mandamus against a state officer is only properly instituted in this Court or the appropriate circuit court.

Such an interpretation of MCL 600.4401(1), however, fails to harmonize that provision with portions of the Court of Claims act, MCL 600.6401 *et seq*., specifically MCL 600.6419. In pertinent part, MCL 600.6419 states:

> (1) Except as provided in sections 6421[3] and 6440,[4] the jurisdiction of the court of claims, as conferred upon it

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[2] See 1976 PA 317.

[3] I.e., MCL 600.6421. Notably, this Court has concluded that § 6421 grants the Court of Claims "exclusive jurisdiction" with respect to any demand for "declaratory or equitable relief" against the state or any of its departments. See, e.g., *Buckner v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2016 (Docket No. 326564), p 4.

[4] I.e., MCL 600.6440, which provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the

> by this chapter [MCL 600.6401 *et seq*.], is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. . . . Except as otherwise provided in this section, the court has the following power and jurisdiction:
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> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or *any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.*
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> * * *
>
> (6) *This chapter does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963*. [Emphasis added.]

Hence, there is a degree of tension between MCL 600.4401(1) and MCL 600.6419(1)(a). While § 6419 suggests that exclusive jurisdiction over demands for extraordinary writs against the state or the state's departments or officers rests with the Court of Claims, the former provision, § 4401(1), instructs parties that "[a]n action for mandamus against a state officer" must be "commenced" in either this Court or an appropriate circuit court. We conclude that, to harmonize these conflicting provisions, § 6419(1)(a) should be read to expand the original jurisdiction of the Court of Claims to include "any demand for an extraordinary writ against the state or any of its departments or officers" such that the Court of Claims now possesses jurisdic-

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complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

tion over mandamus claims that had previously been within the jurisdiction of the circuit court pursuant to MCL 600.4401(1).

In their principal appellate brief, defendants contend that the tension between MCL 600.4401(1) and MCL 600.6419(1)(a) is dissipated by properly considering MCL 600.6419(6), which, they argue, reserves for the circuit court "exclusive" jurisdiction over mandamus actions involving state officers—notwithstanding MCL 600.6419(1)(a). In that respect, we find defendants' argument wholly unpersuasive. First, at the time that MCL 600.6419 was enacted, the circuit court did not possess exclusive jurisdiction over mandamus actions involving state officers; rather, it shared concurrent jurisdiction with this Court. 2013 PA 164; MCL 600.4401(1). Accordingly, we cannot accept defendants' proffered construction of MCL 600.6419(6). We cannot construe the phrase "does not *deprive* the circuit court of exclusive jurisdiction" as language affirmatively *conferring* exclusive jurisdiction to the circuit court that it has never possessed. The distinction is subtle, but the phrase "does not *deprive* the circuit court of exclusive jurisdiction" does not assert that the circuit court *has* exclusive jurisdiction. Moreover, Const 1963, art 6, § 13 does not state that the circuit court's jurisdiction is exclusive. Finally, defendants' interpretation of MCL 600.6419(6) would deprive both the Court of Claims and *this* Court of jurisdiction, thereby rendering portions of both MCL 600.4401(1) and MCL 600.6419(1)(a) nugatory.

In recognition of these problems with their position, defendants acknowledge in their reply brief that, "[a]rguably, MCL 600.6419(6) could be read to mean that the Court of Claims Act does not deprive the circuit court of the power to issue those prerogative and

remedial writs that it *alone* has the jurisdiction to issue; in other words, it does not deprive the circuit court of the undivided power that it does not share with *any other court* in regard to the issuance of prerogative and remedial writs." But defendants contend that, given the fact that the Legislature is presumed to know the law, the Legislature could not have intended the phrase "exclusive jurisdiction" in MCL 600.6419(6) to mean jurisdiction that the Constitution vested in the circuit court *only*. Rather, defendants argue, the Legislature meant that if the circuit court was the only *trial-level* court with jurisdiction over prerogative and remedial writs, such jurisdiction would be transferred away from the circuit court and to the Court of Claims, whereas if the circuit court shared jurisdiction over prerogative and remedial writs with an *appellate* court, it would continue to share that jurisdiction with the appellate court but would not share jurisdiction with the Court of Claims.

Defendants tacitly acknowledge that such an interpretation of MCL 600.6419(6) deviates from the presumption that the Legislature intended the plain meaning conveyed by the plain statutory language. Defendants read into the statute a dual meaning of "exclusive," depending on whether the reference is to exclusive jurisdiction held by the circuit court and the circuit court alone, or exclusive jurisdiction that the circuit court shares with appellate courts. We disagree with this construction as unnecessary in order to avoid a conflict between MCL 600.6419(6) and the Constitution.

Const 1963, art 6, § 13 grants the circuit court *original* jurisdiction to issue, hear, and determine prerogative writs, but it does not state that such original jurisdiction is *exclusive*. On the contrary, be-

cause the Constitution also grants the Supreme Court power over prerogative writs, and because this Court has jurisdiction over prerogative writs pursuant to MCL 600.4401 and Const 1963, art 6, § 10, the circuit court's jurisdiction over such writs is not constitutionally exclusive. Although the Constitution granted to the circuit court jurisdiction over prerogative and remedial writs, the Legislature did not allow the circuit court to exercise that jurisdiction against state officers until it enacted 1976 PA 317. And not only did the 1963 Constitution refrain from granting the circuit court exclusive jurisdiction over claims for prerogative writs against state defendants, but it also permitted the Legislature to withhold such jurisdiction from the circuit court. Accordingly, MCL 600.6419(1) is not contrary to Const 1963, art 6, § 13. The statute simply does what has always been constitutionally permissible; it delegates away the circuit court's jurisdiction over claims for mandamus and other prerogative writs against certain state defendants. In sum, the circuit court never had exclusive jurisdiction over claims for mandamus against state-level defendants, MCL 600.6419(1) permissibly delegated such jurisdiction to the Court of Claims, and MCL 600.6419(6) did not revoke that delegation of jurisdiction because it was unnecessary to do so.

Although it is not directly on point, we find our Supreme Court's opinion in *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003), instructive here. In *Parkwood*, our Supreme Court analyzed the version of MCL 600.6419 in effect before that statute's amendment by 2013 PA 164. In the *Parkwood* version, as in the present version, MCL 600.6419(1) conferred on the Court of Claims the power and jurisdiction "[t]o hear and determine all claims and demands, liquidated and

unliquidated, ex contractu and ex delicto, against the state and any of its departments . . . ." *Parkwood*, 468 Mich at 767. MCL 600.6419(4) then provided that "[t]his chapter shall not deprive the circuit court . . . of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . ." *Id*. at 768. The *Parkwood* Court also considered MCL 600.6419a, which, before its repeal by 2013 PA 164, conferred on "the Court of Claims concurrent jurisdiction with the circuit courts over any claim for equitable and declaratory relief that is ancillary to a claim filed under § 6419." *Id*. At issue in *Parkwood* was whether the Court of Claims had exclusive jurisdiction over the plaintiff's breach-of-contract claim when the plaintiff sought declaratory relief only, not a legal remedy. *Id*. at 770-771. The *Parkwood* Court noted that prior decisions by the Supreme Court and this Court had held that complaints seeking only equitable or declaratory relief were within the circuit court's jurisdiction because, when the prior cases were decided, the Court of Claims did not have an equity side. *Id*. at 768-770, 773. However, following the "abolition of procedural distinctions between the law and equity sides of a court docket," there was no longer a rationale for holding that the Court of Claims had no jurisdiction over claims for equitable relief. *Id*. at 773-774 (citations omitted). The Supreme Court concluded that "[b]ecause the present case involves a contract-based claim for declaratory relief against a state agency, . . . it falls within the exclusive jurisdiction of the Court of Claims under the plain language of § 6419(1)(a)." *Id*. at 772. The Court further held that § 6419(4) retained the circuit court's jurisdiction over declaratory claims

against the state that did not arise from breach of contract or tort. *Id*. at 774.

The analysis in *Parkwood* discussing § 6419(1) and former § 6419(4) provides sound guidance for our analysis of the relationship between § 6419(1) and present § 6419(6). In 2013 PA 164, the Legislature expanded the Court of Claims's jurisdiction to encompass original jurisdiction of "any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." In doing so, the Legislature shifted power and jurisdiction over mandamus claims against state defendants that had previously been within the circuit court's jurisdiction under MCL 600.4401(1) to the Court of Claims. Section 6419(6) retains the circuit court's exclusive jurisdiction over the remaining categories of extraordinary writs (e.g., claims against local government officials[5]), but it does not reverse the shift of jurisdiction under § 6419(1).

Our interpretation of § 6419 is consistent with the need to harmonize it with MCL 600.4401(1) under the doctrine of *in pari materia*. The two statutes clearly conflict. But the plain language of § 6419(1)(a) specifically addresses the question of precedence, stating that its grant of exclusive jurisdiction is effective "notwithstanding another law that confers jurisdiction of the case in the circuit court." Such language "express[es] a sufficiently clear intent" that, to the extent that § 6419 and MCL 600.4401(1) conflict, the Legislature intended § 6419 to supersede MCL 600.4401(1). See *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014) ("The City contends that the [Michigan Medical Marihuana Act (MMMA)] does not express a sufficiently

[5] See generally *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008).

clear intent to supersede the [Michigan Zoning Enabling Act], but we see no ambiguity in the MMMA's plain language to this effect."). By holding otherwise, and by deciding that it lacked subject-matter jurisdiction to hear and decide this matter, the Court of Claims erred.

B. MANDAMUS

Despite our "function[] as a court of review that is principally charged with the duty of correcting errors," *Mich Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 168; 533 NW2d 339 (1995), and the fact that the Court of Claims never ruled on the substantive merits of the parties' respective positions, on appeal plaintiff asks us to decide whether he is entitled to the mandamus relief he sought below. Because the issue was never addressed or decided by the Court of Claims, it is unpreserved, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005), and we therefore decline to address it, *Smit v State Farm Mut Auto Ins Co*, 207 Mich App 674, 685; 525 NW2d 528 (1994) ("As a general rule, this Court declines to consider an issue that was not decided by the trial court."). See also *In re MS*, 291 Mich App 439, 442; 805 NW2d 460 (2011) ("[W]e will not address constitutional issues when, as here, we can resolve an appeal on alternative grounds.").

V. CONCLUSION

We reverse and remand this matter to the Court of Claims for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs under MCR 7.219.

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

In re JONES

Docket No. 330945. Submitted June 10, 2016, at Detroit. Decided June 28, 2016, at 9:00 a.m.

Respondent's parental rights to her minor children, SL and CJ, were terminated in the Kalamazoo Circuit Court, Juvenile Division, under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), (j), and (*l*). The children had different fathers. During the proceedings, respondent claimed that CJ's father "might be Native American," "might have a little Indian in him," and "says he might be Cherokee." Petitioner, the Department of Health and Human Services, sent a notice to the Department of the Interior, Bureau of Indian Affairs (BIA), and the BIA concluded that it did not have enough information to make a determination of tribal affiliation at that time. No further evidence concerning the question of CJ's heritage appeared in the trial court record. The court, Gerald Scott Pierangeli, J., found by a preponderance of the evidence that termination of respondent's rights to SL and CJ was in the children's best interests. Respondent appealed.

The Court of Appeals *held*:

1. The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Protection Act (MIFPA), MCL 712B.1 *et seq*., establish substantive and procedural protections for when an Indian child is involved in a child protective proceeding. The suggestion that a child might be an Indian child triggers the notice requirements of the ICWA, 25 USC 1912(a), and the MIFPA, MCL 712B.9(1), and the petitioner is required to give notice to select entities that a child under the court's jurisdiction might be an Indian child. In this case, it was suggested that CJ's father was of Indian heritage. Therefore, petitioner was obligated to notify the BIA and the tribe possibly affiliated with CJ that a child under the court's jurisdiction could be an Indian child. Petitioner gave notice to the BIA, but there was no evidence that notice was ever sent to the Cherokee tribe. Similarly, no notice was sent to the tribes, if any, in Kalamazoo County as MCL 712B.9(3) requires when, as in this case, petitioner is not able to initially determine the tribe or tribes with which the child might be affiliated. The trial court clearly erred by terminating respon-

dent's parental rights to CJ without first having satisfied the notice requirements of the ICWA and the MIFPA.

2. Under MCL 712.19b(5), the trial court must find by a preponderance of the evidence that termination is in the best interests of the child. In this case, the trial court did not clearly err by finding that termination of respondent's parental rights to CJ and SL was in their best interests given the children's need for safety, permanency, and stability.

Affirmed with regard to SL. Conditionally reversed and remanded with regard to CJ.

Jeffrey S. Getting, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for petitioner.

R. Scott Ryder for respondent.

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

PER CURIAM. Respondent mother appeals as of right the trial court's order terminating her parental rights to the minor children, SL and CJ, under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (c)(*ii*) (other conditions implicating jurisdiction exist and were not rectified), (g) (failure to provide proper care or custody), (j) (reasonable likelihood of harm if child returned to parent's home), and (*l*) (parental rights to another child previously terminated).[1] We affirm with respect to SL and conditionally reverse and remand for further proceedings relative to CJ.

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[1] This Court recently declared that MCL 712A.19b(3)(*l*) "violates the due-process protections of the federal and state Constitutions . . . ." *In re Gach*, 315 Mich App 83, 101; 889 NW2d 707 (2016). Regardless, only one statutory ground need be established in order to support termination of parental rights. MCL 712A.19b(3); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). And on appeal, respondent does not directly challenge the trial court's findings concerning the statutory grounds for termination.

Respondent argues that the trial court and petitioner, the Department of Health and Human Services (DHHS), failed to make sufficient efforts to determine whether CJ is an Indian child under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. This Court has observed that the MIFPA was designed to protect the best interests of Indian children and to promote the security and stability of Indian families and tribes and that "[t]he ICWA and the MIFPA each establish various substantive and procedural protections for when an Indian child is involved in a child protective proceeding." *In re England*, 314 Mich App 245, 251; 887 NW2d 10 (2016), citing MCL 712B.5(a) and *In re Spears*, 309 Mich App 658, 669; 872 NW2d 852 (2015).[2]

Under the ICWA, the United States Congress provided, in pertinent part:

> In any involuntary proceeding in a State court, where the court *knows or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of

[2] An "Indian child" is defined in the ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4). "[O]nly the Indian tribe can determine its membership." *In re Morris*, 491 Mich 81, 100; 815 NW2d 62 (2012). Under the MIFPA, an "Indian child" is defined as "an unmarried person who is under the age of 18 and is either of the following (*i*) [a] member of an Indian tribe [or] (*ii*) [e]ligible for membership in an Indian tribe as determined by that Indian tribe." MCL 712B.3(k). "The definition of 'Indian child' in MIFPA is similar to that in ICWA, but does not require the child who is eligible for membership to also be the biological child of a member of an Indian tribe." *In re KMN*, 309 Mich App 274, 287; 870 NW2d 75 (2015).

> intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . . [25 USC 1912(a) (emphasis added).][3]

With respect to interpretation of the "reason to know" language in 25 USC 1912(a), our Supreme Court construed the phrase broadly, determining that the notice requirement of 25 USC 1912(a) is triggered when there exists "sufficiently reliable information of virtually any criteria on which [tribal] membership might be based," including "information *suggesting* that the child, *a parent of the child*, or members of a parent's family are tribal members[.]" *In re Morris*, 491 Mich 81, 108 & n 18; 815 NW2d 62 (2012) (emphasis added). "Once sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or *may be* an Indian child, resolution of the child's and parent's tribal status requires notice to the tribe or, when the appropriate tribe cannot be determined, to the Secretary of the Interior." *Id*. at 108 (emphasis added); see also *In re Johnson*, 305 Mich App 328, 330-332; 852 NW2d 224 (2014) (holding that the notice requirement of ICWA was triggered when the trial court had information that the child's grandmothers were Native Americans).

The MIFPA, which was enacted pursuant to 2012 PA 565, effective January 2, 2013, contains language similar to that found in 25 USC 1912(a):

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[3] "Secretary" means the Secretary of the Interior. 25 USC 1903(11).

> In a child custody proceeding,[4] if the court *knows or has reason to know* that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary[5] in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe. [MCL 712B.9(1) (emphasis added).]

In the MIFPA, the Legislature expressly set forth a nonexclusive list of circumstances that trigger the notification mandate found in MCL 712B.9(1):

> Circumstances under which a court, the department,[6] or other party to a child custody proceeding has reason to believe a child involved in a child custody proceeding is an Indian include, but are not limited to, any of the following:
>
> * * *
>
> (b) Any public or state-licensed agency involved in child protection services or family support has *discovered information that suggests* that the child is an Indian child.
>
> * * *

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[4] A "child custody proceeding" includes removal actions, MCL 712B.3(b)(*i*), and "[a]ny action resulting in the termination of the parent-child relationship," MCL 712B.3(b)(*ii*). The definitions section of the MIFPA, MCL 712B.3, was amended by 2016 PA 26, effective May 30, 2016; however, that amendment did not substantively alter any of the statutory definitions discussed in this appellate opinion, assuming the amendment is even generally applicable to these proceedings.

[5] The term "Secretary" as used in the MIFPA refers to the Secretary of the Interior. MCL 712B.3(u), as amended by 2016 PA 26 (the Legislature amended MCL 712B.3(u) to capitalize the title of the officeholder).

[6] "Department" means the Department of Human Services or any successor department or agency. MCL 712B.3(e).

> (e) An officer of the court involved in the proceeding has knowledge that the child *may be* an Indian child. [MCL 712B.9(4) (emphasis added).]

In the instant case, multiple petitions had been filed and numerous hearings had been conducted over the span of several years. In January 2011, respondent had indicated to the trial court that CJ's father "might be Native American," although she could not identify any particular tribal affiliation.[7] Nothing came of the matter, the petition pending at that time was dismissed, and the court terminated its jurisdiction. In December 2012, the trial court inquired into Native American heritage, and a child protective services (CPS) worker indicated that there was no Indian heritage or tribal connection. However, the petition that was pending at that particular time pertained solely to SL, not CJ, so the response by the CPS worker is irrelevant to our analysis because there is no argument before us that SL may be an Indian child.[8] In November 2013, in relation to a new petition that did include CJ, respondent informed the trial court that CJ's father "might have a little Indian in him." She further asserted that CJ's father "says he might be Cherokee[,] [b]ut he's not sure." The trial court indicated that the issue needed to be explored, noting that an effort should be made to obtain some cooperation from CJ's father on the matter.

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[7] CJ's father's parental rights were also eventually terminated but are not at issue in this appeal. He was generally uncooperative and did not participate in services. We note "that a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe . . . ." *In re Morris*, 491 Mich at 89.

[8] For this reason, we reject the petitioner's appellate argument that the CPS worker's statements in December 2012 reflected resolution of the question regarding CJ's potential Indian heritage.

At a pretrial conference in December 2013, a DHHS worker informed the trial court that she had spoken to CJ's father, who advised her that he "thinks there may be" Native American heritage in his family, but he was simply unsure. The DHHS worker told the trial court that she directed CJ's father to gather family names for her, so that she could submit paperwork checking on tribal membership or eligibility. The trial court ordered further investigation on the issue and ordered CJ's father to fully cooperate. Thereafter, in late December 2013, the DHHS worker sent a notice to the Department of the Interior, Bureau of Indian Affairs (BIA), in an effort to determine CJ's enrollment, or eligibility status for enrollment, in an Indian tribe.[9] The notice only included the names, birthdates, and addresses of respondent, CJ, and CJ's father. In January 2014, the BIA responded in writing to the inquiry, stating that there was "insufficient information to determine tribal affiliation" at that time. At a review hearing in September 2014, the trial court noted that no exhibit had yet been filed regarding the inquiry into CJ's Native American heritage, and respondent reiterated her belief that CJ's father might be Cherokee. At the next hearing in November 2014, the notice sent to the BIA and the BIA's response were admitted. There is no further discussion or document in the record pertaining to Native American heritage or whether CJ might be an Indian child.

We first conclude that, for purposes of the ICWA, there was sufficiently reliable information—of virtually any criteria—of tribal membership or eligibility for membership, because the trial court had informa-

[9] There is no indication in the record about whether the DHHS worker had been able to procure any further information from CJ's father regarding any family ties to an Indian tribe.

tion obtained from respondent and CJ's father suggesting that CJ's father might have Native American heritage. *In re Morris*, 491 Mich at 108 & n 18; *In re Johnson*, 305 Mich App at 332. We reach this conclusion because the Supreme Court made abundantly clear in *In re Morris* that if we are to err, we are to err on the side of caution, protecting the interests of Indian children, families, and tribes to avoid later potential disruptions in the child's life. *In re Morris*, 491 Mich at 88-89, 106-107. Additionally, for purposes of the MIFPA, we conclude that the DHHS discovered information that "suggest[ed]" that CJ is an Indian child, MCL 712B.9(4)(b), and that the trial court and counsel had knowledge that CJ "*may be* an Indian child," MCL 712B.9(4)(e) (emphasis added).[10] Accordingly, we hold that the notice requirements of both 25 USC 1912(a) and MCL 712B.9(1) were triggered in this case.

The record reflects that notice was sent to the Secretary of the Interior or the BIA, but we note that such notice only becomes obligatory when "the identity or location of the parent or Indian custodian and the tribe cannot be determined[.]" 25 USC 1912(a); MCL 712B.9(1). The first step in the process is to send the appropriate notification to "the parent or Indian custodian *and* the Indian child's tribe," if determinable. 25 USC 1912(a) (emphasis added); MCL 712B.9(1) (emphasis added). The trial court and the DHHS were familiar

[10] The need to proceed cautiously in order to avoid the potential future disruption of lives is also apparent under the MIFPA:

> Any Indian child who is the subject of any action for termination of parental rights under state law, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of this section. [MCL 712B.15(5).]

with the identity and location of respondent and CJ's father, who were both fully apprised of the pending proceedings. Regarding the identity of the Indian tribe, respondent, although unsure, thought that CJ's father might have Cherokee heritage, and, as noted earlier, she told the trial court that CJ's father informed her that "he might be Cherokee." Given that the DHHS and the trial court had information that at least suggested the possibility of Cherokee heritage, absent mention of any other potential tribal affiliation, notice should have been sent to the Cherokee tribe for purposes of 25 USC 1912(a) and MCL 712B.9(1). There is no indication in the record that such notice was sent. Consistently with the remedy set forth in *In re Morris*, 491 Mich at 114-123, and given that we reject respondent's argument concerning the children's best interests, we conditionally reverse the order of termination with respect to CJ and remand for compliance with the notification requirements in the ICWA and the MIFPA. Considering that there is no argument or indication in the record that SL is an Indian child, there is no basis to conditionally reverse the termination of parental rights to SL.

Moreover, aside from 25 USC 1912(a) and MCL 712B.9(1), respondent also presents an argument under MCL 712B.9(3), which provides:

> The department shall actively seek to determine whether a child at initial contact is an Indian child. If the department is able to make an initial determination as to which Indian tribe or tribes a child brought to its attention may be a member, the department shall exercise due diligence to contact the Indian tribe or tribes in writing so that the tribe may verify membership or eligibility for membership. If the department is unable to make an initial determination as to which tribe or tribes a child may be a member, the department shall, at a minimum,

> contact in writing the tribe or tribes located in the county where the child is located and the secretary.

Given the multiple references in the record to possible Cherokee heritage, the DHHS had adequate information to make an "*initial* determination" that CJ "*may* be a member" of the Cherokee tribe, implicating a duty to "exercise due diligence to contact" the Cherokee tribe "in writing so that the tribe may verify membership or eligibility for membership." MCL 712B.9(3) (emphasis added). This was not done. Furthermore, assuming that the DHHS was "unable to make [such] an initial determination" relative to the Cherokee tribe, there is no indication in the record, nor does the DHHS argue on appeal, that the tribe or tribes located in Kalamazoo County were given written notification, which is a minimal requirement under the final sentence in MCL 712B.9(3).[11] Indeed, the DHHS does not even present an appellate argument under MCL 712B.9(3), despite respondent's partial reliance on the provision. Accordingly, MCL 712B.9(3), along with 25 USC 1912(a) and MCL 712B.9(1), serves as a basis to order conditional reversal with regard to CJ. On remand, notice must be sent to the Cherokee tribe and, if one exists, to any tribe or tribes in Kalamazoo County.

Lastly, respondent challenges the trial court's finding that termination of her parental rights was in the children's best interests. The trial court must find by a preponderance of the evidence that termination is in the best interests of a child. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); see also MCL 712A.19b(5). We review the trial court's decision for clear error.

[11] We acknowledge that we do not know whether there are any Indian tribes located in Kalamazoo County. That matter will have to be explored on remand.

MCR 3.977(K); *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). A finding is clearly erroneous if it leaves us with a definite and firm conviction that a mistake was made. *In re HRC*, 286 Mich App at 459. Factors to be considered include "the child's bond to the parent, . . . the parent's parenting ability, . . . the child's need for permanency, stability, and finality, . . . and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). Further, we may also consider whether it is likely "that the child could be returned to her parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 249; 824 NW2d 569 (2012).

The trial court, in this case, did not clearly err by finding that termination of respondent's parental rights was in the children's best interests. Though respondent shared a bond with the children, that bond was outweighed by the children's need for safety, permanency, and stability. Respondent never obtained suitable housing during the course of the proceedings, nor could she meet her own economic or financial needs, let alone the needs of the children. These issues were longstanding, and numerous services had been provided to no avail. There was no indication that respondent would be able to rectify the problems in such time that the children could be returned to her in the foreseeable future. There were also serious concerns with respondent's history of bringing inappropriate individuals—including men with histories of criminal sexual conduct—around her children. Respondent failed to address this issue in counseling and minimized the matter throughout the proceedings. Finally, even though the minor children were not in preadoptive placements, any further delay in providing them

permanency by allowing respondent additional time to improve her situation was not in the children's best interests. The trial court did not clearly err by finding that it was in the children's best interests to terminate respondent's parental rights.

We affirm with respect to the termination of respondent's parental rights to SL. We conditionally reverse the order terminating respondent's parental rights to CJ, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

SAU-TUK INDUSTRIES, INC v ALLEGAN COUNTY

In re PETITION OF ALLEGAN COUNTY TREASURER FOR FORECLOSURE

Docket Nos. 324405 and 325926. Submitted March 8, 2016, at Grand Rapids. Decided June 28, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 933.

In Docket No. 325926, the Allegan County Treasurer petitioned the Allegan Circuit Court for foreclosure of property owned by Sau-Tuk Industries, Inc., on the basis of unpaid utility charges that Sau-Tuk's tenant, Michigan Wood Pellet, LLC (MWP), had incurred. Under the lease terms, MWP assumed responsibility for the payment of utility charges, but Sau-Tuk did not inform the city of Holland's Board of Public Works (BPW) of MWP's responsibility in a written notice and with a copy of the lease as required by MCL 141.121(3) and by §§ 9-6 and 37-33 of the Holland code of ordinances to exempt the property from the imposition of a lien for any unpaid utility charges until after the utility services had been provided and the charges had become delinquent. After receiving the foreclosure notice, Sau-Tuk, in Docket No. 324405, brought a separate action in the Allegan Circuit Court against Allegan County, seeking a declaration that the liens were improper and invalid under §§ 9-6 and 37-33 of the Holland code of ordinances and alleging that the BPW had actual notice that MWP was renting the property and responsible for paying the utility charges because the BPW required MWP to post a surety bond and billed MWP directly for the utility services. Both Sau-Tuk and Allegan County moved for summary disposition in Docket No. 324405, and the court, Margaret Zuzich Bakker, J., granted Allegan County's motion, concluding that the clear and unambiguous terms of MCL 141.121(3) and of §§ 9-6 and 37-33 required that the property owner, not the tenant, give written notice of the lease and the tenant's responsibilities, that a valid lien had attached to the property, and that Sau-Tuk's equitable-estoppel argument failed. Sau-Tuk subsequently objected to the pending foreclosure petition in Docket No. 325926, and, following a hearing, the court, Margaret Zuzich Bakker, J., determined that res judicata barred Sau-Tuk from raising arguments already

decided in Docket No. 324405 and entered a judgment of foreclosure. Sau-Tuk appealed in both cases, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. When the words used in a statute or in an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written. MCL 141.121(3) provides, in relevant part, that charges for utility services furnished to a premises may be a lien on the premises, but when a tenant is responsible for the payment of the charges and the governing body is so notified in writing as well as provided a copy of the lease of the affected premises, if there is one, then the charges shall not become a lien against the premises after the date of the notice. MCL 141.121(3) further directs the city to prescribe by ordinance the time and manner of certification in respect to the collection of the charges and the enforcement of the lien. Sections 9-3 and 37-30 of Holland's code of ordinances authorize the creation of a lien for the collection of electric and water utility charges and further provide that the lien shall become effective immediately upon the distribution or supplying of such electric or water services to the premises. Section 9-6 of Holland's code of ordinances adopts the landlord exception of MCL 141.121(3) as it pertains to electric utility services, requiring that the property owner notify the BPW, in writing, of the tenant's responsibility for payment of electric service charges and provide the BPW with a copy of the lease, if one exists. Section 37-33 of Holland's code of ordinances requires similar steps with regard to a tenant's responsibility for payment of water service charges. In this case, Sau-Tuk failed to follow the clear and unambiguous direction of MCL 141.121(3) and the city's ordinances to prevent the utility liens at issue from arising because Sau-Tuk did not provide the BPW with written notice of MWP's responsibility for payment of utility charges and a copy of the lease until after the utility charges incurred. Because MCL 141.121(3) authorizes the city to prescribe the time and manner of certification in respect to the collection of charges and the enforcement of the lien, and because Holland exercised this authority by requiring that the liens become effective immediately upon the distribution or supplying of electric or water services to the premises pursuant to §§ 9-3 and 37-30 of its code of ordinances, the utility liens at issue arose by operation of law upon the furnishing of the utility services to the premises unless, before the services were furnished, Sau-Tuk invoked the landlord exception by giving the BPW written notice of MWP's tenancy and obligation to pay for utilities and a copy of

the lease. It was undisputed that Sau-Tuk failed to provide such notice and a copy of the lease until after the utility charges had been incurred, and Sau-Tuk could not invoke the landlord exception by presenting evidence that the BPW had actual knowledge of MWP's tenancy and obligation to pay for utilities. Even if Sau-Tuk could prove that the BPW had actual knowledge of MWP's tenancy and responsibility under its lease to pay for utility services, because Sau-Tuk failed to follow the clear and unambiguous direction of MCL 141.121(3) and the city's ordinances to prevent the utility liens at issue from arising, the trial court properly enforced the statute and ordinances as written by granting Allegan County summary disposition in Docket No. 324405 and granting a judgment of foreclosure in Docket No. 325926.

2. Equitable estoppel arises when a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts. Sau-Tuk's claim of estoppel—that the BPW, by requiring MWP to obtain a surety bond, induced Sau-Tuk into believing that the notice provision had been met—failed because Sau-Tuk did not produce evidence of its reliance on the BPW's actions or evidence that it was unaware of the requirements in MCL 141.121(3) and § 9-6 of Holland's code of ordinances.

Affirmed.

Rhoades McKee PC (by *Gregory G. Timmer*) for Sau-Tuk Industries, Inc.

Miller Johnson (by *Craig H. Lubben*) for Allegan County and the Allegan County Treasurer.

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

PER CURIAM. These consolidated appeals present the same legal issue: the validity of liens for unpaid utility charges assessed by the city of Holland's Board of Public Works (BPW) under the city's charter and ordinances as authorized by MCL 141.121(3) and en-

forced in the same manner as delinquent property taxes. The liens secured payment for electric and water services to property that appellant, Sau-Tuk Industries, Inc., leased to Michigan Wood Pellet, LLC (MWP) and were enforced by appellee Allegan County Treasurer at its annual sale of properties to satisfy delinquent taxes. In Docket No. 324405, Sau-Tuk appeals by right the trial court's October 10, 2014 order that granted appellee Allegan County's motion for summary disposition because appellant failed to comply with the plain language of MCL 141.121(3) and the city's ordinances to exempt the property from the utility liens. Sau-Tuk also appeals by right the portion of the trial court's February 2, 2015 judgment of foreclosure of properties for unpaid taxes that included the property at issue (Docket No. 325926). We conclude that the trial court correctly ruled that because Sau-Tuk failed to follow the plain mandate of MCL 141.121(3) and the city's ordinances to forestall the liens, Allegan County was entitled to summary disposition in Docket No. 324405 and a judgment of foreclosure in Docket No. 325926. We affirm.

I. STATE STATUTE AND LOCAL ORDINANCES AT ISSUE

Section 21 of the Revenue Bond Act (RBA), MCL 141.101 *et seq*., MCL 141.121, is at issue in these cases. Under the RBA, a public corporation—such as a city or county, see MCL 141.103(a)—is "authorized to purchase, acquire, construct, improve, enlarge, extend or repair 1 or more public improvements and to own, operate and maintain the same, within or without its corporate limits, and to furnish the services, facilities, and commodities of any such public improvement to users within or without its corporate limits." MCL 141.104. A "public improvement" is defined to include

sewage disposal and water supply systems and "utility systems for supplying light, heat, or power . . . ." MCL 141.103(b). Pertinent to collecting charges for such utility services, Section 21 of the RBA provides:

> Charges for services furnished to a premises may be a lien on the premises, and those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered, and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes. The time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien shall be prescribed by the ordinance adopted by the governing body of the public corporation. However, *in a case when a tenant is responsible for the payment of the charges and the governing body is so notified in writing, the notice to include a copy of the lease of the affected premises, if there is one, then the charges shall not become a lien against the premises after the date of the notice*. In the event of filing of the notice, the public corporation shall render no further service to the premises until a cash deposit in a sum fixed in the ordinance authorizing the issuance of bonds under this act is made as security for the payment of the charges. [MCL 141.121(3) (emphasis added).]

Pursuant to the authorization in MCL 141.121(3), the city of Holland, in Chapter 12 of its charter, provides for municipal ownership of utilities and for the creation of liens to secure payment for utility services, which "become effective immediately upon the distribution or supplying of such utility service or services to such premises." Holland Charter, § 12.18. Furthermore, the city of Holland, in its code of ordinances, provides for the creation and enforcement of liens by which it may recover charges for utility ser-

vices, subject to the landlord exception of MCL 141.121(3). As authorized by the RBA, § 9-3 of Holland's code of ordinances provides that the city, subject to state law, "shall have as security for the collection of all charges for electric services . . . a lien upon the premises to which such electric services were supplied. Such liens shall become effective immediately upon the distribution or supplying of such electric service or services to such premises." Section 9-6 of Holland's code of ordinances also adopts the landlord exception of MCL 141.121(3), which provided at all times pertinent to this case:

> If the owner of a premises which receives electric services provided by the City shall lease such premises to a tenant who is responsible under the lease for the payment of the charges for electric services, and such property owner notifies the Board of public works [BPW], in writing, of such fact, the notice to include a true copy of the lease of the affected premises, if there is one, then the charges for electric services provided to such premises shall not become a lien against the premises after the date such notice is received by the [BPW]. Immediately after the filing of such notice, the [BPW] shall render no further service to the premises until it receives from the tenant, or an individual or entity acting on behalf of the tenant, a cash deposit or surety bond, as established by resolution adopted by City Council, or it receives record of a previously established good credit history of not less than 12 consecutive months, as security for the payment of the electric charges. . . . [Holland City Code, § 9-6.][1]

The city of Holland also provides for the creation of a lien on premises to which water services are pro-

[1] This section was amended on May 14, 2014, by Ordinance No. 1627. The current version of § 9-6 is substantially similar to that in effect at the time of the events in this case but provides that written notice must "include a true copy of the lease of the affected premises executed by the owner or his/her designated agent and the tenant . . . ."

vided. See Holland City Code, § 37-30. Although a nominal part of this case, the exception to imposition of a lien for water charges provides:

> If the owner of a premises which receives water services provided by the City shall lease such premises to a tenant who is responsible under the lease for the payment of the charges for water services accruing subsequent to the filing of an affidavit by the property owner with the Board of Public Works, said affidavit to affirm the execution of such a lease containing a provision regarding the tenant's responsibility for payment of the charges for water services and to contain a notation of the expiration date of the lease, then the charges for water services provided to such premises shall not become a lien against the premises after the date such affidavit is received by the Board of Public Works. . . . [Holland City Code, § 37-33; see also MCL 123.165.]

II. FACTS AND PROCEEDINGS

Sau-Tuk owns the property at issue in these appeals and leased it to MWP for an initial lease term that extended from November 1, 2006, to October 31, 2011. Sau-Tuk then renewed the lease for an additional five years from October 31, 2011. Under the terms of the lease, as stated in the trial court's opinion, MWP "assumed responsibility for the payment of all utility charges, taxes, and fees," as well as the "operation, repair, maintenance and management of the Property." Sau-Tuk acknowledges that it did not initially inform the BPW of this fact in a written notice and with a copy of the lease as is required by MCL 141.121(3) and city ordinance to exempt the property from the imposition of a lien for any unpaid utility charges.

Sometime in October 2006, MWP contacted the BPW about providing utility services to the property. Because MWP was a new business without an estab-

lished good credit history, and because MWP was renting the property, the BPW required MWP to provide either a surety bond or a cash deposit as a condition of obtaining utility services. According to Julie Thompson, the BPW's corporate designee, the BPW does not require security by owners of property who request utility services. MWP complied with the request and obtained a surety bond in the amount of $54,000 in May 2007. The amount of the surety bond was determined by the BPW and approved by an assistant city attorney in an April 2, 2007 letter to the insurance company. Sau-Tuk argues that this letter and Thompson's testimony show that the BPW had actual knowledge of MWP's tenancy and obligation to pay for utility services provided to the property.

After MWP obtained the surety bond, the BPW began providing utility services to the subject property and billing MWP directly for those services. MWP timely paid all charges for water and electric service between 2007 and 2010. During this time frame, MWP renewed its surety bond several times before the BPW released it from its surety-bond requirement in a March 17, 2010 letter because MWP had established "a good payment history of twelve consecutive months . . . ." Thereafter, MWP continued timely paying its utility bills. In May 2011, MWP began to fall behind on its utility payments. By the January 2012 BPW statement for utility services, MWP owed $74,324.77, of which $35,390.52 was delinquent. On March 8, 2012, Sau-Tuk, for the first time, sent the BPW a written notice, with a copy of the lease, of MWP's agreement to pay for utility charges incurred at the leased property.

On January 14, 2014, the Allegan County Treasurer served Sau-Tuk with a notice of forfeiture based on the

unpaid utility charges that MWP had incurred. The notice of forfeiture referred to the delinquent utility charges as delinquent property "taxes," setting forth a schedule of dates by which payment must be made and, if not paid, advising that the trial court would enter a judgment of foreclosure sometime between February 1, 2015, and March 31, 2015. The Allegan County Treasurer ultimately filed its petition for foreclosure in the trial court on May 14, 2014. The petition resulted in the judgment of foreclosure appealed in Docket No. 325926.[2]

Sau-Tuk responded to the foreclosure notice by filing a complaint in the trial court on March 10, 2014, seeking a declaration that the liens were improper and invalid. In support of its claim for declaratory relief, Sau-Tuk relied on § 9-6 of the Holland City Code, which, as set forth earlier, prevents a lien from arising against the premises for unpaid electric charges if the owner of the premises provides a written notice, with a copy of the lease, showing that a tenant is responsible under the lease for the payment of those charges. Although Sau-Tuk did not send a written notice to the BPW that MWP was responsible for paying utility charges under a lease along with a copy of the lease until the utility charges in this case were incurred, Sau-Tuk alleged that the requirements of the notice provision of § 9-6 (and of § 37-33) were satisfied be-

[2] Holland's ordinances and MCL 141.121(3) state that charges for utility services become a lien on the property provided the services, which "shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes." Nevertheless, the charges and liens are not "taxes" but are, instead, a means for collecting a contractual liability for services provided to the property. See *Brown Bark I, LP v Traverse City Light & Power Dep't*, 736 F Supp 2d 1099, 1106-1114 (WD Mich, 2010) (holding that such liens are not taxes that implicate the Tax Injunction Act of 1937, 28 USC 1341).

cause the BPW had *actual* notice that MWP was renting the property and responsible for paying utility charges. Sau-Tuk asserted that because "the goal and intended purpose" of the city ordinance had been satisfied, the city and county were barred from placing a lien on the property for unpaid utility charges that MWP incurred during its tenancy.

On August 4, 2014, the county moved the trial court for summary disposition in its favor pursuant to MCR 2.116(C)(10). In pertinent part, the county argued that it was entitled to judgment as a matter of law because both § 9-6 of the city ordinances and MCL 141.121(3), from which the city ordinance derived, required a property owner to file a written notice advising that a tenant of the property is responsible for utility charges. The county argued that under the terms of the city ordinance and state statute, a written notice must be given before any utility charges are incurred to avoid a lien from arising against the property. Therefore, because it was undisputed that Sau-Tuk did not file its written notice until after MWP incurred the utility charges, the county argued that the notice was "too late . . . to prevent a lien from attaching to the property for the unpaid utilities."

On August 5, 2014, Sau-Tuk filed its own motion for summary disposition pursuant to MCR 2.116(C)(9) (opposing party has failed to state a valid defense) and (C)(10). Sau-Tuk's (C)(9) motion was premised on its argument that the county's sole defense—that Sau-Tuk failed to comply with MCL 141.121(3) by providing written notice with a copy of the lease to the BPW that a tenant was responsible for payment of the charges—was "untenable" because the notice provision was satisfied in that the BPW had actual notice of MWP's tenancy and responsibility for paying the utility

charges. The trial court ultimately denied Sau-Tuk relief under MCR 2.116(C)(9) because such a motion could be decided on the pleadings only, and the county had unambiguously asserted in its answer "that actual notice does not constitute compliance with the notice provision of MCL 141.121(3)." While Sau-Tuk states in its brief on appeal the legal standard for motions under MCR 2.116(C)(9), Sau-Tuk does not specifically challenge the trial court's ruling. Consequently, this part of Sau-Tuk's appeal is abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, the essence of the parties' claims was decided adversely to Sau-Tuk by the trial court's ruling under MCR 2.116(C)(10).

The trial court held a hearing on the parties' motions on October 6, 2014. At the outset, Sau-Tuk acknowledged that it did not initially provide the BPW with an affidavit and a copy of the lease.[3] Nonetheless, Sau-Tuk argued that it had substantially complied with the notice requirement and also that the trial court should "apply the doctrine of estoppel or otherwise declare that the purpose and the intent of the statute has been satisfied" because strict compliance with the notice requirement would not have led to a different result. Sau-Tuk argued that the BPW required MWP to obtain a surety bond, thus demonstrating that it was on actual notice that MWP was a tenant

[3] A property owner is only required to file an affidavit to avoid a lien for water service charges. See MCL 123.165; Holland City Code, § 37-33. To avoid a lien for electric service charges, a property owner must provide "in writing" a notice of a tenant's responsibility for payment and "a true copy of the lease of the affected premises, if there is one . . . ." Holland City Code, § 9-6. As mentioned earlier, the current version of § 9-6 provides that the written notice must "include a true copy of the lease of the affected premises executed by the owner or his/her designated agent and the tenant . . . ." See note 1 of this opinion.

responsible for paying the utility charges. The county responded that the purpose of the ordinance is "only fulfilled if the owner actually seeks to . . . protect their rights" by filing written notice of the tenant's obligation to pay utility charges. Because Sau-Tuk "never acted to protect itself," the county argued that Sau-Tuk failed to comply with the notice requirement.

On October 10, 2014, the trial court issued its written opinion and order denying Sau-Tuk's motion for summary disposition and granting the county's motion. With respect to Sau-Tuk's motion under MCR 2.116(C)(10), the trial court first concluded that Sau-Tuk had not substantially complied with the notice requirements of MCL 141.121(3) and Holland's ordinances. The trial court reasoned that to avoid a lien encumbering property furnished utility services, a property owner must, with respect to electric services, provide the BPW a written notice under § 9-6 and, with respect to water services, provide the BPW an affidavit under § 37-33, and both must be accompanied by a copy of the lease. The court further ruled that the clear and unambiguous terms of § 9-6 and § 37-33 required that the property owner, not the tenant or other entity, give written notice of the lease and the tenant's responsibilities. Thus, the court concluded that Sau-Tuk "did nothing to comply with the statute, and left the protection of its property rights to its tenant . . . ." The court also reasoned that Sau-Tuk, in essence, acknowledged that it knew that it had not previously complied with the statutory notice requirement by filing an affidavit "after the utility charges in question had been incurred."

The trial court next concluded that Sau-Tuk's estoppel argument was unavailing. Sau-Tuk argued that by requiring MWP to post a surety bond and billing MWP

for the utility services provided, the BPW induced Sau-Tuk to believe that compliance with MCL 141.121(3) and § 9-6 was not necessary. The trial court acknowledged that in certain circumstances equitable estoppel may apply to a municipality. The court reasoned, however, that although the BPW required MWP to obtain a surety bond, that act was not sufficient to estop the BPW from requiring written notice of Sau-Tuk because it would not be possible to conclude that Sau-Tuk justifiably relied and acted on the belief that it need not comply with the plain terms of the statute and city ordinance to protect itself from a lien against the property. The court ruled that Sau-Tuk was presumed to know the requirements of a law and could not attribute fault to the BPW for its own failure to act.

The trial court also noted that Sau-Tuk failed to contact the BPW directly regarding whether MWP's actions satisfied the written notice requirement of MCL 141.121(3) and § 9-6. Therefore, the court ruled that equitable estoppel did not apply.

The trial court next ruled in favor of the county on its motion for summary disposition. Applying the principles of statutory construction, the trial court reasoned that because MCL 141.121(3) was clear and unambiguous, it must be enforced as written. That is, MCL 141.121(3) requires a property owner-landlord to provide written notice of a tenant's obligation to pay utility charges, along with a copy of the lease agreement. The provisions of § 9-6 of Holland's ordinances are substantially similar. The trial court opined that "if the notice provisions of MCL § 141.121 and the Holland ordinances could be satisfied by nothing more than a tenant giving written notice to the BPW, without a copy of his or her lease, those notice provisions would be rendered nugatory." Because Sau-Tuk failed

to comply with the plain language of MCL 141.121(3) and the Holland ordinances that required a landlord to submit written notice and a copy of the lease to the BPW before the utility services were provided to the property, the trial court concluded that a valid lien to secure payment of charges for those services attached to the property. The trial court therefore granted the county summary disposition.

Notwithstanding the trial court's order establishing the validity of the utility liens, Sau-Tuk filed an objection to the pending foreclosure petition. In support of its objections, Sau-Tuk relied on the same arguments previously presented in the declaratory action. At a hearing on the objections, the trial court determined that the foreclosure petition would proceed because Sau-Tuk was barred by the doctrine of res judicata from raising arguments already decided in the previous action. Consequently, the trial court entered its judgment of foreclosure that included Sau-Tuk's property. Sau-Tuk subsequently appealed the judgment of foreclosure in Docket No. 325926, and this Court consolidated the appeal with the appeal in Docket No. 324405.

III. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In this case, the parties filed competing motions for summary disposition pursuant to MCR 2.116(C)(10), which may be granted if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judg-

ment as a matter of law." In deciding a motion under MCR 2.116(C)(10), the trial court must consider affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120. The trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); MCR 2.116(C)(10).

The issue presented in these appeals concerns the interpretation of both a state statute and municipal ordinance provisions. Statutory interpretation presents a question of law, which this Court reviews de novo. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). Municipal ordinances are interpreted and reviewed in the same manner as statutes. *Bonner v Brighton*, 495 Mich 209, 221-222; 848 NW2d 380 (2014). Therefore, our review is de novo, and "the rules governing statutory interpretation apply with equal force to a municipal ordinance[.]" *Id*. at 222. As we stated in *Mayor of Cadillac*, 306 Mich App at 516:

> When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. If the language of a statute is unambiguous, we presume the Legislature intended the meaning expressed in the statute. A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. . . . When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law. [Quotation marks and citations omitted.]

Similarly, "the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body." *Bonner*, 495 Mich at 222. The most reliable evidence of that intent is the language of the ordinance itself, which must be given its plain and ordinary meaning. *Id*. When the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written. *Gilliam v Hi-Temp Prod Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003); *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000).

B. DISCUSSION

We conclude that even if Sau-Tuk could prove that Holland's BPW had actual knowledge of MWP's tenancy and responsibility under its lease to pay for utility charges, because Sau-Tuk failed to follow the clear and unambiguous direction of MCL 141.121(3) and the city's ordinances to prevent the utility liens at issue from arising, the trial court properly enforced the statute and ordinances as written by granting Allegan County summary disposition in Docket No. 324405 and granting a judgment of foreclosure in Docket No. 325926.

The legal issue presented in these appeals is not exactly one of first impression. The trial court, in addition to enforcing the plain language of the statute and Holland's ordinances, also relied on *Saginaw Landlords Ass'n v Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 2001 (Docket No. 222256). Although unpublished opinions of this Court are not binding precedent, they may be considered instructive or persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783

NW2d 133 (2010). In *Saginaw Landlords Ass'n*, unpub op at 1-2, this Court addressed whether Saginaw's liens for unpaid water charges were valid and enforceable against the plaintiffs' properties under the terms of MCL 141.121(3) and Saginaw Administrative Code, § 4-108, comparable to Holland's § 9-3 and § 9-6. Section 4-108 provided that "charges for water and services" are "made a lien on all premises served thereby, unless notice is given that a tenant is responsible" as provided by MCL 141.121(3). The plaintiffs argued that "their tenants' completed water applications provided defendant with sufficient notice of the tenants' responsibility for payment to preclude defendant from enforcing liens under [MCL 141.121(3)] and the city ordinance." *Saginaw Landlords Ass'n*, unpub op at 3-4. This Court rejected the plaintiffs' argument, holding that the tenants' applications did not satisfy the notice requirements of the statute because Saginaw "was not provided any additional written notice specifically indicating that the tenant agreed to be responsible for payment of the water bills under leases executed with plaintiffs, a requirement even if the leases themselves were oral." *Id*. at 4. Thus, the Court implicitly concluded that a municipal corporation's actual knowledge of a tenant's obligation to pay utility charges was insufficient to save the property owner from a lien to secure payment if the tenant fails to pay arising by operation of law against the property served. In so doing, this Court concluded that the notice provision of MCL 141.121(3), as well as that of the city's ordinance, was clear and unambiguous, and that the water applications submitted by the tenants "did not satisfy" the statute's plain terms. *Saginaw Landlords Ass'n*, unpub op at 2, 4. This Court concluded that "[i]f the notice required by [Saginaw's] ordinance was satisfied simply by a tenant's completion of the water

application, it would render meaningless the statutory language requiring written documentation of the lease agreement fixing responsibility for water payment on a tenant." *Id*. at 4. We find *Saginaw Landlords Ass'n* persuasive because it applied the plain text of the statute and pertinent ordinances.

As the trial court correctly observed, and as this Court determined in *Saginaw Landlords Ass'n*, MCL 141.121(3) is plain and unambiguous. The statute plainly provides that when a public corporation, such as Holland, provides utility services, the "[c]harges for [the] services furnished to a premises may be a lien on the premises . . . ." Holland, in its charter and in its code of ordinances, has acted on this statutory authority by creating liens on premises that arise and attach to the premises furnished utility services at the time the services are provided.[4]

At oral argument, we requested that the parties further brief the issue of when the utility liens at issue

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[4] "Except as otherwise provided, or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such utility service or services to such premises. . . ." Holland Charter, § 12.18.

"Except as otherwise provided or limited by state law, the City shall have as security for the collection of all charges for electric services as authorized by the Revenue Bond Act of 1933, as amended, a lien upon the premises to which such electric services were supplied. Such liens shall become effective immediately upon the distribution or supplying of such electric service or services to such premises. . . ." Holland City Code, § 9-3.

"Except as otherwise provided or limited by state law, the City shall have as security for the collection of all charges for water services as authorized by the Collection of Water Charges Act, a lien upon the premises to which such water services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such water service or services to such premises . . . ." Holland City Code, § 37-30.

"attached" to Sau-Tuk's property. The question relates to whether the utility liens "attached" before or after Sau-Tuk's March 8, 2012 written notice with a copy of the lease to the BPW—as required by MCL 141.121(3) and § 9.6—of MWP's agreement to pay for utility charges incurred at the leased property. Sau-Tuk argues that the utility charges do not become a lien and attach until they have been certified and entered on the tax roll against the premises. Sau-Tuk relies on the provision in MCL 141.121(3) that states that the utility "charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered . . . ." We disagree with this analysis, which, although not totally without merit, conflates delinquent *charges* with the *lien* intended to secure payment of the charges.

First, nowhere in the statute or Holland's ordinances is the word "attach" used. Rather, MCL 141.121(3) authorizes a municipal corporation to create utility liens, see *Saginaw Landlords Ass'n*, unpub op at 2, and the statute also directs that the municipality prescribe by ordinance "[t]he time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien . . . ." So, the statute addresses: (1) the creation and enforcement of a *lien* and (2) the certification and collection of delinquent utility *charges*. Likewise, the language Sau-Tuk cites provides for the certification of delinquent *charges* and entry of the *lien* on the tax rolls. This language can only mean that the utility lien already exists when "the proper tax assessing officer or agency" certifies the delinquent utility *charges* and then enters the existing *lien* on the tax rolls. This reading is consistent with the very nature of a lien that

only exists to secure payment of a debt—in this case, the utility charges. See *Black's Law Dictionary* (10th ed), defining "lien" as "[a] legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied." See also *Barrows v Baughman*, 9 Mich 213, 217-218 (1861) ("The lien . . . is intended as a security for the *payment* of the debt, and can only be enforced as a means of compelling *payment*.").

Also, *Black's Law Dictionary* (10th ed) defines "attach" as "[t]o annex, bind, or fasten," and "[t]o take or seize under legal authority <attach the debtor's assets>." In this case, there is no question regarding to what property the utility lien attaches. The statute plainly specifies that the lien attaches to the premises furnished the utility services. MCL 141.121(3) ("Charges for services furnished to a premises may be a lien on the premises . . . ."); see *Norcross Co v Turner-Fisher Assoc*, 165 Mich App 170, 179-180; 418 NW2d 418 (1987) (discussing to which interests a construction lien "attached").

In this case, MCL 141.121(3) plainly authorizes the city of Holland to create a lien that attaches to premises furnished utility services to secure payment of the charges (the debt) for the utility services that are furnished to the premises and directs the city by ordinance to prescribe "[t]he time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien . . . ." In exercising this authority, Holland has created liens on premises that arise and attach to the premises furnished utility services at the time those services are provided. "Such liens shall become effective immediately upon the distribution or supplying of such electric [water] service or services to such prem-

ises. . . ." Holland City Code, §§ 9-3 and 37-30. We must enforce the clear and unambiguous provisions of the state statute and Holland's ordinances as written. *Gilliam*, 260 Mich App at 109; *Brandon Charter Twp*, 241 Mich App at 422.

As just discussed, the utility liens at issue arise by operation of law upon the furnishing of utility services to the premises. See *Brown Bark I, LP v Traverse City Light & Power Dep't*, 736 F Supp 2d 1099, 1118, 1121 (WD Mich, 2010) (holding that utility liens authorized by MCL 141.121(3) and implemented by local ordinance arise "by operation of law, as provided by statute, without any need to rely on any private contract or other written undertaking, and without the need to file a lien"); see also *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934) (noting that "liens upon real estate may be created only in writing [by contract] or by operation of law"). In this case, pursuant to MCL 141.121(3) and Holland's ordinance provisions, liens on Sau-Tuk's property to pay for the utility services—here, water and electricity—arose by operation of law at the time the services were furnished unless before the services were furnished Sau-Tuk invoked the landlord exception by giving the BPW written notice of MWP's tenancy and obligation to pay for utilities (or an affidavit in the case of water service) and a copy of the written lease, if one exists. It is undisputed that Sau-Tuk failed to provide the BPW a written notice of MWP's tenancy and obligation under the lease terms to pay for utility charges, as required by MCL 141.121(3) and Holland City Code, § 9-6, until after the utility services had been provided, the lien came into existence, and the charges had become delinquent. The issue then becomes whether Sau-Tuk may invoke the landlord exception, not by complying with the plain terms of the statute and city ordinance, but by present-

ing evidence that the BPW had actual knowledge of MWP's tenancy and obligation to pay for utilities. Principles of statutory construction require that we reject Sau-Tuk's argument. See *Wyandotte Electric Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 140; 881 NW2d 95 (2016) (holding that the Court must give effect to every word, phrase, and clause of a statute requiring written notice under the public works bond act, MCL 129.201 *et seq*., to avoid rendering any part of the statute surplusage or nugatory).

We agree with the reasoning of this Court in *Saginaw Landlords Ass'n*, unpub op at 4, that to accept Sau-Tuk's argument would render nugatory the clear and unambiguous language of MCL 141.121(3) and Holland City Code, § 9-6. The statute and ordinance required Sau-Tuk to give written notice to the BPW of its lease with MWP and of its tenant's obligation under the lease to pay the charges for utility services furnished the property to preclude the utility liens from arising. A clear and unambiguous statute needs no further construction, and its plain terms must be enforced as written. *Gilliam*, 260 Mich App at 109. "Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). Furthermore, we may not pick and choose what parts of a statute to enforce; we must give effect to every word of a statute if at all possible so as not to render any part of the statute surplusage or nugatory. *Id*. at 373; *Wyandotte Electric Supply Co*, 499 Mich at 140. Similarly, we must also enforce as written the clear and unambiguous terms of Holland's ordinances. *Brandon Charter Twp*, 241 Mich App at 422. Because Sau-Tuk failed to comply with the plain language of

MCL 141.121(3) and the city's ordinances to prevent the utility liens from arising, the trial court properly rejected Sau-Tuk's argument that the BPW's knowledge from other sources could prevent enforcement of liens in due course "in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes." MCL 141.121(3).

Like the trial court, we also reject Sau-Tuk's argument that the county and the city should be estopped from asserting noncompliance with MCL 141.121(3) and § 9-6 of Holland's ordinances because the BPW induced Sau-Tuk to believe strict compliance was not necessary when the BPW required MWP to post a surety bond and billed MWP directly for the utility services provided. Specifically, Sau-Tuk contends that the filing of the written notice required by these provisions is a prerequisite to the BPW's right to insist upon a surety bond before providing utility services. The part of the statute on which Sau-Tuk relies provides:

> In the event of filing of the notice, the public corporation shall render no further service to the premises until a cash deposit in a sum fixed in the ordinance authorizing the issuance of bonds under this act is made as security for the payment of the charges. [MCL 141.121(3).]

And the ordinance on which it relies provides:

> Immediately after the filing of such notice, the [BPW] shall render no further service to the premises until it receives from the tenant, or an individual or entity acting on behalf of the tenant, a cash deposit or surety bond, as established by resolution adopted by City Council, or it receives record of a previously established good credit history of not less than 12 consecutive months, as security for the payment of the electric charges. . . . [Holland City Code, § 9-6.]

Clearly, both provisions require that once a municipality has been provided a written notice of a tenant's obligation to pay utility charges, the municipality must refrain from providing further utility services to the property until it obtains adequate security to ensure payment.

Nevertheless, the premise of Sau-Tuk's argument—that the written notice required by MCL 141.121(3) and § 9-6 is a prerequisite to the BPW's right to require a surety bond—is false. While the statute and ordinance specify a course of action that the city and its BPW must follow if a written notice is filed, neither the statute nor the ordinance specifies that the city or its BPW cannot require of a new nonresidential utility customer—one without a credit history—a cash deposit or surety bond to secure payment of utility charges. While principles of statutory construction require that we give effect to every word of a statute if at all possible so as not to render any part of the statute surplusage or nugatory, *GMAC LLC*, 286 Mich App at 373, the pertinent principle regarding Sau-Tuk's argument is that "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself," *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (opinion by KELLY, J.). In other words, we "may not speculate regarding legislative intent beyond the words expressed in a statute." *Id*. There is simply no provision in either MCL 141.121(3) or § 9-6 of Holland's code of ordinances that prohibits the BPW from requiring security of a nonresidential utility customer who does not have an established credit history, and we may not speculate and infer one from the language Sau-Tuk cites.

Moreover, the trial court correctly ruled that Sau-Tuk cannot establish the elements of equitable estop-

pel. "Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999) (quotation marks and citation omitted). In *Parker v West Bloomfield Twp*, 60 Mich App 583, 592; 231 NW2d 424 (1975), this Court ruled that "[a] municipality may be subject to the doctrine of estoppel in certain situations." A plaintiff seeking to apply the doctrine of estoppel to a municipality "must show a good faith reliance upon the municipality's conduct, lack of actual knowledge or lack of the means of obtaining actual knowledge of the facts in question, and . . . a change in position to the extent that plaintiff would incur a substantial loss were the local government allowed to disaffirm its previous position." *Id*. (quotation marks and citation omitted).

In this case, Sau-Tuk's claim of estoppel fails because Sau-Tuk did not produce evidence that it was unaware of the requirements in MCL 141.121(3) and § 9-6 of Holland's code of ordinances. "[E]veryone dealing with a municipality and its agents is charged with knowledge of the . . . provisions of lawfully adopted ordinances." *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). Sau-Tuk suggests that the BPW, by its conduct of requiring MWP to obtain a surety bond, induced Sau-Tuk into believing that the notice provision had been met. As the trial court observed, by filing the notice, Sau-Tuk implicitly acknowledged that it was previously not in compliance with the notice requirement. At best, it is unclear from the record whether its initial failure to file the notice was a product of its own negligence or lack of knowledge or whether it stemmed

from any representations or conduct by the BPW. In either scenario, because Sau-Tuk failed to produce evidence demonstrating its ignorance of the requirements or of its reliance on the BPW's actions, we find that Sau-Tuk has not proven the elements required to invoke equitable estoppel.

We affirm. As the prevailing parties, appellees may tax costs pursuant to MCR 7.219.

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

PEOPLE v BIDDLES

Docket No. 326140. Submitted May 3, 2016, at Detroit. Decided June 30, 2016, at 9:00 a.m.

Clifford L. Biddles was convicted following a jury trial in the Wayne Circuit Court of being a felon in possession of a firearm, MCL 750.224f. Defendant's conviction arose from an altercation that occurred outside an apartment complex when codefendant Charles Johnson shot and killed an individual who had approached defendant and codefendant Johnson. According to a witness, defendant was seen holding a firearm after codefendant Johnson fired his weapon. The court, Cynthia Gray Hathaway, J., sentenced defendant as a fourth-offense habitual offender to 76 to 156 months of imprisonment. Defendant appealed.

The Court of Appeals *held*:

1. In *People v Lockridge*, 498 Mich 358 (2015), the Supreme Court decided that the mandatory nature of Michigan's legislative sentencing guidelines constrained a sentencing court's discretion and that the use of judicially found facts to score the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury decide beyond a reasonable doubt facts that influenced the defendant's sentence. The *Lockridge* Court remedied these problems by making the sentencing guidelines advisory only. In this case, defendant argued both that his offense variable (OV) scores were not supported by sufficient evidence and that because his sentence was based on the mandatory sentencing guidelines, the use of judicially found facts to score his OVs—facts not supported by jury-found facts or by defendant's admissions—violated his Sixth Amendment rights. The Court of Appeals determined that considering a claim such as defendant's required the Court to first conduct an analysis of defendant's evidentiary challenges to his OV scores. If a reviewing court concludes that the trial court erred in scoring a defendant's OVs and that this error resulted in a change in the recommended minimum sentence range and the need to resentence the defendant for that reason, the court's review has ended and there is no need to proceed to an analysis under *Lockridge*. In this case, because the trial court clearly erred in the number of points it

assessed for OV 1, MCL 777.31; OV 3, MCL 777.33; OV 4, MCL 777.34; and OV 9, MCL 777.39, defendant's *Lockridge* claim was moot and the Court did not need to address it. Because the change in OV level as a result of the corrected OV scores placed defendant in a different cell on the Class E sentencing grid, defendant was entitled to be resentenced.

2. A defendant's right to a fair trial is compromised when a trial judge's conduct during trial pierces the veil of judicial impartiality. To determine whether a trial court's conduct reaches the level of piercing the veil of judicial impartiality, the Court of Appeals must make a fact-specific inquiry under the totality of the circumstances. The Court must analyze the nature of the judicial misconduct, the trial judge's tone and demeanor, the scope of the misconduct in light of the length and complexity of the trial, the extent to which the trial judge directed his or her misconduct to one side more than the other, and the delivery of any curative instructions. In this case, the trial judge's conduct did not pierce the veil of judicial impartiality. The trial judge properly managed the trial, ruled on objections, limited excessive and improper questioning of witnesses, and did not interject more frequently in one party's presentation of its case than the other's. Finally, the trial judge properly instructed the jury that the court's inquiries or actions were not evidence and that the judge did not interject herself into the trial process with the intention of influencing the jury.

Conviction affirmed, sentence vacated, and case remanded for resentencing.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, agreed with the majority's resolution of defendant's challenge to the trial court's conduct, but disagreed with its analysis of the sentencing issue. The construction of a framework distinguishing evidentiary challenges from constitutional challenges was unnecessary and not supported by caselaw. Defendant asserted that the trial court's scoring of the OVs lacked evidentiary support and presented the challenge as a *Lockridge* violation. Because the trial court's scoring of the OVs relied on facts found by the court, defendant was entitled to the remand procedure outlined in *Lockridge*.

CRIMINAL LAW — FELONY SENTENCING — LEGISLATIVE SENTENCING GUIDELINES — OFFENSE VARIABLES — EVIDENTIARY SUPPORT.

When a defendant challenges the evidentiary support for his or her offense variable (OV) scores and the court finds an error that changes the defendant's recommended minimum sentence range,

resentencing is required, any *People v Lockridge*, 498 Mich 358 (2015), sentencing challenge is moot, and there is no need to conduct a *Lockridge* analysis or order a remand under *United States v Crosby*, 397 F3d 103 (CA 2, 2005); even though *Lockridge* created a new review procedure for appeals of sentences imposed under the mandatory sentencing guidelines, a sentencing appeal may still be decided solely on the basis of the evidence presented in support of the defendant's OV scores.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Deborah K. Blair*, Assistant Prosecuting Attorney, for the people.

Neil J. Leithauser for defendant.

Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

MURPHY, P.J. Defendant was convicted by a jury of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and he was sentenced as a fourth-offense habitual offender, MCL 769.12, to 76 to 156 months' imprisonment. Defendant appeals as of right, challenging his conviction and sentence. We affirm defendant's conviction, vacate his sentence, and remand for resentencing.

I. FACTUAL BACKGROUND

Defendant and his cousin, codefendant Charles Johnson, were both charged with second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and felon-in-possession, MCL 750.224f, in connection with the shooting death of Timothy Kirby and the assault of Kirby's nephew, Christopher Johnson, which occurred

outside the victims' apartment complex. The prosecution presented evidence that the victims were inside the apartment and defendant and codefendant Johnson were among a group "partying" outside when Kirby heard someone say that he had been stabbed. When Christopher Johnson and Kirby went outside to investigate, they encountered defendant, and Kirby inquired about what was occurring. According to Christopher Johnson, defendant responded by asking if the victims "got a beef" and signaling to codefendant Johnson, who then approached the men, brandished a handgun, and shot toward the victims as they fled. Codefendant Johnson, testifying on defendant's behalf,[1] admitted that he had quickly approached the victims after they said something to defendant, pulled his handgun, and fired three or four shots, killing Kirby. Codefendant Johnson denied that defendant had motioned or signaled to him and described defendant as being in shock after codefendant Johnson fired his gun. The jury convicted defendant of felon-in-possession—there was evidence that defendant was observed holding a gun after the shooting by codefendant Johnson had concluded—but it acquitted him of the additional charges.

II. TRIAL COURT'S CONDUCT

Defendant argues that he is entitled to a new trial because the trial judge's comments to defense counsel during his cross-examination of the officer in charge deprived him of a fair trial. We disagree.

"The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law

[1] Defendant and codefendant Johnson were tried together. Midway through trial, codefendant Johnson pleaded guilty to all charges against him and then testified for defendant.

that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). A defendant must overcome "a heavy presumption of judicial impartiality" when claiming judicial bias. *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011) (quotation marks and citation omitted). To determine whether the trial judge's conduct deprived defendant of a fair trial, we consider whether the trial judge's "conduct pierce[d] the veil of judicial impartiality." *Stevens*, 498 Mich at 164, 170. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id*. at 171. This is a fact-specific inquiry, and we must consider the cumulative effect of any errors. *Id*. at 171-172. A single instance of misconduct generally does not result in the appearance that a trial judge is biased unless the instance is "so egregious that it pierces the veil of impartiality." *Id*. at 171. To evaluate the totality of the circumstances, we consider a variety of factors, including

> the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. [*Id*. at 172.]

Initially, defendant points to the trial judge's remark that defense counsel might "get a spanking." After the trial judge had sustained one of the prosecutor's objections to defense counsel's questions, defense counsel asked, "May we approach on something before I get to this area just in case you--[.]" At that point, the trial

judge interjected, "Just before you get a spanking." Although this comment would have been better left unsaid, the judge seemed to be acknowledging defense counsel's reason for approaching the bench. During the preceding line of questioning, the trial judge had sustained the prosecutor's objections and had intervened on at least nine occasions, attempting to explain to defense counsel why his questions were improper and needed to be rephrased. Although the judge made the challenged statement in a jesting manner, the clear intent of the comment was that defense counsel could approach the bench in an attempt to avoid being interrupted and corrected yet again. Considering the trial judge's comment in context, we cannot conclude that the isolated and flippant statement influenced the jury.

Defendant next directs our attention to additional exchanges between defense counsel and the trial judge that defendant alleges demonstrate bias. For instance, defendant claims that the judge thwarted counsel's attempts to ask the officer in charge if he had made "a deal" with a witness, if defendant was charged in this case because he was untruthful, and when the arrest warrant was issued. It is well established that the trial court has a duty to control trial proceedings in the courtroom and has wide discretion and power in fulfilling that duty. See *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Although a defendant has the right to cross-examine his accusers as secured by the Confrontation Clause, US Const, Am VI, a court has wide latitude to impose reasonable limits on cross-examination to ensure relevancy or because of concerns regarding such matters as harassment, prejudice, confusion of the issues, and repetitiveness. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A court must "exercise reasonable control over

the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

The trial judge's remarks were not of such a nature as to unduly influence the jury. The record shows that the trial judge appropriately exercised her authority to control the trial and prevent excessive and improper questioning of the officer. The judge aptly noted that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." See MRE 602. In addition, the trial judge interrupted various questions by defense counsel that called for speculation and were repetitive and argumentative. Defendant has provided no explanation, argument, or authority indicating how any of the evidentiary objections were improper and not in accordance with MRE 611(a). Rather, defendant focuses on the trial judge's interruptions and apparent growing frustration with defense counsel, but fails to acknowledge that defense counsel talked back to the judge and ignored the judge's directives to move on and rephrase questions, which necessitated many of the judge's repeated interruptions.

Next, defendant complains about the trial judge's comments in the following passage, which occurred as defense counsel questioned the officer:

> *Q*. Did you testify in the case?
>
> *A*. Yes.
>
> *Q*. *And you sat there in the witness chair?*
>
> *A*. *Yes.*

Q. As a witness?

A. Yes.

The Court: [Counsel,] *why do you drag things out?*

[*Defense Counsel*]: It's my approach. *Can I just be me*[*?*]

The Court: No, because it is getting to be argumentative and you know that the rules of evidence don't allow arguments.

[*Defense Counsel*]: *I'm not being argumentative.* [Emphasis added.]

Defendant fails to acknowledge defense counsel's unnecessary and inane questions of the officer and counsel's improper and disrespectful response to the judge's ruling and statements in the above colloquy. In sum, considering the totality of the circumstances, including defense counsel's questions, the trial judge's interruptions and remarks were reasonably measured and were focused on enforcing the rules of evidence. They were not calculated to pierce the veil of judicial impartiality and were unlikely to unduly influence the jury to defendant's detriment. In addition, it does not appear from the record that the trial judge interjected more frequently during the defense's improper questioning of the witnesses than during the prosecution's examinations. Finally, the trial judge explained to the jury that she had a responsibility to ensure that the trial was run efficiently and fairly. At the beginning of trial and at the close of the proofs, the judge instructed the jury that the case must be decided solely on the basis of the evidence, that the judge's comments and rulings were not evidence, that the judge was not trying to influence the jury's vote or express a personal opinion about the case when making a comment or ruling, and that if the jury believed that the judge had an opinion, that opinion had to be disregarded. These instructions weigh against a conclusion that the trial

judge pierced the veil of judicial impartiality and deprived defendant of a fair trial. *Stevens*, 498 Mich at 190. We also cannot help but note that defendant was acquitted by the jury of murder, assault, and felony-firearm charges, seriously calling into question defendant's claim that judicial bias improperly influenced the jurors to his detriment. Defendant has not demonstrated that the trial judge's conduct deprived him of a fair trial.

III. SENTENCING

Defendant poses, broadly speaking, a two-pronged attack against the sentence imposed by the trial court. First, defendant presents a challenge regarding the adequacy of the evidence supporting the court's scoring of several offense variables (OVs): OV 1, MCL 777.31; OV 3, MCL 777.33; OV 4, MCL 777.34; and OV 9, MCL 777.39. We shall refer to this argument as defendant's "evidentiary challenge." Second, defendant presents a constitutional argument under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), contending that the trial court engaged in impermissible judicial fact-finding with regard to the same OVs. We shall refer to this argument as defendant's "constitutional challenge."

Each of defendant's challenges has its own distinct remedy. With respect to the evidentiary challenge, if the trial court clearly erred by finding that a preponderance of the evidence supported one or more of the OV scores or otherwise erred by applying the facts to the OVs, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), and if the scoring error resulted in an alteration of the minimum sentence range, he would be entitled to resentencing, *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). On the other hand, a

Crosby remand[2] under *Lockridge* is not the same remedy as remanding a case for resentencing because of an error in applying the guidelines. In *Lockridge*, our Supreme Court set forth the parameters of a *Crosby* remand, stating:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the "circumstances existing at the time of the original sentence." [*Lockridge*, 498 Mich at 398, quoting *United States v Crosby*, 397 F3d 103, 117 (CA 2, 2005).]

Accordingly, a *Crosby* remand results in *the possibility* of resentencing, whereas, in the context of a successful evidentiary challenge, resentencing is actually ordered by the appellate court. Of course, post-*Lockridge*, any resentencing will have to be conducted pursuant to the principles enunciated in *Lockridge*, primarily the directive that the guidelines are now advisory only. *Lockridge*, 498 Mich at 365. When this Court is presented with an evidentiary *and* a constitutional challenge regarding the scoring of the guidelines, the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot—a defendant will receive the protec-

[2] This is a reference to *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

tions of *Lockridge* when he or she is resentenced. And if an evidentiary challenge does not succeed, then and only then should we entertain the constitutional challenge. Therefore, we disagree with any assertion that defendant's evidentiary challenge need not be reached because his constitutional challenge under *Lockridge* is worthy of a *Crosby* remand.[3]

The fact that a trial court engaged in judicial fact-finding is not relevant to the inquiry into an evidentiary challenge.[4] The constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself; it was judicial fact-finding in conjunction with *required* application of those found facts for purposes of increasing a *mandatory* minimum sentence range. *Lockridge* remedied this constitutional violation by making the guidelines *advisory*, not by eliminating judicial fact-finding. As explained by the Court in *Lockridge*:

> Th[e] deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the

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[3] In *People v Sours*, 315 Mich App 346; 890 NW2d 401 (2016), this Court recently addressed an evidentiary challenge regarding OV 19, MCL 777.49 (interference with the administration of justice), as well as a constitutional challenge under *Lockridge* concerning OV 19. The *Sours* panel first analyzed the evidentiary challenge, concluding that the assessment of 10 points for OV 19 was improper, that OV 19 should have been assessed zero points, that the scoring error altered the minimum sentence range, and that, accordingly, the defendant was entitled to resentencing. *Sours*, 315 Mich App at 350-351. Moving on to the defendant's constitutional challenge, this Court held that "[b]ecause 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." *Id*. at 351. Our analysis is entirely consistent with the *Sours* approach.

[4] We note that the panel in *Sours* did not find it problematic, when addressing the evidentiary challenge, that the lower court had engaged in judicial fact-finding in scoring OV 19. See *Sours*, 315 Mich App at 348-350.

> defendant or found by the jury to score offense variables . . . that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the "mandatory minimum" sentence . . . .
>
> To remedy the constitutional violation, we sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure.
>
> Consistently with the remedy imposed by the United States Supreme Court . . . , we hold that a guidelines minimum sentence range . . . is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. [*Lockridge*, 498 Mich at 364-365 (citations omitted).]

That judicial fact-finding remains part of the process of calculating the guidelines is evidenced by the *Lockridge* Court's observation that its "holding today does nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, *whether using judge-found facts or not*." *Id*. at 392 n 28 (second emphasis added). This quote from *Lockridge* is consistent and reconcilable with the full *Lockridge* opinion; judicial fact-finding is proper as long as the guidelines are advisory only.[5] Our point is further buttressed by the Supreme Court's following discussion:

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[5] In *People v Blevins*, this Court found parts of *Lockridge* irreconcilable and noted that another panel of the Court had indicated that

> First, the defendant asks us to require juries to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict. *We reject this option*. The constitutional violation can be effectively remedied without burdening our judicial system in this manner, which could essentially turn sentencing proceedings into mini-trials. And the United States Supreme Court . . . expressly rejected this remedy because of the profound disruptive effect it would have in every case. . . . "It would alter the judge's role in sentencing." We agree. [*Lockridge*, 498 Mich at 389 (citation and punctuation omitted; emphasis added).]

Absent the use of an admission or stipulation or a jury's factual findings to assess a defendant's OVs, the only remaining avenue available to score the OVs entails judicial fact-finding, which is of no constitu-

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judicial fact-finding "constitutes a departure." *People v Blevins*, 314 Mich App 339, 362 n 8; 886 NW2d 456 (2016), quoting *People v Stokes*, 312 Mich App 181, 196; 877 NW2d 752 (2015). The *Blevins* Court concluded that *Stokes* set forth this judicial fact-finding versus departure distinction in reconciling *Lockridge*. *Blevins*, 314 Mich App at 362 n 8. We do not read *Stokes* as even acknowledging a possible irreconcilable feature of *Lockridge*, let alone attempting to reconcile parts of *Lockridge.* The *Blevins* panel's conclusion that *Lockridge* contained language that was difficult to reconcile was predicated on footnote 28 in *Lockridge*, wherein the Court stated that all OVs must be assessed the highest number of points possible "whether using judge-found facts or not," and the *Lockridge* Court's comments on page 399 that, to show plain error, "a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant . . . ." *Blevins*, 314 Mich App at 362, 362 n 8, citing *Lockridge*, 498 Mich at 392 n 28, 399. We do not find any conflict in the language. As we discussed earlier in this opinion, footnote 28 of *Lockridge* indicates that judicial fact-finding continues to play a role in scoring the guidelines, and the language on page 399 of *Lockridge* merely provides the analytical framework for determining whether a defendant is entitled to a *Crosby* remand when the guidelines were mandatory at the time of sentencing. We do not find that *Blevins* is controlling here, given that *Blevins* was strictly a case involving a constitutional challenge under *Lockridge*, and because the commentary in footnote 8 of the *Blevins* opinion was dicta.

tional consequence if the guidelines are merely advisory. Accordingly, we disagree with any contention that a trial court can only use facts determined by a jury beyond a reasonable doubt when calculating a defendant's OV scores under the guidelines. This is in direct contradiction of the *Lockridge* Court's rejection of the defendant's argument that juries should be required to find the facts used to score the OVs. *Lockridge*, 498 Mich at 389.

At this juncture, we find it necessary to address the comments in the concurring/dissenting opinion, in which our colleague indicates that she does not understand our analytical framework for evaluating "evidentiary" versus "constitutional" challenges and that it does not make sense to her. It appears that the concurrence/dissent is of the view that the only relevant inquiry relates to *Lockridge* and whether a *Crosby* remand is necessary. The concurrence/dissent fails to appreciate that, as mentioned earlier, aside from the constitutional challenge under *Lockridge*, defendant *separately* argues that there was inadequate evidence to support the number of points assessed under the pertinent OVs. The concurrence/dissent conflates the evidentiary and constitutional challenges. The evidentiary challenge cannot simply be ignored, and in *People v Sours*, 315 Mich App 346, 348-351; 890 NW2d 401 (2016), this Court proceeded exactly as we are doing here, resolving the evidentiary challenge first and then moving on to the constitutional challenge, which was rendered moot in *Sours* because resentencing was dictated in light of the successful evidentiary challenge. The issuance of *Lockridge* did not result in depriving a defendant of presenting a traditional evidentiary challenge to a trial court's scoring of the guidelines, even if the scoring was also constitutionally problematic under *Lockridge*; a

defendant would be free to forgo the constitutional challenge or embrace it in conjunction with the evidentiary challenge. Stated otherwise, evidentiary challenges to OV scores for sentences imposed pre-*Lockridge* are not irrelevant or moot simply because the scoring may also have violated the constitutional protections recognized in *Lockridge*. And again, the remedies for successful evidentiary and constitutional challenges are distinct.[6]

Next, with respect to defendant's evidentiary challenge, the only OV that is *initially* pertinent is OV 3, which was scored at 100 points. Defendant's total OV score was 155 points, placing him at OV Level VI, which is the highest OV level in the Class E grid applicable to the firearm offense of which he was convicted. MCL 777.16m; MCL 777.66. Indeed, a total OV score of 75 or more points is all that is needed to be placed at OV Level VI. MCL 777.66. And OVs 1, 4, and 9, as assessed against defendant, add up to 45 points, which if subtracted from defendant's total OV score of 155 points leaves a total of 110 points, and defendant would remain at OV Level VI. Therefore, even if all three of these OVs were improperly assessed and

[6] Perhaps the concurrence/dissent believes that, for example, because an OV was scored on the basis of improper judicial fact-finding under *Lockridge* in the context of mandatory sentence ranges, any challenge to that particular OV score on the basis that there was generally insufficient evidence in the record to support the judge's OV assessment need not be addressed or is not viable, forcing sole consideration of the applicability of *Lockridge*. However, that view fails to recognize that the inadequacy of the evidence can serve as a separate appellate argument, with resentencing as the available remedy, or that argument can be made together with a *Lockridge* constitutional argument, as in this case, or a defendant could simply and solely present a constitutional challenge. It is a strategic decision to be made by the defendant. Our analytical framework is intended to give direction when both an evidentiary and a constitutional argument are made on appeal.

should have been scored at zero points, it would not alter the guidelines range, making resentencing unnecessary. *Francisco*, 474 Mich at 89 n 8 ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required."). However, OV 3 was assessed at 100 points; therefore, it is necessary to examine the scoring of OV 3.

OV 3 addresses physical injury to a victim, and a score of 100 points is mandated where "[a] victim was killed," MCL 777.33(1)(a), so long as the "death results from the commission of a crime and homicide is not the sentencing offense," MCL 777.33(2)(b). Defendant contends that his conduct related to the felon-in-possession conviction did not cause or result in anyone's death. See *People v Laidler*, 491 Mich 339, 345; 817 NW2d 517 (2012) ("Because the Legislature in MCL 777.33(2)(b) used the phrase '*results* from the commission of a crime,' it is clear that the defendant's criminal actions must constitute a factual cause of a death for purposes of OV 3."). OV 3 also provides that "[i]n multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." MCL 777.33(2)(a). Codefendant Johnson, who pleaded guilty during the trial to the charges against him and then testified on defendant's behalf, was assessed 100 points for OV 3 in an earlier sentencing.[7] The sentencing record in defendant's case is simply unclear regarding whether the trial court assessed 100 points for OV 3 on the basis of the multiple-offender provision, MCL

[7] Codefendant Johnson's plea encompassed the crime of second-degree murder, which constitutes homicide, and therefore he was not assessed 100 points for OV 3 relative to that crime, see MCL 777.33(2)(b), but guidelines for codefendant Johnson were also scored for the offense of assault with intent to commit murder, and he was assessed 100 points for OV 3 on that crime.

777.33(2)(a), or on the basis of a straightforward application of the facts pertaining to defendant's conduct, MCL 777.33(2)(b), or on both bases. Regardless, neither provision supports the assessment of 100 points for OV 3.

First, this was not a multiple-offender case because defendant was acquitted of second-degree murder, assault with intent to commit murder, and felony-firearm, because the felon-in-possession conviction was based on evidence apart from the shooting, and because codefendant Johnson was convicted by plea of the crimes for which defendant was acquitted. See *People v Johnston*, 478 Mich 903, 904 (2007); *People v Morson*, 471 Mich 248, 260 n 13; 685 NW2d 203 (2004) (rejecting the argument that "the multiple offender provision does not require a comparison of the OV scores for identical crimes," and noting that comparison is to be made to "OV scores received for a specific offense"). Had defendant been convicted of assault with intent to commit murder as was his codefendant, then an assessment of 100 points for OV 3 would have been proper.[8] However, the multiple-offender provision in OV 3 was not implicated in this case.

Next, looking solely at defendant's conduct, our analysis of whether "[a] victim was killed," MCL 777.33(1)(a), and whether the "death result[ed] from

[8] We note that the guidelines were not scored for codefendant Johnson regarding his conviction of felon-in-possession, considering his convictions of higher offenses. See *People v Lopez*, 305 Mich App 686, 690-692; 854 NW2d 205 (2014). Interestingly, had 100 points been the proper score for OV 3 on the basis of the multiple-offender provision, there would not have been a constitutional or *Lockridge* problem because the death or killing would have been established through codefendant Johnson's plea to second-degree murder. Also, defendant's gun possession was separate from codefendant Johnson's possession and discharge of his firearm.

the commission of a crime," MCL 777.33(2)(b), does not support a conclusion that the death in this case resulted from or was factually caused by defendant's commission of the offense of felon-in-possession, *Laidler*, 491 Mich at 345.[9] "[T]he offense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise." *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009). OV 3 does not specifically provide otherwise; therefore, we can only take into consideration defendant's sentencing offense for purposes of scoring OV 3. See *People v Mushatt*, 486 Mich 934 (2010). The record reflects that defendant's conviction of felon-in-possession was based on the testimony of a witness who, after the shooting, observed a man wearing a white shirt holding a gun and codefendant Johnson's testimony that defendant was wearing a white shirt at the time of the incident. There was no evidence, let alone a preponderance of it, establishing a causal connection between defendant's crime of felon-in-possession and Kirby's death. To the extent that the trial court relied on MCL 777.33(2)(b) in assessing 100 points for OV 3, it clearly erred. *Hardy*, 494 Mich at 438. On examination of the remaining provisions in OV 3 regarding life-threatening, permanently incapacitating, or bodily injuries, none would apply, considering the lack of a causal link between defendant's felon-in-possession offense and Kirby's death. MCL 777.33(1)(c) through (e). The scoring error results in an alteration of the minimum sentence range, thereby entitling defendant to resentencing, *Francisco*, 474 Mich at 89, at which time he will receive the constitutional protection of advisory guidelines as dictated by *Lockridge*. As in *Sours*, 315 Mich App at 351,

[9] Defendant did stipulate that he was a convicted felon when the shootings occurred.

because defendant is entitled to be resentenced, his constitutional challenge under *Lockridge* is now moot and need not be addressed.

The remaining OV scores now become relevant under our analysis for purposes of resentencing and the correct placement of defendant in the Class E grid. With respect to OV 1, defendant's challenge of the 25-point assessment was waived at sentencing, see *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); however, defendant also presents an ineffective-assistance claim on the matter, and we agree that counsel's performance was deficient in waiving a challenge to OV 1 and that defendant was prejudiced by counsel's error, see *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); see also *Francisco*, 474 Mich at 89 n 8. Twenty-five points is properly assessed for OV 1 when "[a] firearm was discharged at or toward a human being . . . ." MCL 777.31(1)(a). OV 1's multiple-offender provision is not implicated for the same reasons already set forth in addressing the multiple-offender provision in OV 3. Further, "OV 1 is an 'offense-specific' variable; therefore, in scoring OV 1, [a] trial court [is] limited to 'considering the sentencing offense alone.' " *People v Chelmicki*, 305 Mich App 58, 72; 850 NW2d 612 (2014), quoting *McGraw*, 484 Mich at 127. Here, there was no evidence that defendant's possession of the gun, which was used to support the felon-in-possession conviction, entailed defendant's discharge of the weapon, let alone discharging it at or toward a human being. The trial court thus clearly erred by assessing 25 points for OV 1, defense counsel's performance in waiving an argument relative to OV 1 was deficient, and defendant was prejudiced because the waived error altered the minimum guidelines range, MCL 777.66. We do note that a five-point score for OV 1 is proper when "[a] weapon was dis-

played . . . .” MCL 777.31(1)(e). Given that resentencing is already necessary in this case, we direct the trial court on resentencing to entertain the question whether five points should be assessed for OV 1.[10]

With respect to OV 4, defendant was assessed 10 points, which is the proper score when “[s]erious psychological injury requiring professional treatment occurred to a victim[.]” MCL 777.34(1)(a). Because OV 4 does not specifically provide otherwise, we are limited to solely considering the sentencing offense of felon-in-possession when scoring OV 4. *McGraw*, 484 Mich at 129. The record contains no evidence that serious psychological injury occurred to a victim as a result of defendant’s status as a felon and his being seen carrying a gun after the shooting; OV 4 should have been scored at zero points. The trial court clearly erred by assessing 10 points for OV 4.

Finally, defendant was assessed 10 points for OV 9, which is the proper score for OV 9 when “[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]” MCL 777.39(1)(c). The *McGraw* Court specifically held that OV 9 can only be scored in reference to the sentencing offense. *McGraw*, 484 Mich at 133-134. In the instant case, defendant’s commission of the offense of felon-in-possession, in and of itself, simply did not place anyone in danger of physical injury or death. Accordingly, the trial court clearly erred by assessing 10 points for OV 9, which should have been scored at zero points.

We affirm defendant’s conviction, vacate his sentence, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

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[10] Even if five points is a proper score for OV 1, the resulting 20-point error in scoring OV 1, as opposed to a 25-point error, would still lower the minimum guidelines range. MCL 777.66.

CAVANAGH, J., concurred with MURPHY, P.J.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*). I write separately because I respectfully do not understand the majority's resolution of defendant's sentencing issue. In particular, in the specific context of an alleged violation of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), I do not understand the majority's construction of a framework for evaluating "evidentiary" as opposed to "constitutional" challenges. I fully agree with the majority's resolution of defendant's challenge to the trial court's conduct. I likewise concur with the majority's recitation of the basic facts of the case.

Defendant contends that the trial court improperly scored Offense Variables (OVs) 1, 3, 4, and 9 of his sentencing guidelines pursuant to MCL 777.31, MCL 777.33, MCL 777.34, and MCL 777.39, respectively. He further asserts that his trial counsel was ineffective for failing to object to the scoring of OV 1. Defendant argues that his scores lack the requisite evidentiary support, and he presents that challenge as a *Lockridge* violation. We review de novo issues of constitutional law, including whether the trial court engaged in judicial fact-finding. *People v Stokes*, 312 Mich App 181, 192; 877 NW2d 752 (2015).

In *Lockridge*, our Supreme Court held that Michigan's mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial to the extent that the guidelines required judicial fact-finding beyond facts admitted by a defendant or found by the jury beyond a reasonable doubt and that this judicial fact-finding improperly increased the floor of a defendant's minimum sentence range. *Lockridge*, 498 Mich at 364-365; *Stokes*, 312 Mich App at 193-194. Our

Supreme Court appeared to hold that judicial fact-finding was not impermissible per se, but rather it was impermissible in the context of *mandatory* minimum sentence ranges. This Court has reconciled certain statements in *Lockridge* by determining that judges may score the guidelines on the basis of facts they found, independently of a jury's verdict or a defendant's admissions, on the theory that doing so constituted a departure, which now needs only to be justified as reasonable. *Lockridge*, 498 Mich at 365. Our Supreme Court did not, however, abrogate the requirement that a trial court departing from the recommended guidelines range articulate its reasons for that departure. See *id*. at 392. If the trial court's improper scoring of offense variables increased the floor of the guidelines minimum sentence range, the guidelines range was unconstitutionally constrained by a violation of the Sixth Amendment. *Id*.

The net effect as I understand it is as follows: (1) if the trial court imposed a sentence according to sentencing guidelines scored on the basis of facts the trial court found independently of the jury's verdict or the defendant's admissions, and (2) it did so under the belief that the resulting sentence range was mandatory, and (3) the guidelines minimum sentence range cannot be sustained on the basis of facts admitted by defendant or by the jury's verdict, (4) then the defendant has "establish[ed] a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, 498 Mich at 395. However, the trial court may rely on judicially found facts to depart from a minimum sentence range that is based on properly scored guidelines, and any such departure will be reviewed for reasonableness. *Lockridge*, 498 Mich at 392.

In *People v Sours*, 315 Mich App 346; 890 NW2d 401 (2016), the majority seems to imply that this Court distinguished between evidentiary and constitutional challenges under *Lockridge* by addressing the defendant's challenge to the trial court's scoring of OV 19 under MCL 777.49. I do not read *Sours* in the same way. In *Sours*, this Court noted that OV 19 requires either that the crime itself constitute some manner of interference with the administration of justice or that the defendant engage in conduct that in some way seeks to evade responsibility for illegal conduct. *Sours*, 315 Mich App at 349. The Court observed that the defendant's parole violation, for which he was not even apparently convicted in the proceeding that culminated in the *Sours* appeal, was neither of those things, and the *Sours* defendant was arrested for the actual sentencing offense, possession of methamphetamine, promptly upon discovery of the illegal substance. The defendant had no opportunity to make any attempt to evade justice. *Id*. at 350. In other words, there were no facts that could conceivably have supported scoring OV 19.

Here, there clearly *are* facts in the record that could support the OV scores assessed by the trial court. For example, OV 3 should be scored at 100 points if "a person was killed," MCL 777.33(1)(a), and indeed, a person *was* killed. At issue is whether, in context, those facts were *properly* found. I conclude that the OV scores calculated by the trial court could not have been based only on facts necessarily found by the jury or admitted by defendant, as I understand *Lockridge* requires when the trial court imposes a mandatory sentence range based on those scores. Defendant was convicted only of being a felon in possession of a firearm, so the jury was only required to find beyond a

reasonable doubt that defendant was armed with a weapon and was ineligible to possess it. See MCL 750.224f; see also *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). Defendant stipulated only that he was ineligible to possess a firearm at the time of the shooting. Each of the challenged OV scores in this case required a finding of at least one fact that was neither directly nor indirectly supported by the jury's verdict or defendant's admission.

The trial court scored OV 1 at 25 points, indicating that "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon . . . ." See MCL 777.31(1)(a). However, the jury's verdict required a finding that defendant *possessed* a firearm, but not that defendant *used* that firearm. Accordingly, OV 1 should not have been scored at 25 points. The trial court scored OV 3 at 100 points, indicating that "[a] victim was killed," MCL 777.33(1)(a). Although the trial court may consider other facts and injuries for the purpose of imposing sentence, OV scores must be based on " 'the sentencing offense alone.' " *People v Mushatt*, 486 Mich 934, 934 (2010), quoting *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). Again, nothing in the jury's verdict or defendant's admissions causally links his possession of a firearm to any death, so OV 3 should not have been scored at 100 points.

Likewise, OV 4 was scored at 10 points, indicating that "[s]erious psychological injury requiring professional treatment occurred to a victim," MCL 777.34(1)(a), and OV 9 was scored at 10 points, indicating that "2 to 9 victims . . . were placed in danger of physical injury or death, or 4 to 19 victims . . . were placed in danger of property loss," MCL 777.39(1)(c). Again, the jury did not necessarily find that any victim

existed or that a victim suffered or was placed in danger of injury as a result of defendant's possession of a firearm. Accordingly, these OVs should not have been scored at 10 points each.

The trial court scored the guidelines for defendant's conviction of being a felon in possession of a firearm, which is a Class E offense. MCL 777.16m. Defendant received a total OV score of 155 points. That score, combined with his prior record variable score of 70 points, placed him in the E-VI cell of the applicable sentencing grid, for which the minimum sentence range is 22 to 76 months for a fourth-offense habitual offender. MCL 777.66; MCL 777.21. The scores for OVs 1, 3, 4, and 9 increased defendant's total OV score from 10 points to 155 points, which, in turn, changed his placement on the grid from OV Level II (10 to 24 points) to OV Level VI (75+ points), resulting in a higher guidelines range. Because defendant was sentenced before our Supreme Court's decision in *Lockridge* and his placement in OV Level VI cannot be sustained on the basis of facts admitted by defendant or necessarily found by the jury, defendant has "establish[ed] a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, 498 Mich at 395. Because I understand that *all* OV scores might be considered for some purpose by the Department of Corrections, I disagree with the majority's conclusion that it is unnecessary to consider defendant's challenges to all of them.

My understanding of *Lockridge* is that because the trial court's scoring of the OVs was based on judicially found facts that increased the floor of the guidelines minimum sentence range, defendant is entitled to the *Crosby* remand procedure outlined in *Lockridge*.

Stokes, 312 Mich App at 197-203; *Lockridge*, 498 Mich at 395-399. On remand, the trial court should allow defendant an opportunity " 'to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought.' " *Lockridge*, 498 Mich at 398, quoting *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005) (alteration in original). If the defendant does not wish to avoid resentencing, the court must determine if it "would have imposed a materially different sentence but for the unconstitutional constraint [considering] only the 'circumstances existing at the time of the original sentence.' " *Lockridge*, 498 Mich at 398, quoting *Crosby*, 397 F3d at 117. The trial court may consider the judicially found facts underlying its original scoring when determining if departure from the guidelines minimum sentence range is appropriate. See *Lockridge*, 498 Mich at 391-392 ("[T]he sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."). If the sentencing court decides to depart from the guidelines minimum sentence range, it must state on the record its reasons for departure. MCL 769.34(3).

To be clear, I do not in any way wish to suggest that I believe the majority's reasoning is irrational, fallacious, or wrong. I do not agree with it only because it does not make sense to me. The majority's assertion that I somehow claim that "defendant's evidentiary challenge need not be reached" appears equally to fail to apprehend my own reading of *Lockridge* and *Sours*. It is my hope that further developments in the law will provide additional guidance.

PEOPLE v SOLLOWAY

Docket No. 324559. Submitted March 1, 2016, at Lansing. Decided June 30, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 997.

Timothy L. Solloway was convicted following a bench trial in the Cass Circuit Court of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and two counts of failing to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, MCL 28.729. The charges stemmed from allegations that during the summer when defendant's son, "MM," was nine years old, he woke up one evening in defendant's home to find himself no longer wearing pajamas and with defendant on top of him shaking up and down. MM told defendant to get off, but defendant said, "No." MM saw defendant unzip his pants and stick his penis out. Defendant then flipped MM over and inserted his penis in MM's rectum. MM did not disclose what happened until two days after the incident when he experienced rectal bleeding after he went to the bathroom. MM told a teacher he was bleeding. The teacher sent MM to the principal, who in turn called MM's mother—defendant's ex-wife—to pick MM up. While MM was waiting for his mother, a police officer came to speak with MM at school. MM told the officer that he was bleeding from his rectum and had been molested by defendant a few days before. MM's mother arrived at the school with MM's grandfather and stepfather, and they took MM directly to the hospital. On the way, MM disclosed to the three of them what had happened. The physical exam at the hospital revealed injuries consistent with MM's account of the sexual assault. After speaking with MM, the police ran defendant's record and discovered he was currently on probation and had previously been convicted of fourth-degree criminal sexual conduct (CSC-IV) under MCL 750.520e, requiring him to register under SORA and verify his information, including all telephone and e-mail addresses used. During a search of defendant's residence, two cellular phones were seized, one of which had cellular service and was registered in a relative's name and the other of which only had Internet and on which defendant admitted that he searched for pornography. Defendant also admitted to having an e-mail account in his father's name that was unregistered. At trial, defendant denied the allegations that

he sexually assaulted MM but admitted that he was guilty of having an unregistered e-mail address and that his status as a sex offender prohibited him from using the one cellular telephone to access pornography. The court, Michael E. Dodge, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to imprisonment for life on the CSC-I conviction and to concurrent terms of three to seven years' imprisonment for each of the failing-to-comply convictions, with credit for 464 days served. Defendant appealed.

The Court of Appeals *held*:

1. There was sufficient evidence to support the CSC-I conviction, and the verdict was not against the great weight of the evidence. The two elements of CSC-I are sexual penetration and a victim less than 13 years of age. Because MM's age was not contested by either party, the only issue was whether there was sufficient evidence to establish beyond a reasonable doubt that defendant engaged in sexual penetration with MM. MM testified that defendant put his penis in MM's rectum, and a victim's testimony may be sufficient to support a conviction and need not be corroborated. Defendant challenged MM's credibility, but credibility is a question for the fact-finder. In any case, there was additional evidence that corroborated MM's testimony, including defendant's semen on a blanket from MM's bed and the testimony of defendant's nephew that defendant would wake him up at night until he was about nine and touch him inappropriately in the genital area. Defendant admitted committing this sexual abuse of his nephew. Defendant's commission of a previous sexual assault against his similarly aged nephew also supported MM's testimony. The verdict was also not against the great weight of the evidence because each of the trial court's findings was supported by the evidence.

2. Defendant's convictions under SORA had to be vacated because the provisions under which he was convicted are unconstitutionally vague. The convictions for failing to comply arise from MCL 28.727(1)(h) and (i), which seek information regarding telephone numbers and e-mail addresses "routinely used" by the registrant. As was found by a federal district court in *Doe v Snyder*, 101 F Supp 3d 672 (ED Mich, 2015), the definition of "routinely" is not sufficiently concrete to provide fair notice of the proscribed conduct or provide standards for law enforcement to administer reporting requirements. Law enforcement officers and judges could hold different views of how often telephone numbers or e-mail addresses need to be used by an individual to be "routinely used" under the statute.

3. Defendant was not denied effective assistance of counsel. Nothing in the record suggested that defense counsel failed to conduct a thorough investigation before trial, as defendant claimed. The question of which witnesses to call was a question of trial strategy. Defendant failed to explain what the missing testimony would have been or how it would have assisted his case; therefore, defendant failed to demonstrate that the uncalled witnesses deprived him of a substantial defense. Defense counsel did pursue a theory that MM was coerced into making allegations against defendant, and the fact that it was unsuccessful did not render him ineffective. Defense counsel was not ineffective for failing to produce MM's medical records. The medical records from the examination were admitted through the nurse who examined MM, and defendant did not identify any other relevant medical records. Even if counsel's performance was deficient, in light of the overwhelming evidence against defendant, none of the alleged errors would have affected the outcome of the trial.

4. The trial court did not err by admitting other-acts evidence. The trial court properly admitted the evidence of the CSC-IV conduct under MCL 768.27a. It was relevant and, therefore, admissible to show defendant's propensity to commit the charged crime. Such evidence could still be excluded under MRE 403, but the propensity inference is weighed in favor of the evidence's probative value instead of its prejudicial effect. There are at least six considerations for a court to assess when determining whether to exclude such evidence under MRE 403: (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. In this case, all of the factors either weighed in favor of admitting the evidence or at least did not support its exclusion. Therefore, the trial court did not abuse its discretion by admitting the other-acts evidence.

5. The trial court did not violate the rule of completeness or deny defendant the right to present a defense or the right to trial by an impartial judge by sustaining the prosecution's objections to certain cross-examination questions of MM's mother and to certain questions asked on direct examination of a police officer. Both were objected to on hearsay grounds. Although the mother's testimony was not hearsay, defendant could not show that the plain error in the preclusion of the testimony affected his sub-

stantial rights because defendant was permitted to testify about the content of the questions—previous allegations of sexual abuse made against him but for which he was not charged as a result—and the mother admitted that there was ill will between her and defendant. The officer's statements were properly excluded as hearsay. Neither person's testimony fell under the rule of completeness because that rule only pertains to the admissibility of writings or recorded statements, not live testimony.

6. There was no prosecutorial misconduct and no violation of *Brady v Maryland*, 373 US 83 (1963). Defendant argued that the prosecution offered a fraudulent certified record of his sex offender registration. A *Brady* violation requires that the prosecution has suppressed evidence that is favorable to the accused and is material. Defendant was not arguing suppression, but falsification, so *Brady* was inapplicable. Nothing in the record suggested that the certified record was falsified or tampered with in any way, and defendant failed to demonstrate that the prosecution admitted the certified record of his sex offender registration in bad faith.

Affirmed in part, vacated in part, and remanded.

CRIMINAL LAW — PENALTIES — SEX OFFENDERS — REGISTRATION — OVERBREADTH AND VAGUENESS.

The requirements under MCL 28.727(1)(h) and (i) of the Michigan Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, that a registrant must report all routinely used telephone numbers and e-mail addresses, are unconstitutional because the meaning of the term "routinely" is not sufficiently concrete to provide fair notice of the proscribed conduct, leaving registrants of ordinary intelligence unable to determine when the reporting requirements are triggered.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

Timothy L. Solloway, *in propria persona*, and *Ann M. Prater* for defendant.

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM. Defendant appeals as of right his bench trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and two counts of failing to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., MCL 28.729. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to imprisonment for life on the CSC-I conviction and concurrent terms of three to seven years' imprisonment on each of the failing-to-comply convictions, with credit for 464 days served. We vacate defendant's convictions for failing to comply with SORA, affirm in all other respects, and remand for correction of the presentence investigation report and the judgment of sentence.

I. FACTS

On the morning of July 22, 2013, defendant's then nine-year-old son "MM" rode the bus from summer school to defendant's residence, where he was supposed to spend the remainder of the summer. That evening, MM fell asleep in the bedroom of defendant's one-bedroom apartment with his pajamas on, and defendant went to bed in the living room. According to MM, he woke up during the night with defendant on top of him, and MM no longer had his pajamas on. MM testified that defendant was facing him and "shaking up and down." MM told defendant to get off, but defendant said, "No." Eventually, MM saw defendant unzip his pants and "stick his peebug[1] out." Defendant then "flipped [MM] over" and "put his peebug in [MM's] butt." Although MM testified that he experienced pain "on [his] butt" that day, he did not tell anyone what happened.

[1] It was established at trial through multiple witnesses that MM uses the word "peebug" to refer to a penis.

Two days after the incident, MM noticed some rectal bleeding after he went to the bathroom at school. MM told his teacher that he was bleeding. His teacher sent him to the principal, who thereafter called MM's mother (defendant's ex-wife) to pick MM up. While MM was waiting for his mother, a police officer came to talk to him at school. MM told the officer that he was "bleeding from [his] butt" and that he had just been "molested [by defendant] a couple of days" before. Thereafter, MM's mother arrived at the school with MM's grandpa and stepfather, and they took MM directly to the hospital. On the way, MM told the three of them what had happened. A physical examination of MM at the hospital revealed injuries consistent with his account of the sexual assault.

After speaking with MM, police ran defendant's record and found that he was currently on probation and had been previously convicted of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e. Defendant was therefore required to register under SORA and verify his information, including all telephone and e-mail addresses used. Officers, along with defendant's probation officer, went to defendant's apartment, explained to him why they were there, read defendant his *Miranda*[2] rights, which defendant waived, and received defendant's consent to search the residence. During the search, officers seized several items, including two cellular telephones. Defendant told the officers that he used one of the cellular telephones for calls and that it was registered in a relative's name. He told the officers that the other cellular telephone used to have cellular service, but it no longer did. Defendant stated that he only used this second cellular telephone for Internet access, and he admitted he searched for

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

pornography on it. Defendant also admitted during the investigation in this case that he had an e-mail account in his father's name, but he did not register it.

At trial, defendant denied the allegations that he sexually assaulted the victim. With respect to the SORA violations, defendant admitted that he was guilty of having an e-mail address that his probation officer or other public safety officers did not know about. He also admitted, with respect to one of the cellular telephones, that his status as a sex offender prohibited him from using this cellular telephone to access pornography. As previously indicated, the trial court convicted defendant of CSC-I and two counts of failing to comply with SORA.

II. CSC-I CONVICTION: SUFFICIENCY/GREAT WEIGHT OF THE EVIDENCE

On appeal, defendant first contends that there was insufficient evidence to support his conviction for CSC-I or, alternatively, that the verdict was against the great weight of the evidence. We disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court must determine whether the evidence was sufficient to justify a rational trier of fact's conclusion that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). In determining whether sufficient evidence was presented to support a conviction, the reviewing court will not interfere with the fact-finder's role of deciding the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of

the prosecution, *id*. at 515, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime, *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A defendant is guilty of CSC-I, MCL 750.520b(1)(a), if he or she engaged in sexual penetration with the victim and the victim was less than 13 years old. *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996) (opinion by SAWYER, P.J.) "Sexual penetration" is defined by statute as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body . . . ." MCL 750.520a(r).

The victim's age is not contested by either party. It was well established at trial that MM was nine years old at the time of the sexual assault. Accordingly, the only issue is whether the evidence was sufficient to establish beyond a reasonable doubt that defendant engaged in sexual penetration with MM. *Hack*, 219 Mich App at 303 (opinion by SAWYER, P.J.). In this case, MM testified in great detail about the sexual assault. He testified that he woke up to defendant on top of him, "shaking up and down." MM testified that defendant then flipped him over and "put his peebug in [MM's] butt." MM explained that he could feel defendant's "peebug" in his body. In criminal sexual conduct cases, a victim's testimony may be sufficient to support a defendant's conviction and need not be corroborated. *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012); MCL 750.520h. Given MM's testimony, the evidence, when viewed in a light most favorable to the prosecution, was sufficient to support the trial court's finding that sexual penetration occurred beyond a reasonable doubt.

Defendant challenges MM's credibility. However, witness credibility is a question for the fact-finder, and this Court does not interfere with the fact-finder's role. *Wolfe*, 440 Mich at 514-515. Moreover, even though it is not necessary for a criminal sexual conduct conviction, there was evidence presented that corroborated MM's testimony. For instance, Mindy O'Brien, the sexual assault nurse examiner who examined MM at the hospital, testified that MM suffered tearing and rawness in his anal area that was consistent with his claims, and DNA evidence revealed that defendant's semen was located on a white fleece blanket taken from MM's bed. Further, there was testimony by defendant's nephew that when he had resided with defendant for several years, until he was approximately nine years old, defendant had touched him inappropriately in his genital area many times with his hand and his body. The nephew testified that defendant would wake him up in the middle of the night to perform these assaults. With respect to this conduct, defendant ultimately pleaded guilty and was convicted of CSC-IV, and defendant admitted in his testimony at trial that he committed the sexual abuse toward his nephew. The fact that defendant committed a previous sexual assault against his similarly aged nephew—albeit "sexual contact,"[3] not penetration—also supports MM's testimony.

The verdict on defendant's CSC-I conviction was also not against the great weight of the evidence. A verdict is against the great weight of the evidence and a new trial should be granted when "the evidence preponderates heavily against the verdict and a seri-

[3] "Sexual contact" is defined as including "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." MCL 750.520a(q).

ous miscarriage of justice would otherwise result." *Brantley*, 296 Mich App at 553, quoting *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (quotation marks omitted; citation omitted in *Brantley*). Generally, a verdict may only be vacated when the verdict is not reasonably supported by the evidence, but rather it "is more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations." *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). Questions regarding credibility are not sufficient grounds for relief *unless* the "testimony contradicts indisputable facts or laws," the "testimony is patently incredible or defies physical realities," the "testimony is material and . . . so inherently implausible that it could not be believed by a reasonable juror," or the "testimony has been seriously impeached and the case is marked by uncertainties and discrepancies." *Lemmon*, 456 Mich at 643-644 (citations and quotation marks omitted).

The trial court found that MM was less than 13 years old when defendant entered his bedroom at night, got on top of him, and eventually inserted his penis into MM's anal opening. The trial court found that MM's testimony of this assault was "very clear and very credible." The trial court found that O'Brien's testimony of the victim's injuries was consistent with the victim's account of the sexual assault. In particular, the trial court noted O'Brien's testimony that the victim's injuries, as a whole, were "inconsistent with difficult bowel movements" as defendant attempted to claim. Each of the trial court's findings is supported by the evidence. Therefore, defendant failed to establish that the evidence "preponderate[d] heavily" against the trial court's verdict. *Brantley*, 296 Mich App at 553.

In sum, we hold that sufficient evidence was presented to sustain defendant's CSC-I conviction, and the verdict was not against the great weight of the evidence. Accordingly, defendant's CSC-I conviction is affirmed.

III. SORA CONSTITUTIONALITY CHALLENGE

Next, defendant challenges his convictions for failing to comply with SORA. Defendant argues that his convictions under SORA must be vacated because the provisions under which he was convicted were found unconstitutionally vague by a federal district court. See *Doe v Snyder*, 101 F Supp 3d 672 (ED Mich, 2015). "This Court reviews de novo a challenge to a statute's constitutionality under the void-for-vagueness doctrine." *People v Vronko*, 228 Mich App 649, 651-652; 579 NW2d 138 (1998).

Notably, the holding in *Doe* is not binding on this Court, although it may be considered persuasive. See *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013) ("Lower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis."). Because *Doe* is not binding authority on this Court, see *id*., despite the Attorney General's concession that defendant's convictions must be vacated because *Doe* declared the relevant SORA provisions unconstitutionally vague, to address defendant's argument, this Court must consider whether the SORA provisions under which defendant was convicted are, in fact, unconstitutionally vague. We hold that they are.

When a statute is challenged on constitutional grounds, it "is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent." *Vronko*, 228 Mich App at 652. A

statute may be determined to be "unconstitutionally vague" when "(1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed or (3) its coverage is overly broad and impinges on First Amendment Freedoms." *Id*. A statute will not be found vague "if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Id*. at 653.

Defendant's convictions for failing to comply with SORA arise out of MCL 28.727(1)(h) and (i). These two provisions provide that defendant must report the following under SORA:

> (h) All telephone numbers registered to the individual or routinely used by the individual.
>
> (i) All electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system. [MCL 28.727(1)(h) and (i).]

In challenging the constitutionality of these provisions in *Doe*, the plaintiffs argued that the phrase "routinely used"—found in both provisions—was unconstitutionally "vague and undefined." *Doe*, 101 F Supp 3d at 686. Quoting *Webster's Third New International Dictionary* (2002), the *Doe* court defined "routine" as "a standard practice," "the habitual method of performance of established procedures," and "of a commonplace or repetitious character." *Id*. at 688 (quotation marks omitted). The federal district court found that although the term "routinely" suggested that "some degree of normal repetition" was necessary, its meaning was not

"sufficiently concrete" to provide fair notice of the proscribed conduct or provide standards for law enforcement to administer the reporting requirements. *Id*. The court additionally found that the ambiguity could leave "registrants of ordinary intelligence unable to determine when the reporting requirements are triggered." *Id*. at 689-690. Accordingly, the court held that the requirements to report telephone numbers and e-mail addresses routinely used by the individual under MCL 28.727(1)(h) and (i) were unconstitutional and the provisions' "enforcement is enjoined." *Id*. at 713.

The explanation of the void-for-vagueness doctrine was enunciated by the United States Supreme Court in *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [Citations omitted; alteration in original.]

In this case, the phrase "routinely used," as found in MCL 28.727(1)(h) and (i), renders those statutory provisions vague. We find the analysis in *Doe*, 101 F Supp 3d at 688-713, persuasive. Given the dictionary definition of "routinely," as discussed in that case, *id*. at 688, it is evident that law enforcement officers and judges could hold different views of how often a telephone number or e-mail address must be used by an individual to be "routinely used" under the statute. We thus agree with the holding in *Doe* and find that the provisions under which defendant was convicted are unconstitutionally vague.[4]

Therefore, defendant's convictions for failing to comply with SORA are vacated.[5]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends, in both his appellate and Standard 4 brief,[6] that he was denied the effective assistance of counsel. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575,

[4] We note that the Senate has passed a bill that proposes amending SORA, including the provisions at issue, which would serve to eliminate the phrase "routinely used by the individual" from MCL 28.727(1)(h) and (i); those provisions would instead apply to telephone numbers and e-mail addresses registered to the individual. See 2015 SB 581. The proposed amendment would also add an additional requirement concerning the reporting of e-mail addresses routinely used by the individual and define the phrase "routinely used." See *id*.

[5] It is worth noting that the Attorney General does not contest the federal district court's pertinent holdings in *Doe* and that "the People waive argument on Solloway's SORA convictions and will not pursue enforcement of those claims on appeal."

[6] See Administrative Order No. 2004-6, Standard 4, 471 Mich c, cii (2004).

579; 640 NW2d 246 (2002). Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of law are reviewed de novo. *Id*. However, because defendant's motion for a new trial and request for a *Ginther*[7] hearing were denied, no factual record was created with respect to defendant's claim, and this Court's review is limited to mistakes apparent on the lower court record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).[8]

To prevail on a claim of ineffective assistance of counsel, a defendant bears a heavy burden to establish that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the outcome of the defendant's trial would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). Counsel's performance should be evaluated at the time of the alleged error without the benefit of hindsight. *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004). A defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Carbin*, 463 Mich at 600.

Defendant argues that defense counsel was ineffective for a laundry list of reasons, none of which has merit. Of significant importance, defendant provides no factual support and little, if any, legal support for his claims. Defendant simply argues that the stated actions fell below an objective standard of reasonable-

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

[8] Moreover, although defendant moved the trial court for a new trial and requested a *Ginther* hearing, he did not do so on the grounds that he argues in his Standard 4 brief.

ness and prejudiced his case. However, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant failed to meet his burden here with respect to all of his allegations. Therefore, this Court could find, for this reason alone, that defendant's claims of ineffective assistance of counsel fail. We will, nevertheless, briefly address defendant's primary allegations of error.

First, nothing in the record suggests that defense counsel failed to conduct a thorough investigation before trial, as claimed by defendant. Defense counsel presented three witnesses, including defendant, who testified in support of the defense theory. Defense counsel also appeared prepared to cross-examine each witness presented by the prosecution, and he attempted to attack MM's credibility and provide alternative explanations for the physical evidence that corroborated MM's account of the sexual assault.

Second, "[d]ecisions regarding . . . whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Thus, whether defense counsel should have (1) presented the victim's counselor as a witness, (2) consulted or produced an expert medical witness, or (3) presented "layman testimony" that would establish MM's mother had coerced MM into making false accusations against defendant in the past were matters of trial strategy. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant does not argue why it was necessary for defense counsel to procure an expert medical witness to testify at trial, nor does he explain

how the missing testimony of MM's counselor would have assisted his case or what the missing testimony would have been. Because defendant fails to explain what this missing testimony would have been or how it would have assisted his case, he has not demonstrated that defense counsel's failure to procure an expert medical witness or call MM's counselor as a witness contravened trial strategy and deprived him of a substantial defense. *Rockey*, 237 Mich App at 76; *Dixon*, 263 Mich App at 398.

Third, defense counsel did, in fact, pursue the theory at trial that MM was coerced into making allegations against defendant. Defense counsel attempted to elicit testimony from MM's mother and Justin Pangle (a tribal police officer), two lay witnesses who could have potentially supported his defense theory. Additionally, defense counsel presented Cynthia Lunk as a lay witness in support of this coercion theory. The fact that defense counsel's strategy was ultimately unsuccessful does not render him ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Moreover, defendant fails to identify on appeal any other lay witness whom defense counsel should have produced to testify further in this regard.

Lastly, defense counsel was not ineffective for failing to produce MM's medical records. The decision of what evidence to present is also presumed to be a matter of trial strategy. *Rockey*, 237 Mich App at 76. At trial, medical records from MM's examination were admitted through O'Brien's testimony. On appeal, defendant does not point to any other medical records that would have been relevant to the instant case. Ostensibly, defendant wanted defense counsel to produce MM's medical records relating to his alleged bowel movement problems; however, defendant fails to establish

that these medical records even exist. Therefore, defendant has not overcome the presumption of trial strategy with respect to the production of this evidence. See *id*.

Even if, for the sake of argument, this Court had found that counsel's performance was deficient for any of the aforementioned reasons, defendant is not entitled to relief unless he meets the burden of establishing prejudice. *Carbin*, 463 Mich at 600. Defendant is required to show that trial counsel's performance prejudiced him enough to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). None of the alleged errors by defense counsel would have affected the outcome of trial. MM, whom the trial court found to be "very clear and very credible," provided a detailed account of the sexual assault. Physical evidence was presented of MM's injuries, and defendant's semen was found on a blanket from MM's bed. The testimony of defendant's nephew that defendant committed a similar sexual assault against him when he was nine years old also supported the trial court's verdict in this case. Accordingly, in light of the overwhelming evidence against defendant, he is unable to establish a reasonable probability that the outcome of his trial would have been different but for the alleged errors. *Carbin*, 463 Mich at 600.

V. OTHER-ACTS EVIDENCE

Defendant next contends that the trial court erred by admitting irrelevant and prejudicial other-acts evidence. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found when the trial court's decision falls

outside the range of reasonable and principled outcomes. *People v Murphy (On Remand)*, 282 Mich App 571, 578; 766 NW2d 303 (2009). A preserved trial error in the admission of evidence does not constitute grounds for reversal "unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

Under MCL 768.27a, "in a criminal case in which the defendant is accused of committing a listed offense[9] against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." This allows the prosecution to offer evidence of another sexual offense committed by the defendant against a minor without having to justify its admission under MRE 404(b). *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007).

In this case, the prosecutor offered evidence of defendant's prior act against his nephew that took place when the nephew was nine years old. Defendant was convicted of CSC-IV, MCL 750.520e, as a result of this conduct which, when committed against a minor less than 13 years of age, is a "listed offense" for purposes of applying MCL 768.27a. See MCL 28.722(j) and (w)(*vi*). At trial, the nephew testified that defendant touched him inappropriately when he was nine years old and living with defendant. The nephew testified that defendant would come into his room in the middle of the night and wake him up and that he found defendant on top of him, rubbing against him in

[9] Violations of MCL 750.520b are included as "listed offenses." MCL 28.722(j) and (w)(*iv*).

"an up down motion, penis to penis." Finally, the nephew testified that defendant told him that he would beat him up if he ever told anyone.

This other-acts evidence was, as conceded by defendant, relevant to matters at trial. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under MCL 768.27a, evidence is relevant, and therefore admissible, when offered to show the defendant's propensity to commit the charged crime. *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012) (indicating that MCL 768.27a permits admission of evidence that would generally not be admitted under MRE 404(b)). Accordingly, in the present case, evidence of defendant's sexual offense against his nephew—who, notably, was related to defendant and nine years old at the time—"ma[de] it more probable that he committed the charged offense" against MM, who was also related to defendant and the same age as defendant's nephew at the time of the assault. *Id*. Moreover, the evidence was also relevant to MM's credibility. See, e.g., *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). The fact that defendant committed a similar crime against his nephew made it more probable that MM was telling the truth. See *id*. Therefore, the challenged evidence was relevant and had a high probative value in the instant case.

The crux of defendant's argument is that the evidence should have been excluded under MRE 403 because of its prejudicial nature. Relevant evidence that is admissible under MCL 768.27a may still be excluded under MRE 403. *Watkins*, 491 Mich at 481.

Evidence may be excluded under MRE 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference *in favor of* the evidence's probative value rather than its prejudicial effect." *Watkins*, 491 Mich at 487 (emphasis added). The *Watkins* Court provided an illustrative list of considerations for courts to assess in determining whether such evidence should be excluded:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id*. at 487-488.]

In this case, looking at "the dissimilarity between the other acts and the charged crime," *id*., the acts are not so dissimilar as to preclude admission of the other-acts evidence. In fact, defendant admits that his conduct against his nephew and the charged offense against MM were similar. He argues that the *similarity* between the acts is what makes the other-acts evidence so prejudicial. However, the similarities between the nephew's testimony and MM's testimony weigh in favor of admission. MM and defendant's nephew were close in age at the time defendant sexually assaulted them, and defendant was related to both of them. Defendant committed the offenses against MM and the nephew at a time when each of them was living with him. Finally, both the prior act and the charged offense involved defendant entering

the victim's bedroom in the middle of the night, climbing on top of him, and engaging in some sort of inappropriate touching. The fact that defendant did not engage in penetration with his nephew, but did with MM, does not make the acts so dissimilar that the probative value of the evidence was outweighed by the danger of unfair prejudice. Therefore, this factor weighs in favor of the evidence's admission.

Regarding the temporal proximity between the prior act and the charged offense, see *id*., the prior act concerning defendant's nephew occurred in 2001, approximately 12 years before the charged crime. While the acts occurred some years apart, given how similar the acts are, the temporal divide between their occurrences, standing alone, does not preclude the evidence's admission.

Third, looking at the infrequency of the other acts, see *id*., this factor did not preclude admission of the evidence. The nephew testified that defendant touched him inappropriately multiple times; it was not a one-time occurrence. Therefore, it cannot be said that the other acts occurred so infrequently as to support exclusion of the evidence.

Fourth, looking at the presence of intervening acts, see *id*., there do not appear to be any intervening acts that would weigh against the admissibility of the other-acts evidence.

Fifth, considering "the lack of reliability of the evidence supporting the occurrence of the other acts," *id*., this factor also did not preclude admission of the evidence. Defendant made no argument on appeal or in the trial court that his nephew was an unreliable witness. In fact, his nephew's reliability is supported by the fact that defendant pleaded guilty to CSC-IV

with respect to his conduct against the nephew. Therefore, this fifth factor does not weigh against the admissibility of the other-acts evidence.

Finally, considering "the lack of need for evidence beyond the complainant's and defendant's testimony," *id*., this factor did not preclude admission of the evidence. On one hand, this Court could find that there was not a need for testimony beyond that of MM and defendant in this case because of the physical evidence of sexual abuse that was presented. However, because of the nature of the crime, there were no eyewitnesses to support MM's allegations. And through cross-examinations and defendant's testimony, defendant attempted to provide alternative explanations for the existence of the physical evidence. For instance, it was defendant's position that MM's injuries resulted from his bowel movements and that defendant's semen appeared on the white blanket because he masturbated on it. Accordingly, because there were no eyewitnesses to corroborate MM's testimony and to refute defendant's theories in regard to the physical evidence of the crime, there was a need for evidence beyond MM's and defendant's testimony.

In light of the foregoing, the *Watkins* factors weigh heavily in favor of the admissibility of the other-acts evidence. Therefore, the trial court did not abuse its discretion by admitting the other-acts evidence.

VI. OBJECTIONS BY THE PROSECUTION

Defendant next argues that the trial court violated the rule of completeness and denied him the right to present a defense and the right to trial by an impartial judge due, in part, to the trial court's sustaining of objections by the prosecutor to certain cross-

examination questions of MM's mother and to certain questions asked on direct examination of Pangle.[10] We disagree.

In order to preserve an issue for appellate review, it must be raised before and considered by the trial court. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Defendant opposed the prosecutor's objections to the mother's and Pangle's testimony in the trial court. However, defendant failed to argue at that time whether, by sustaining the prosecutor's objections, the trial court denied defendant his constitutional right to present a defense and violated the rule of completeness. An objection on one ground is not sufficient to preserve an issue on a different ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Therefore, neither issue is preserved for appeal, and this Court's review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. To obtain relief, it must be found that (1) an error occurred, (2) the error was plain or obvious, and (3) the plain error affected the defendant's substantial rights. *Id*. The defendant bears the burden of establishing that his substantial rights were affected. *Id*. at 763. Additionally, to be entitled to reversal, the defendant must show that the "error resulted in the conviction of an actually innocent defendant" or that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. (quotation marks, brackets, and citation omitted).

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[10] Although defendant includes an ineffective assistance of counsel argument in his statement of questions presented under this issue, defendant completely fails to make an ineffective assistance argument in his analysis. Therefore, this argument is wholly abandoned, and we do not consider it. See *Kevorkian*, 248 Mich App at 389.

A criminal defendant has a due process right to present a defense under the state and federal Constitutions. *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002). But the right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). The defendant "must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Accordingly, the right to present a defense "extends only to relevant and admissible evidence." *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010), rev'd on other grounds 492 Mich 367 (2012).

In this case, defendant's argument that he was denied his right to present a defense is based on the trial court's preclusion of certain testimony from MM's mother and Pangle. As a prefatory matter, defendant does not make any argument concerning the admissibility of this evidence. Rather, he merely asserts that he was denied his constitutional right to present a defense by the trial court's preclusion of it. Because defendant fails to rationalize the basis of his argument, this Court could find it abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's argument fails on the merits in any event.

The mother was asked during cross-examination whether she had ever made allegations that the victim was molested before the charged offense occurred in July 2013. Before the mother answered, the prosecutor objected on the basis of hearsay, and the trial court sustained the objection. Under MRE 801(c), "hearsay" is defined 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." Hearsay evidence is inadmissible unless it falls within one of the exceptions listed in the Michigan Rules of Evidence. MRE 802; see also *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013).

The mother's testimony was not inadmissible hearsay because her testimony was not being offered for the truth of the matter asserted. The question posed by defendant to the mother asked her to testify about an out-of-court statement that she made, namely whether she had previously alleged that MM was molested before the charged offense occurred. Even though her previous allegation would be an "unsworn, out-of-court statement," it was not offered by defendant to prove the truth of the matter asserted. *Musser*, 494 Mich at 350. That is, defendant did not offer the mother's testimony to establish that MM was previously molested. Rather, it seems that defendant was offering the mother's testimony to attack MM's credibility by showing that similar, uncharged allegations had been made in the past. Preclusion of this testimony on the basis of hearsay grounds was, therefore, in error. However, defendant cannot show that the plain error in the preclusion of the mother's testimony affected his substantial rights.

Defendant argues that excluding this evidence deprived the trial court of all the "tools" it needed to assess the evidence. But, even though the mother was precluded from testifying to these previous allegations, *defendant* was permitted to testify about them. In particular, defendant testified that there were allegations made in the summer of 2012 that he molested MM, but he did not get charged as a result. Additionally, the mother testified that there was "ill will" between her and defendant. Therefore, defendant can-

not establish that the outcome of trial would have been different if the mother's testimony would have been admitted (i.e., plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763-764), and defendant is not entitled to relief on his claim that the trial court infringed his constitutional right to present a defense on this basis.

Pangle was asked on direct examination whether he received a telephone call from defendant in June 2013, and Pangle responded that he did. When Pangle was asked about the nature of the telephone call, the prosecutor objected on hearsay grounds. The trial court stated that the prosecutor's objection would be sustained unless defendant could establish a hearsay exception. Defendant could not establish an applicable exception, and this Court can think of none. Defendant's statements to Pangle constitute hearsay because they were made out of court and were being offered for the truth of the matter asserted. See MRE 801(c). That is, defendant was offering his statements to Pangle to establish that the victim's mother planned to make false allegations against him. Therefore, they were properly excluded as hearsay.

Defendant also argues that the trial court's failure to admit the mother's and Pangle's testimony violated the rule of completeness. However, defendant's reliance on the rule of completeness to justify relief is misplaced. Under the rule of completeness in MRE 106, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." This "rule of evidence [is] only . . . pertinent if defendant sought, but was denied, permission to have

a complete writing or recorded statement introduced." *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). Because the rule of completeness only pertains to the admissibility of writings or recorded statements, and defendant's argument concerns the actual testimony of the mother and Pangle, it is irrelevant here.

VII. PROSECUTORIAL MISCONDUCT

Defendant next asserts that the prosecution engaged in misconduct and violated the due process principle enunciated in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by falsifying evidence, to wit: a certified record of defendant's sex offender registration. We disagree.

"[A] defendant must contemporaneously object and request a curative instruction" to preserve an issue of misconduct for appellate review. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant failed to object when the prosecutor offered the certified record of his sex offender registration into evidence. Therefore, this issue is not preserved.

Generally, to prevail on a claim of prosecutorial misconduct, a defendant must show that he was denied a fair and impartial trial. *People v Bosca*, 310 Mich App 1, 26; 871 NW2d 307 (2015). In reviewing prosecutorial misconduct challenges, this Court views the alleged prosecutorial misconduct in context. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A defendant is entitled to a fair trial, not a perfect one. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008).

This Court reviews a defendant's constitutional due process claim de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). However, when,

as here, an issue is unpreserved, this Court's review is limited to plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764. To obtain relief generally requires a showing of prejudice—specifically, that the error affected the outcome of the lower court proceedings. *Id.*

In this case, defendant argues that the prosecutor offered a fraudulent record into evidence in violation of *Brady*. Defendant's reliance on *Brady*, however, is misplaced. The three components of a *Brady* violation are that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). In this case, defendant does not argue that the prosecutor suppressed evidence, but rather that it *falsified* evidence. Defendant does not suggest—and nothing in the record supports—that the record of defendant's sex offender registration was not available to defendant before trial. Accordingly, the rule from *Brady* is inapplicable here.

Considering defendant's argument under the general prosecutorial misconduct rules, we hold it has no merit. First, defendant's assertion that the certified record was falsified is unsupported. Nothing in the record suggests that the prosecutor or anyone else falsified the document or tampered with it in any way. Defendant's argument is merely an unsubstantiated allegation, which this Court finds insufficient to grant appellate relief. The fact that defendant's telephone number was contained on a separate document does not show that the certified record of his sex offender registration was fraudulent.

Second, defendant failed to demonstrate that the prosecutor admitted the certified record of his sex offender registration in bad faith. The prosecutor offered

the evidence through the testimony of Steve Grinnewald, Director of Public Safety for the City of Dowagiac, who was the individual who last verified defendant's registration. Grinnewald explained that the certified record admitted in evidence was requested through the Michigan Sex Offender Registry. His testimony established that defendant was provided with a copy of the certified record the last time he came into the department to verify his information. Defendant was told to look over the record and state if anything needed to be altered or added. Defendant did not change or add any information, and then Grinnewald watched defendant initial the document. On the basis of this testimony, it appears that the prosecutor offered evidence of defendant's certified record of his sex registration in good faith, and defendant has shown nothing to the contrary. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Therefore, defendant's claim of prosecutorial misconduct is wholly without merit, and he has not established plain error. *Carines*, 460 Mich at 763-764.[11]

We therefore vacate defendant's convictions for failing to comply with SORA and affirm in all other respects. We remand to the trial court to correct the presentence investigation report and the judgment of sentence. We do not retain jurisdiction.

SERVITTO, P.J., and GADOLA and O'BRIEN, JJ., concurred.

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[11] Defendant also includes in his questions presented an alternative argument that his right to the effective assistance of counsel was violated by defense counsel's failure to object to the falsified evidence. However, defendant fails to explain this argument in his analysis, and he cites no law pertaining to ineffective assistance of counsel under this issue. Accordingly, this Court finds his argument abandoned. *Kevorkian*, 248 Mich App at 389.

PEOPLE v DAVIS-CHRISTIAN

Docket No. 329924. Submitted June 14, 2016, at Lansing. Decided June 30, 2016, at 9:10 a.m.

Lewis C. Davis-Christian was charged in the Ingham Circuit Court with three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a, in connection with his sexual contact with the complainant. Before the alleged sexual contact, the complainant was in counseling to address issues related to an earlier, unrelated sexual assault in 2011 by a different person. During her forensic interview in this case, the complainant stated that defendant's sexual abuse of her had occurred like the "last time." Defendant moved to compel discovery of the complainant's counseling records, arguing that the records were likely to contain material necessary to his defense, including possible impeachment material. The court, Rosemarie E. Aquilina, J., granted defendant's motion. The prosecution objected, arguing that the records were privileged communications. The court rejected the prosecution's argument and concluded that it would review the counseling records in camera to determine whether the records contained information necessary for defendant to prepare a defense. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. Generally, discovery should be granted when the information sought is necessary to a fair trial and a proper preparation of a defense. However, a defendant in general has no right to discover privileged records without certain special procedures, including an in camera review of the privileged information by the trial court. In a criminal sexual assault prosecution, an in camera review serves the dual purposes of promoting the state's interests in protecting the privacy interests of the complainant and safeguarding the defendant's right to a fair trial.

2. *People v Stanaway*, 446 Mich 643 (1994), as reflected in MCR 6.201(C)(2), held that a trial court must conduct an in camera inspection of privileged records if a defendant demon-

strates a good-faith belief, grounded in specific articulable facts, that there is a reasonable probability that those records protected by a privilege are likely to contain material information necessary to the defendant's defense. The trial court must direct that the evidence necessary to the defense be made available to defense counsel if the court determines during the in camera inspection that the records reveal evidence necessary to the defense. The privileged information should not be disclosed when the party seeking disclosure is on a fishing expedition to see what information may be revealed.

3. In this case, the trial court abused its discretion because it failed to apply the correct law when it granted defendant's discovery motion. The trial court incorrectly stated that it would review the complainant's counseling records to determine whether they were relevant. Instead, before conducting an in camera review of the records, the trial court should have determined whether defendant demonstrated a good-faith belief, grounded in specific articulable facts, that the records contained material information necessary to his defense. Defendant's argument that the complainant's counseling records likely contained material necessary to his defense because the complainant stated that the alleged abuse occurred as it had the "last time" was only a generalized assertion that the record might contain useful evidence. Defendant's motion did not contain the required specificity. The complainant's statement referred to the 2011 assault as a reference point for the type of assault alleged in this case; there was no implication that the prior incident would undermine her allegations in this case, and defendant could not use that statement to fish for evidence to enhance his defense. Any information in the complainant's counseling records would not have been material to the defense because defendant already had access to witness statements indicating that the complainant had allegedly acted in a sexually aggressive manner on three separate occasions and because defendant had access to the police report and forensic interview in the 2011 case. In other words, the privileged records were not material to his defense because defendant could make a sound argument in his defense without access to those records.

Reversed and remanded.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings III*, Prosecuting Attorney, *Joseph B. Finnerty*, Appellate Divi-

sion Unit Chief, and *Kahla D. Crino*, Assistant Prosecuting Attorney, for the people.

Abood Law Firm (by *Andrew P. Abood*) for defendant.

Before: FORT HOOD, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

RONAYNE KRAUSE, J. The prosecution appeals by delayed leave granted[1] the trial court's interlocutory order granting defendant's motion for an in camera review of the complainant's counseling records. For the reasons discussed in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

Because of several alleged instances of criminal penetration and sexual contact between defendant and complainant, defendant was charged with three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a. Defendant alleged that during the complainant's forensic interview regarding these incidents, the complainant stated that defendant's alleged assault of her had happened like the "last time," referring to a prior instance of sexual abuse perpetrated on the complainant by a nonparty in 2011.[2] Defendant asserted that complainant had attended counseling after the 2011 incident and moved to compel discovery of complain-

[1] *People v Davis-Christian*, unpublished order of the Court of Appeals, entered January 19, 2016 (Docket No. 329924).

[2] The defendant in the 2011 abuse case entered a guilty plea to second-degree criminal sexual conduct.

ant's counseling records, arguing that the records were likely to contain material necessary to his defense, including possible impeachment material. The trial court granted defendant's motion; the prosecution objected, arguing that the counseling records were privileged communications and that the complainant had not waived the privilege. The prosecution further argued that defendant had failed to establish a reasonable probability grounded in fact that the counseling records were likely to contain information necessary to prepare a defense. The prosecution agreed to the use of a protective order to turn over the police reports and corresponding forensic interviews associated with the prior sexual abuse. With respect to the counseling records, the trial court ruled that it would review them in camera because defendant's freedom was at stake. The prosecution filed an application for interlocutory appeal, which this Court granted; the trial court stayed implementation of the order pending the outcome of this appeal.

II. ANALYSIS

A trial court's decision to conduct or deny an in camera review of records in a criminal prosecution is reviewed for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014).

"Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense." *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Nevertheless, defendants generally have no right to discover privileged records

absent certain special procedures, such as an in camera review of the privileged information conducted by the trial court. MCR 6.201(C)(1) and (2). In a criminal sexual conduct prosecution, an in camera review "promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial." *People v Hackett*, 421 Mich 338, 350; 365 NW2d 120 (1984).

Stanaway explained the proper procedure a court must use to determine whether to grant an in camera review of privileged material:

> [W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant. [*Stanaway*, 446 Mich at 649-650.]

However, the *Stanaway* Court explained that "disclosure should not occur when the record reflects that the party seeking disclosure is on 'a fishing expedition to see what may turn up.' " *Id*. at 680, quoting *Bowman Dairy Co v United States*, 341 US 214, 221; 71 S Ct 675; 95 L Ed 879 (1951). A defendant "is fishing" for information when he or she relies on generalized assertions and fails to state any "specific articulable fact" that indicates the privileged records are needed to prepare a defense. *Id*. at 681. The Michigan Supreme Court amended MCR 6.201(C) in 1996 to reflect the rule announced in *Stanaway*. MCR 6.201, 451 Mich cx, cxi (staff comment).

MCR 6.201(C)(2) provides in part as follows:

> If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable

> probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.
>
> (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.

The trial court in this case abused its discretion because it failed to apply the law as articulated in *Stanaway* and MCR 6.201(C)(2). In fact, the trial court explicitly disregarded *Stanaway* and articulated its own standard:

> [B]ut as to the counseling records, yeah, I'm going to review them . . . *I don't care what Stanaway says, what you want to point to or don't point to*. I don't know if this is relevant or not, but, quite frankly, the relevance comes in with the freedom of defendant or his incarceration. That's where the relevance is, because if there's something in there that puts him behind bars or frees him, there's the relevance, so I don't talk to anybody. I'm not allowed to. I'm going to read it and say yea or nay. It's very simple. [Emphasis added.]

The trial court's articulated standard would allow an in camera review of most—if not all—of the counseling records of alleged sexual assault victims. However, *Stanaway* rejected that type of sweeping discovery, keeping in mind the state's interest in protecting the victim's privacy rights. Addressing defendant

Stanaway's assertion that the records were needed in an attempt to discover any prior inconsistent statement or rebuttal evidence, the Court responded: "This is no more than a generalized assertion that the counseling records may contain evidence useful for impeachment on cross-examination. *This need might exist in every case involving an accusation of criminal sexual conduct.*" *Stanaway*, 446 Mich at 681 (emphasis added).

The parties do not dispute that the complainant's counseling records are privileged and that the need for an in camera review is controlled by *Stanaway* and MCR 6.201(C). *Stanaway* was a consolidated appeal that involved two defendants, Stanley Caruso and Brian Stanaway.[3] In this case, the parties each rely on the factual circumstances and holding related to one of the defendants in *Stanaway* to the exclusion of the other; the prosecution turns to defendant Stanaway, while defendant turns to defendant Caruso.

The Supreme Court concluded that Stanaway's request for privileged counseling records was properly denied because his request fell "short of the specific justification necessary to overcome the privilege." *Id*. at 681-682. Stanaway had asserted that he needed access to privileged records to "unearth any prior inconsistent statements made by the complainant or any other relevant rebuttal evidence." *Id*. at 681. The Supreme Court determined that Stanaway was merely "fishing" because he had failed to state any "specific articulable fact" to indicate that the requested information was necessary for him to prepare a defense. *Id*.

[3] See *People v Caruso*, 444 Mich 876 (1993), and *People v Stanaway*, 444 Mich 876 (1993) (ordering that the cases be argued and submitted together).

Defendant asserts that this case is analogous to the Supreme Court's ruling with respect to defendant Caruso. The Court described the relevant facts regarding Caruso as follows:

> Defendant Stanley Caruso is charged with second-degree criminal sexual conduct. . . . The allegation surfaced when the child wrote a note to her mother's live-in boyfriend about the alleged incident.
>
> Before trial, defense counsel moved to obtain the complainant's counseling records, asserting that there was good reason to believe the complainant had been the victim of sexual abuse by her biological father. It was further suggested that this may not have been the first note written to the live-in boyfriend of a sexual nature. It was believed by the defense that the child had written at least one prior note in which she suggested she wanted to have sex with him in the car. [*Id*. at 654-655.]

The Court concluded:

> Defendant Caruso may have demonstrated a realistic and substantial possibility that the material he requested might contain information necessary to his defense. The defendant argued in his motion for in camera discovery that the circumstances in which the accusation was made were relevant to the truth or falsity of the claim. The defense theory is that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation against her uncle. The defendant asserted a good-faith belief in his motion that the complainant suffered sexual abuse by her biological father before this allegation of abuse, the nonresolution of which produced a false accusation, and factual support for some sexually aggressive behavior, namely, writing a letter to her mother's live-in boyfriend inviting him to have sex with her in his car. The in camera review ordered by the trial judge may have been proper under the facts of this case. [*Id*. at 682-683.]

In this case, and in light of her comment that the alleged abuse occurred as it had the "last time," defendant argued that the complainant's counseling records likely contained material necessary to his defense. These allegations are merely generalized assertions that the record might contain useful evidence, i.e., they are of the sort that "might exist in every case involving an accusation of criminal sexual conduct." *Id*. at 681. The complainant's statement referred to the 2011 assault as a reference point for the type of assault alleged in this case; the statement did not hint or imply that the prior incident would undermine the present allegations. Defendant is attempting to use the complainant's statement as a way to access privileged information to "fish" for evidence that may enhance his defense strategy.

Defendant attempts to analogize Caruso's theory of defense to his own. Caruso theorized that the complainant was a "troubled, maladjusted child whose past trauma has caused her to make a false accusation . . . ." *Id*. at 682. With regard to Caruso, the Court concluded that evidence related to the complainant's counseling records might provide "factual support for some sexually aggressive behavior" on the part of the complainant that was related to the discovery of the allegation against Caruso. *Id*. Similarly, in this case defendant asserts that the prosecution provided statements from three witnesses attesting to various occasions when the complainant engaged in sexually aggressive behavior. However, defendant has not demonstrated how complainant's counseling records would be "necessary to the defense." MCR 6.201(C)(2). Unlike defendant Caruso, who arguably articulated a need to ascertain a specific piece of evidence to prove a

fact material to his defense,[4] defendant's assertion of need merely voices a hope of corroborating evidence, untethered to any articulable facts. Defendant has access to the police report and forensic interview associated with the 2011 case, although the trial court has not yet made any rulings regarding the admissibility of that information. Coupled with the alleged witness statements, those documents give defendant the information necessary to properly prepare a defense. As long as defendant is able to make a sound argument in his defense without having access to complainant's privileged counseling records, any information in those records would not be material to his defense.

Defendant also asserts that he has "a good faith reason to believe that, in [the complainant's] prior sexual assault, she attributed her exposure to pornography to the prior defendant," which he argues is inconsistent with her alleged assertion in the case at hand that defendant exposed her to pornography. However, the complainant testified at the preliminary examination that defendant showed her Internet pornography, not that defendant was the first person to show her pornography or that she had never seen it before. Accordingly, the premise underlying this argument is invalid.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and GADOLA, J., concurred with RONAYNE KRAUSE, J.

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[4] The Court only held that the in camera review ordered by the trial judge on the basis of Caruso's request may have been proper. *Stanaway*, 446 Mich at 683.

TYLER v TYLER

Docket No. 326766. Submitted June 10, 2016, at Lansing. Decided June 30, 2016, at 9:15 a.m.

Johnnie J. Tyler, II, filed a complaint for divorce against Jamie L. Tyler in the Livingston Circuit Court. In his complaint, plaintiff stated that the parties had no minor children "from this current marriage." Defendant did not file an answer. Instead, defendant filed her own complaint for divorce. She stated that the parties had minor children from their previous marriage to each other. Plaintiff filed for a default judgment. The court, Theresa M. Brennan, J., granted plaintiff's motion for default. The court later set aside the default judgment and dismissed plaintiff's case without prejudice. Plaintiff appealed.

The Court of Appeals *held*:

MCR 3.206(5)(b) requires a party filing a complaint for divorce to state whether the parties have minor children or minor children born during the marriage. The language of the court rule clearly creates two categories of children to be identified in a complaint for divorce. First, a party filing for divorce must state whether either of the parties has minor children even if the children were not born of the marriage subject to the divorce. Second, a party filing for divorce must state whether the parties have any minor children born during the marriage. In his complaint, plaintiff did not—as required by MCR 3.206(5)(b)—acknowledge the parties' minor children from their first marriage to each other. Therefore, the trial court had the authority under MCR 2.504(B)(1) to set aside its default judgment in plaintiff's favor and dismiss plaintiff's complaint.

Affirmed.

FAMILY LAW — DIVORCE — MINOR CHILDREN — BORN TO PARTIES IN ANOTHER MARRIAGE.

A party filing for divorce must declare whether either party to the divorce has minor children even though the minor children may not have been born during the marriage that is the subject of the divorce.

Neal D. Nielsen for plaintiff.

Gentry Nalley, PLLC (by *Kevin S. Gentry* and *Heather KS Nalley*), for defendant.

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

PER CURIAM. Plaintiff appeals by right the trial court's order dismissing without prejudice his complaint for divorce. We affirm.

In his complaint for divorce, plaintiff alleged that the parties were married in April 2014 and that there were no minor children "from this current marriage." Plaintiff acknowledged that an action involving these parties had been previously filed in the court, but indicated that the previous action was no longer pending. There is no information in the record before us regarding what this previous action entailed, but plaintiff contends on appeal that the parties had been previously married to each other (from 2005 to 2010), that the parties had children together as a product of the first marriage, and that the previous action was a divorce proceeding.

Defendant never filed a response to the complaint; however, according to the trial court, she separately filed a complaint for divorce, alleging that there were minor children. Plaintiff subsequently filed a request for a default and an accompanying affidavit, and a default was entered. Thereafter, the trial court sua sponte set aside the default and dismissed the case. The entirety of the court's dismissal order reads as follows:

> This case was filed February 25, 2015. It came to the attention of the Court that there are minor children although the complaint alleges there are not. The defendant, Jamie Tyler, subsequently filed a complaint for

> divorce properly alleging that there are minor children on March 4, 2015. The plaintiff filed a default in this case on March 26, 2015.
>
> IT IS ORDERED that the default is set aside and this case is dismissed without prejudice.

Plaintiff claims that the trial court improperly dismissed his divorce action because he was under no obligation to state in his complaint that there were minor children from the parties' first marriage. "A trial court's decision to dismiss an action is reviewed for an abuse of discretion." *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

An examination of the applicable court rule reveals the error of plaintiff's argument. MCR 3.206(A) states:

> (5) In an action for divorce, separate maintenance, annulment of marriage, or affirmation of marriage, regardless of the contentions of the parties with respect to the existence or validity of the marriage, the complaint also must state
>
> * * *
>
> (b) whether there are minor children of the parties or minor children born during the marriage . . . .

The two categories—"minor children of the parties" and "minor children born during the marriage"—are separated by the disjunctive "or" and establish overlapping but not coextensive domains. The rule clearly includes children that do not fall into the category of "minor children born during the marriage," such as

children of the parties born before the marriage and children adopted by the parties.

The trial court has express authority to dismiss a complaint. MCR 2.504(B)(1) provides, "If a party fails to comply with [the court] rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." Because plaintiff failed to comply with the court rule, the trial court properly dismissed his complaint.

We affirm.

MARKEY, P.J., and OWENS and BOONSTRA, JJ., concurred.

SCUGOZA v METROPOLITAN DIRECT PROPERTY AND CASUALTY INSURANCE COMPANY

Docket No. 327076. Submitted June 7, 2016, at Grand Rapids. Decided July 5, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 946.

Karen Scugoza brought an action under the no-fault act, MCL 500.3101 *et seq*., in the Branch Circuit Court against Metropolitan Direct Property and Casualty Insurance Company for refusing to pay the correct and full amount of no-fault motor vehicle insurance survivors' loss benefits that she claimed entitlement to receive as the surviving spouse of Nicholas Scugoza, who died as a result of injuries he suffered in a car accident. Plaintiff moved for partial summary disposition, arguing that there were no genuine issues of material fact and that, as a matter of law, survivors' loss benefits under MCL 500.3108(1) included a calculation of old-age Social Security benefits a deceased spouse had been receiving before his or her death. The court, Patrick W. O'Grady, J., examined the plain language of the statute and agreed with plaintiff, granting her motion for partial summary disposition. Defendant applied to appeal by leave, and the Court of Appeals granted the application.

The Court of Appeals *held*:

The sole dispute in this case was the meaning of the phrase "contributions of tangible things of economic value" as used in MCL 500.3108(1) and whether the plain meaning of the phrase encompasses old-age Social Security benefits. When language is unambiguous, the interpretation begins and ends with the words of the statute. Because none of the terms is defined in the statute, it was appropriate to consult a dictionary. Using dictionary definitions, the phrase "tangible things of economic value" refers to something that is capable of being valued or having its worth ascertained. The old-age Social Security benefits at issue in this case fit within the plain language of the statute because they were capable of being valued and had a rate of worth. The Michigan Supreme Court had already interpreted the phrase in another context and determined that the Legislature intended a broad understanding of the phrase rather than limiting it to wages and salary. The Supreme Court determined that included

within the phrase were things such as hospital and medical insurance benefits, disability coverage, pensions, investment income, annuity income, and other benefits. Subsequent panels of the Court of Appeals concluded that loans, child support payments, and trust funds were all contributions of tangible things of economic value. Because old-age Social Security benefits are intended to function as a means of financial support or income for recipients, they constitute tangible things of economic value. Defendant's reliance on the legislative history was problematic for two reasons. First, legislative history is a poor indicator of legislative intent and, therefore, an unpersuasive tool of statutory construction. Second, the Supreme Court already considered the legislative history and determined that it supports a broad interpretation, which favors including old-age Social Security benefits. Finally, defendant argued that caselaw treats old-age Social Security benefits differently from private-employment benefits, but the case it cited for that proposition referred to MCL 500.3109, not MCL 500.3108. MCL 500.3109 deals with setoffs that cannot be determined until one has determined what benefits are payable under § 3108; to calculate the setoffs in § 3109 before completing the calculations in § 3108 is error. Therefore, whether old-age Social Security benefits are compensable under MCL 500.3108 must be decided without regard to MCL 500.3109.

Affirmed.

INSURANCE — NO-FAULT — SURVIVORS' BENEFITS — CONTRIBUTIONS TO SUPPORT — OLD-AGE SOCIAL SECURITY BENEFITS.

Old-age Social Security benefits payable in accordance with 42 USC 402 are "tangible things of economic value" as that term is used in MCL 500.3108(1) and, therefore, can be considered in the calculation of survivors' loss benefits under the no-fault act, MCL 500.3101 *et seq*.

Rocchio Law Offices (by *Patrick K. Rocchio*) for plaintiff.

The Rossi Law Firm PLLC (by *Monica Hoeft Rossi* and *Chrisdon F. Rossi*) for defendant.

Before: STEPHENS, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM. At issue in this case is whether old-age Social Security benefits payable in accordance with 42 USC 402 are "tangible things of economic value" as that term is used in MCL 500.3108(1) and, therefore, can be considered in a calculation of survivors' loss benefits under the no-fault act, MCL 500.3101 *et seq*. The trial court determined that old-age Social Security benefits were, under the plain language of MCL 500.3108(1), "tangible things of economic value," and granted plaintiff partial summary disposition under MCR 2.116(C)(10). Defendant appeals that ruling by leave granted. Because we conclude that the plain language of MCL 500.3108(1) encompasses old-age Social Security benefits, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The pertinent facts in this case are undisputed. Plaintiff's husband, Nicholas Scugoza, died on September 20, 2013, as a result of injuries he suffered in a car accident in Branch County. At the time he died, Nicholas was entitled to a gross sum of $1,611.90 per month in old-age Social Security benefits.

Plaintiff applied to defendant, Nicholas's insurer, for survivors' loss benefits under the no-fault act, MCL 500.3101 *et seq*. On September 22, 2014, plaintiff sued defendant for refusing to pay the "correct and full amount of no-fault motor vehicle insurance [survivors'] loss benefits for which she is eligible and entitled to receive as the surviving spouse of Nicholas Scugoza." On January 14, 2015, plaintiff moved for partial summary disposition, arguing that there were no genuine issues of material fact and that, as a matter of law, survivors' loss benefits under MCL 500.3108(1)[1] in-

[1] MCL 500.3108(1) provides, in pertinent part:

cluded a calculation of old-age Social Security benefits a deceased spouse had been receiving before his or her death. Plaintiff argued that old-age Social Security benefits were akin to a pension and were therefore a "tangible thing of economic value" under MCL 500.3108(1).

In a written opinion, the trial court examined the plain language of MCL 500.3108(1) to determine whether the statute applied to old-age Social Security benefits. The court reasoned that MCL 500.3108(1), which broadly refers to "contributions of tangible things of economic value" in describing survivors' loss benefits, encompassed old-age Social Security benefits. Accordingly, the trial court granted plaintiff's motion for partial summary disposition.

II. ANALYSIS

We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper 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*. Questions of statutory interpretation are questions of law, which this Court reviews de novo. *Shorecrest Lanes & Lounge, Inc v Liquor Control Comm*, 252 Mich App 456, 460; 652 NW2d 493 (2002).

"In general, the no-fault act is designed to achieve

> Except as provided in subsection (2), personal protection insurance benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death . . . .

the expeditious compensation of damages resulting from motor vehicle accidents and to minimize administrative delays and factual disputes." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 685; 828 NW2d 400 (2012). The no-fault act provides that "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of" the no-fault act. MCL 500.3105(1). As noted earlier, the no-fault act includes personal protection insurance (PIP) benefits for survivors' loss, and provides, in pertinent part:

> [P]ersonal protection insurance benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of *contributions of tangible things of economic value*, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding $20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death. [MCL 500.3108(1) (emphasis added).]

In this case, there is no dispute that plaintiff was a dependent of Nicholas under the no-fault act. See MCL 500.3110(1)(a). There is no dispute that Nicholas's death arose "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," MCL 500.3105(1), and that his death constituted an accidental bodily injury under the no-fault act, MCL 500.3105(3). There is also no dispute that defendant was Nicholas's insurer. Therefore, defendant is obligated under the no-fault act to plaintiff for "loss, after

the date on which the deceased died, of contributions of tangible things of economic value" that plaintiff "at the time of the deceased's death would have received for support during [her] dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death," i.e., survivors' loss benefits. MCL 500.3108(1).

The dispute in this case concerns the meaning of the phrase "contributions of tangible things of economic value" and whether the plain meaning of the phrase encompasses the old-age Social Security benefits Nicholas had been receiving.

> As with any statutory interpretation, [a reviewing court's] goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. When the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. [*Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 255-256; 865 NW2d 908 (2015) (citations omitted).]

In short, when the language is unambiguous, statutory interpretation begins and ends with the words of the statute. See *id*.

None of the terms in the phrase "contributions of tangible things of economic value" are defined in the statute; therefore, we may consult a dictionary in ascertaining the plain meaning of the terms. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The phrase "contributions of tangible things of economic value" has no inherent limitation on the type of contributions received for support other than: (1) the contribution must be tangible and (2) the contribution must have economic value. The word "tangible" has been defined to mean "capable of being appraised at an

actual or approximate value . . . ." *Merriam Webster's Collegiate Dictionary* (11th ed). Meanwhile, "economic value"—sometimes referred to as "exchange value"—means "[t]he rate of worth set on property . . . ." *Black's Law Dictionary* (10th ed). Using dictionary definitions, it is apparent that the phrase "tangible things of economic value" refers to *something* that is capable of being valued or having its worth ascertained.

Moreover, it is equally apparent that the old-age Social Security benefits at issue in this case fit within the plain language of the statute. Indeed, the benefits are capable of being valued and do in fact have a "rate of worth." The benefits in this case were distributed on a monthly basis at a predetermined monthly value, as revealed by letters sent to Nicholas by the Social Security Administration. "The purpose of the federal old age benefits of the Social Security Act is *to provide funds* through contributions by employer and employee for the *decent support* of elderly workmen who have ceased to labor." *Social Security Bd v Nierotko*, 327 US 358, 364; 66 S Ct 637; 90 L Ed 718 (1946) (emphasis added). Our courts, too, have characterized old-age Social Security benefits as a type of income, albeit a type of income not received from employment. See *Jarosz v DAIIE*, 418 Mich 565, 585; 345 NW2d 563 (1984). In other words, it is apparent that old-age Social Security benefits are designed as a tangible means of financial support. And, according to the pleadings in this case, the old-age Social Security benefits were a "tangible thing[] of economic value" that Nicholas used as support for his dependent, i.e., his wife, plaintiff Karen Scugoza.

Although it did so in a different context, our Supreme Court has already had occasion to interpret the phrase "contributions of tangible things of economic

value" under MCL 500.3108(1). See *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538; 302 NW2d 537 (1981). Reviewing the plain language of the statute, the Court in *Miller* concluded that the Legislature intended for a broad understanding of the phrase "contributions of tangible things of economic value":

> The language of § 3108 . . . establishes that it is the legislative intention that the calculation of "contributions of tangible things of economic value" *should include consideration of all demonstrable contributions* that would have been made to the dependents by the deceased but for his death . . . . [*Id*. at 550 (emphasis added).]

The Court rejected an argument that "contributions of tangible things of economic value" were limited to wages and salary, and gave a nonexhaustive list of potential "tangible things of economic value":

> In today's complex economic system, the "tangible things of economic value" which many persons contribute to the support of their dependents include hospital and medical insurance benefits, disability coverage, pensions, investment income, annuity income and other benefits. Had it been the intent of the Legislature to limit survivors' benefits to a sum equal to what eligible dependents would have received from wages and salary alone, it could be expected to have said so. It chose instead the far broader category of "contributions of tangible things of economic value" which, on its face, suggests the inclusion of benefits derived for family support from other and different sources. [*Id*. at 557.]

Following *Miller*, this Court has applied the broad construction of "contributions of tangible things of economic value," concluding that the phrase encompassed loans an unemployed deceased used to sustain herself and her children, *McCollum v Community Serv Ins Co*, 137 Mich App 805, 811; 359 NW2d 215 (1984), child support payments a deceased was obligated to

make, *Fredericksen v State Farm Mut Auto Ins Co*, 141 Mich App 235, 238-239; 366 NW2d 256 (1985), and funds received from a trust of which the deceased was a beneficiary, *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 180-181; 617 NW2d 735 (2000).

We hold that the Supreme Court's interpretation of MCL 500.3108 in *Miller* supports the conclusion that old-age Social Security benefits are to be included in the calculation of survivors' loss benefits under the no-fault act. As noted, old-age Social Security benefits are intended to function as a means of financial support or income for recipients. Therefore, as with "wage or salary income[, which] is almost always a significant factor in calculating the actual financial loss incurred by survivors," Nicholas's old-age Social Security benefits were " 'tangible things of economic value' available for dependents' support . . . ." *Miller*, 410 Mich at 561. Old-age Social Security benefits end "the month preceding the month in which" the recipient dies. 42 USC 402(a). Therefore, Nicholas's old-age Social Security benefits were "tangible things of economic value that" were "lost" to plaintiff "by reason of [Nicholas]'s death." *Miller*, 410 Mich at 561. As the Supreme Court stated, "[T]he Legislature intended that the measurement of [MCL 500.]3108 survivors' loss benefits should include the value of tangible things other than, and in addition to, wages and salary." *Id*. If the Legislature had intended to exclude governmental benefits from survivors' loss benefits under MCL 500.3108, "it could be expected to have said so." *Id*. at 557. Accordingly, we conclude that Nicholas's old-age Social Security benefits are included within plaintiff's survivors' loss benefits under MCL 500.3108(1).

Defendant argues that the legislative history of MCL 500.3108(1) demonstrates that old-age Social

Security benefits are not compensable under MCL 500.3108(1). Defendant argues that the legislative history of MCL 500.3108 evidences an intent to make survivors' loss benefits comparable to compensation available for economic losses under the wrongful death act, MCL 600.2922. In a conclusory and somewhat circular fashion, defendant contends that there is no authority for the proposition that old-age Social Security benefits are compensable in a wrongful death action; hence, there is no authority for the idea that old-age Social Security benefits are compensable as part of a survivors' loss claim under MCL 500.3108(1).

At the outset, we note our Supreme Court's distaste for legislative history, describing it as "a feeble indicator of legislative intent [that] is therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Tech, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). Moreover, we conclude that the legislative history of MCL 500.3108 supports our conclusion. The Court in *Miller* examined the legislative history of MCL 500.3108 and concluded that the Legislature intended "that survivors' loss benefits should at least roughly correspond to *economic loss* damages recoverable under" the wrongful death act. *Miller*, 410 Mich at 560, citing MCL 600.2922. The wrongful death act, concluded the Court in *Miller*, allows for the recovery of economic losses, which include, "at a minimum, the loss of financial support from the deceased," and which "focus upon the financial loss actually incurred by the survivors as a result of their decedent's death." *Id*. at 560-561. The amount of financial loss actually incurred, reasoned the Court, included the decedent's salary, as well as "the myriad employment-related fringe benefits and other 'tangible things of economic value' available for dependents' support described hereinbefore which are not always reflected in

wage or salary . . . ." *Id*. at 561. In other words, recovery for economic losses in wrongful death actions includes, as does recovery for survivors' loss benefits under MCL 500.3108(1), a broad category of "tangible things of economic value." Hence, we do not interpret any restrictions on what is compensable under MCL 500.3108(1) as survivors' loss benefits—at least not with regard to what is sought in the instant case—from any references to wrongful death actions in the legislative history of MCL 500.3108. Moreover, contrary to defendant's contentions, this Court has concluded that Social Security benefits are compensable in a wrongful death action. See *Hoffman v Rengo Oil Co, Inc*, 20 Mich App 575, 577; 174 NW2d 155 (1969) (holding that a verdict in a wrongful death action was not excessive when the deceased's income was determined according to, among other things, the deceased's monthly Social Security benefits).

Defendant also argues that old-age Social Security benefits should not be included as survivors' loss benefits because they are not employment related; rather, they are government benefits. This argument fails. First, there is no language in MCL 500.3108(1) indicating that the Legislature intended to limit survivors' loss benefits to benefits provided only by employers, and this Court "cannot and should not add requirements to the statute that are not found there." *Empire Iron Mining Partnership v Orhanen*, 211 Mich App 130, 135; 535 NW2d 228 (1995). Second, the Supreme Court stated that survivors' loss benefits include "the myriad employment-related fringe benefits *and other 'tangible things of economic value'* available for dependents' support . . . ." *Miller*, 410 Mich at 561 (emphasis added). Indeed, this Court has held that even things of tangible value without any relation whatsoever to employment

may be compensable under MCL 500.3108(1). See *Gauntlett*, 242 Mich App at 181; *McCollum*, 137 Mich App at 811-812.

Defendant cites *Jarosz*, 418 Mich at 580-581, a case that dealt with old-age Social Security benefits in the context of MCL 500.3109, and argues that our caselaw treats old-age Social Security benefits differently from private employment benefits. Defendant's citation of *Jarosz* is unavailing because that case did not discuss MCL 500.3108 or "tangible things of economic value." Moreover, the citation to *Jarosz* appears to implicate setoffs under MCL 500.3109, which is an entirely different matter that is not before this Court in the instant case. As the trial court aptly noted, our Supreme Court has directed that in calculating survivors' loss benefits,[2] "one first determines what personal protection benefits are payable"; those benefits cannot exceed the statutory maximum set forth in MCL 500.3108(1). *Wood v Auto-Owners Ins Co*, 469 Mich 401, 405; 668 NW2d 353 (2003). This determination under MCL 500.3108 must occur *before* determining the amount, if any, by which survivors' loss benefits should be offset under MCL 500.3109, and "applying the setoff provision before completing the MCL 500.3108 analysis" constitutes error. *Wood*, 469 Mich at 406. Therefore, this Court's determination of whether old-age Social Security benefits are compensable under MCL 500.3108 must be made without regard to MCL 500.3109, and we do not weigh in on any matters pertaining to setoffs, or whether a setoff would even be appropriate in this case. *Id*.

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[2] Survivors' loss benefits include economic loss, which is at issue in this case, as well as replacement services, which are not at issue in this appeal. MCL 500.3108(1); *Wood v Auto-Owners Ins*, 469 Mich 401, 404; 668 NW2d 353 (2003).

Lastly, given our conclusion that the plain language of MCL 500.3108(1) encompasses old-age Social Security benefits, we decline plaintiff's invitation to determine whether old-age Social Security benefits are the equivalent of a "pension."[3]

Affirmed.

STEPHENS, P.J., and BECKERING and GLEICHER, JJ., concurred.

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[3] Citing an article that has not been supplied to this Court, plaintiff argues that old-age Social Security benefits are a type of pension. According to plaintiff, because our Supreme Court in *Miller*, 410 Mich at 561, used the word "pensions" in describing "tangible things of economic value," *Miller* conclusively resolves this case. We need not entertain this argument because of our conclusion that the plain language of MCL 500.3108(1) is broad enough to include old-age Social Security benefits regardless of plaintiff's contentions that such benefits constitute a pension.

In re APPLICATION OF CONSUMERS ENERGY TO INCREASE ELECTRIC RATES (ON REMAND)

Docket No. 317434. Submitted February 19, 2016, at Lansing. Decided July 5, 2016, at 9:05 a.m.

Consumers Energy filed an application in the Michigan Public Service Commission (PSC), requesting rate relief to cover the costs associated with its ongoing monetary investments in the advanced metering infrastructure (AMI) program. In 2013, Consumers and the Attorney General entered into a settlement agreement regarding the requested annual rate increase, and the Attorney General reserved for future resolution two issues: a request to the PSC to suspend Consumers' AMI program and an objection to the amount of the opt-out tariff charged by Consumers in the event a customer did not participate in that program. The Attorney General later challenged those reserved issues in the PSC. In June 2013, the PSC issued an order approving Consumers' continuation of the AMI program and approving Consumers' opt-out tariffs. The Attorney General appealed the PSC's order regarding the AMI program, arguing that the record lacked competent, material, and substantial evidence to support a finding by the PSC that the benefit of the program outweighed its costs. The Court of Appeals consolidated that case with a separate appeal (Docket No. 317456) in which certain Consumers customers challenged the opt-out tariffs. In an unpublished opinion per curiam, issued April 30, 2015 (Docket Nos. 317434 and 317456), the Court of Appeals, O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ., affirmed the PSC rate increase for the AMI program in Docket No. 317434, and because the PSC gave only a cursory analysis of the opt-out tariffs during the lower court proceeding, in Docket No. 317456 it remanded the case for a contested case hearing on that issue. The Attorney General moved for reconsideration of the opinion, which the Court of Appeals denied (O'CONNELL, P.J., would have granted the motion). The Attorney General then sought leave to appeal in Docket No. 317434. In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the Court of Appeals for consideration of the merits of the Attorney General's arguments in that appeal. *In re Application of Consumers Energy to Increase Electric Rates*, 498 Mich 967 (2016).

On remand, the Court of Appeals *held*:

1. MCL 652.25 provides, in part, that all rates prescribed by the PSC must be lawful and reasonable. A PSC order is unlawful when the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An order is unreasonable if it is not supported by the evidence.

2. Const 1963, art 6, § 28 provides that a final PSC order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. An appellate court must give due deference to the PSC's administrative expertise and will not substitute its judgment for that of the PSC. Matters of credibility and the weight attributed to expert testimony are for the PSC to decide, not an appellate court. In this case, the PSC did not err by approving Consumers' AMI program and the installation of the meters. A Consumers witness provided testimony that the benefits of the program outweighed its costs, specifically that the program had an estimated 20-year net present value of $42 million. Accordingly, the PSC order approving the AMI program was supported by competent, material, and substantial evidence on the whole record, and the rate was lawful and reasonable. The PSC was entitled to rely on the testimony of the Consumers witness rather than the testimony of other witnesses who reached different conclusions.

3. While the 2013 settlement agreement between the Attorney General and Consumers did not resolve two issues—a request to the PSC to suspend Consumers' AMI program and an objection to the amount of the opt-out tariff—the Attorney General only raised the AMI program issue in the initial appeal in the Court of Appeals; it did not challenge the opt-out tariff in Docket No. 317434. The Supreme Court remand order directed the Court of Appeals to consider the merits of the Attorney General's claim in Docket No. 317434; the order did not disturb the Court of Appeals decision in Docket No. 317456, which remanded the case for a contested case hearing regarding the amount of the opt-out tariffs. For that reason, the only issue in this remand was whether there was sufficient evidence to support the PSC's conclusion that the benefits of the AMI program outweighed its costs.

Affirmed.

O'CONNELL, P.J., dissenting, disagreed with the majority's analysis regarding whether there was sufficient evidence to support the PSC's decision to approve the AMI program. In holding that the PSC's conclusion—the benefits of the program outweighed its costs—was supported by competent, material, and substantial evidence on the whole record, the majority erroneously relied on the same analysis by the PSC that was rejected as

insufficient by the Court in the original appeal in Docket No. 317456. The Supreme Court remand order directed the Court of Appeals to address the issues raised by the Attorney General in its motion for reconsideration of its original opinion, which included those preserved in the 2013 settlement agreement, not just whether the benefit of the AMI program outweighed its costs. Consumers submitted the testimony of only one witness regarding the costs and benefits of the program, and that testimony which conflicted with that of the Attorney General's expert witness, which was better supported by data and analysis. For this reason, the PSC's analysis of the issue was not reasonable or supported by the evidence. Judge O'CONNELL would have remanded this case to the PSC for it to fully address the two issues reserved by the Attorney General in the stipulated settlement agreement, including the cost of the opt-out tariff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Michael Moody*, Assistant Attorney General, for the Attorney General.

B. Eric Restuccia, Deputy Solicitor General, and *Steven D. Hughey*, *Lauren D. Donofrio*, and *Amit T. Sing*, Assistant Attorneys General, for the Michigan Public Service Commission.

Jon R. Robinson, *Raymond E. McQuillan*, and *Robert W. Beach* for Consumers Energy Company.

ON REMAND

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

GADOLA, J. In *In re Application of Consumers Energy to Increase Electric Rates*, 498 Mich 967 (2016), our Supreme Court reversed the portion of this Court's judgment in *Attorney General v Mich Pub Serv Comm*, unpublished opinion per curiam of the Court of Ap-

peals, issued April 30, 2015 (Docket Nos. 317434 and 317456), that addressed the Attorney General's claim of appeal in Docket No. 317434 and remanded the case for consideration of the merits of that appeal.[1]

Our original opinion in this case, *Attorney General*, unpub op at 2-3, contains a concise statement of the underlying facts and proceedings:

> Several years ago, Consumers Energy began implementing an [advanced metering infrastructure (AMI)][1] program in Michigan. On November 4, 2010, the [Michigan Public Service Commission (PSC)] issued an order in Case No. U-16191 that approved Consumers Energy's pilot AMI program, but required Consumers Energy to meet certain conditions, such as providing information on the benefits and costs of the program, before approving full deployment of the AMI program. In *In re Application of Consumers Energy Co to Increase Rates*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket Nos. 301318 and 301381), this Court affirmed the PSC's decision regarding Consumers Energy's pilot AMI program. On June 7, 2012, the PSC issued an order in Case No. U-16794 authorizing Consumers Energy to proceed with Phase 2 of its AMI deployment program. In that case, the PSC adopted $44.8 million in expenditures for the AMI program in Consumers Energy's rate base.
>
> On September 19, 2012, Consumers Energy filed an application requesting rate relief in the case underlying this appeal, Case No. U-17087, to cover, among other things, its ongoing investments associated with the AMI program. In addition, Consumers Energy sought approval of opt-out tariffs for customers who did not wish to participate in the AMI program. On October 19, 2012, an administrative law judge (ALJ) granted intervenor status to the Attorney General.

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[1] The Attorney General's appeal was consolidated with that filed by Michelle Rison and other individuals, who are customers of Consumers Energy Company. That appeal (Docket No. 317456) is not affected by our Supreme Court's remand order.

On May 7, 2013, the parties filed a settlement agreement in which they agreed to an annual rate increase of $89 million. However, in the agreement, the Attorney General reserved two issues for future resolution, including (1) a request to the PSC "to direct Consumers Energy to suspend the [AMI] program," and (2) an objection "to the amount of the 'opt-out' fee." The PSC entered an order on May 15, 2013, approving the settlement agreement. Thereafter, the Attorney General challenged the PSC's continued support of Phase 2 of Consumers Energy's AMI program and challenged Consumers Energy's application for approval of its opt-out tariffs.

In response, Consumers Energy argued that it prepared an updated business case analysis for its AMI program in March 2012, and that the analysis indicated a 20-year positive net present value (NPV) of $42 million for the AMI program. Consumers Energy noted that the Attorney General also sought suspension of its AMI program in Case Nos. U-16191 and U-16794 on the ground that the cost/benefit analysis used in each case was flawed, but that the PSC rejected the Attorney General's request in each case. The Attorney General argued that the PSC should suspend Consumers Energy's AMI program until a cost/benefit analysis showed that the program would bring value to customers. The Attorney General asserted that its analysis showed that the AMI program had a negative NPV, and that Consumers Energy's testimony regarding savings from the AMI program was speculative.

On June 28, 2013, the PSC issued an order approving Consumers Energy's continuation of the AMI program and approving Consumers Energy's opt-out tariffs.

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[1] An AMI meter, also known as a smart meter, is capable of collecting near-real-time data on a customer's energy usage and reporting the data to the utility at frequent intervals. *In re Applications of Detroit Edison Co*, 296 Mich App 101, 114; 817 NW2d 630 (2012).

The standard of review for PSC orders is narrow and well defined.[2] Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported

[2] Although the dissent correctly points out that the Attorney General's settlement agreement did not resolve two issues—(1) a request to the PSC to suspend the AMI program and (2) an objection to the amount of the opt-out fee if the program continued—the Attorney General only contested the first issue in its appeal in Docket No. 317434, arguing that the PSC should not have allowed the AMI program to continue because the record lacked competent, material, and substantial evidence that the benefits of the program outweighed its costs. The Attorney General did not object to the amount of the opt-out tariffs in its appeal. Rather, in Docket No. 317456, the appellant customers objected to the amount of the opt-out tariffs. In that appeal, we concluded that the opt-out issue was "given only cursory analysis in the PSC lower court record," and therefore remanded the issue to the PSC for a contested case hearing. *Attorney General*, unpub op at 6. In its remand order, the Supreme Court directed us to consider the merits of the Attorney General's claim of appeal in Docket No. 317434. *In re Application of Consumers Energy to Increase Electric Rates*, 498 Mich at 967. The order did not disturb our ruling in Docket No. 317456. Accordingly, the Supreme Court's remand order provides that, despite the Attorney General's agreement to the $89 million rate increase, the Attorney General could still contest the continuance of the AMI program on the basis that the costs of the program outweighed its benefits. The only issue before this Court, therefore, is whether sufficient evidence supported the PSC's conclusion that the benefits of the AMI program outweighed its costs.

by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103, 108; 754 NW2d 259 (2008). If the language of a statute is vague or obscure, the PSC's construction serves as an aid in determining the legislative intent and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. *Id*. at 103-104. However, the construction given to a statute by the PSC is not binding on us. *Id*. at 103. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

On appeal, the Attorney General argues that although Consumers maintained that its updated cost-benefit analysis indicated a $42 million NPV over 20 years for the AMI program, Consumers could not confirm the estimated savings and could not support its estimates. The Attorney General further argues that the alleged savings were inflated and were not based on any studies of Consumers' service territory. In addition, the Attorney General argues that the PSC did

not do an independent analysis of Consumers' cost-benefit analysis but instead erroneously relied on prior factual determinations derived from a different cost-benefit analysis to find that Consumers' costs were reasonable and prudent. We disagree.[3]

Consumers' witness Lauren Youngdahl, the Smart Grid Customer Engagement Programs Manager, testified that the AMI program would advance the modernization of the electric grid, and that its benefits could be divided into five key categories: (1) customer programs such as pricing demand response (35% of total benefits), (2) advanced energy theft detection (22% of total benefits), (3) reduced meter reading costs (19% of total benefits), (4) other operating and maintenance (O&M) and avoided capital savings (17% of total ben-

[3] We reject the PSC's argument that the Attorney General lacks standing to challenge the PSC's June 28, 2013 order. A party must be aggrieved by a lower court's decision to have standing to bring an appeal from that decision. MCR 7.203(A); *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co*, 475 Mich at 291 (quotation marks omitted). The Attorney General had the statutory right to intervene to represent the interests of the people of this state. MCL 14.28. The Attorney General intervened because the PSC's decision would affect the rates paid by Consumers' Michigan customers. The Attorney General can be said to be a party in interest with standing to appeal the PSC's order. MCL 462.26(1).

Similarly, the argument by Consumers and the PSC that the Attorney General's appeal is a collateral attack on prior orders is without merit. Such an attack is precluded. *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999). In its June 28, 2013 order in this case, the PSC made the latest in a series of decisions to allow Consumers' AMI program to go forward. The PSC's decision was based on an updated cost-benefit analysis prepared by Consumers for this case. The Attorney General may be making arguments similar to those made in prior cases, but the arguments are based on evidence presented in this case. The Attorney General's appeal is not a collateral attack.

efits), and (5) terminal value beyond the end date of the analysis (7% of total benefits).

Youngdahl relied on a business case analysis that was updated in March 2012, which indicated the AMI program had an overall 20-year NPV of $42 million. The business case included final pricing for smart meters, associated components for smart meters, vendor services, and meter installation. The business case reassessed and reduced anticipated IT infrastructure costs. The business case analysis included benefits confirmed by Phase 1 of the AMI pilot programming, including remote metering and meter event capabilities that would facilitate O&M cost reductions, improve employee safety, reduce customers' bills, reduce outage restoration times, and enhance energy consumption management.

Attorney General witness Sebastian Coppola recommended that the PSC suspend Consumers' AMI program. Coppola testified that his calculations indicated that the program had a negative NPV of $133.4 million. On appeal, the Attorney General emphasizes that the savings predicted by Consumers could not be confirmed and were not based on studies performed with Consumers' customers.

The essence of the Attorney General's argument is that the PSC's decision to continue funding Consumers' AMI program was not supported by sufficient evidence on the record. The Attorney General asserts that Consumers' savings figures were aspirational and were not based on actual studies of Consumers' own customers. The Attorney General relies on *In re Applications of Detroit Edison Co*, 296 Mich App 101; 817 NW2d 630 (2012), as support for the proposition that evidence consisting of "aspirational testimony describing [a program] in optimistic but speculative terms"

does not constitute sufficient evidence on which to approve a rate increase. *Id*. at 115. However, that case is distinguishable from the instant matter in that in this case, the settlement agreement established that Consumers was entitled to a revenue increase in the amount of $89 million. That revenue increase was unrelated to the issue of whether the PSC should direct Consumers to suspend its AMI program.

The parties presented contradictory testimony on Consumers' AMI program and whether the analysis presented by Consumers—which indicated the program would have an estimated 20-year NPV of $42 million—was sufficient to authorize Consumers to continue the program. However, the PSC was entitled to rely on the testimony presented by Consumers' witness even though other testimony reached opposite conclusions. *Great Lakes Steel Div of Nat'l Steel Corp v Mich Pub Serv Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983). The testimony given by Youngdahl was based on the updated business case, which contained data from Phase 1 of the AMI program and projections based on that data. The PSC emphasized that it would continue to review costs associated with Consumers' AMI program in each future rate case. The PSC's order that approved full deployment of Consumers' AMI program was supported by the requisite evidence, and it was not unlawful or unreasonable. MCL 462.26(8).

Affirmed.

FORT HOOD, J., concurred with GADOLA, J.

O'CONNELL, P.J. (*dissenting*).

I respectfully dissent.

The Attorney General's settlement in this case preserved two issues for further review: (1) a request to

the Public Service Commission (PSC) to suspend the advanced metering infrastructure (AMI) program and (2) should the program continue, an objection to the amount of the opt-out fee. These issues are based on the PSC's decision regarding the costs and benefits of the AMI program. Unfortunately, the PSC's decision regarding these two issues does not provide this Court with an opportunity to meaningfully review its decision. I would remand this case to the PSC with directions to fully address the two issues reserved by the Attorney General in its stipulated settlement agreement.

I. THE MAJORITY OPINION

Our Supreme Court has remanded this case to specifically address the issues that the Attorney General preserved in its settlement agreement in this case:

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment that addressed the claim of appeal filed by the Attorney General, Docket No. 317434, and we remand this case to the Court of Appeals for consideration of the merits of that claim of appeal. The fact that the Attorney General stipulated to a settlement agreement that recognized a rate increase is not inconsistent with the Attorney General's appeal from the June 28, 2013 decision of the Michigan Public Service Commission. That decision resolved issues preserved by the Attorney General in the settlement agreement. Those preserved issues can be addressed independent of the $89 million in rate relief approved pursuant to the settlement agreement. This order does not disturb the Court of Appeals disposition in the consolidated case, Docket No. 317456. We express no opinion regarding the merits of the Attorney General's appeal. [*In re Application of Consumers Energy to Increase Electric Rates*, 498 Mich 967 (2016).]

Despite the fact that the PSC made only one finding—that petitioner, Consumers Energy, proved its case, a finding full of conclusory statements and absent reasoning or reference to the proofs—the majority opinion concludes that the PSC made sufficient findings on this issue such that Consumers proved its entitlement to recover costs for the AMI program. And the majority opinion does not address the opt-out fee other than to note that the PSC entered an order approving Consumers' opt-out tariffs.[1] I strongly disagree with the majority's analysis.

In our original opinion regarding the companion cases, *Attorney General v Mich Pub Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434 and 317456), this Court concluded that the PSC gave only a cursory analysis to some of the issues presented in this case on the exact same lower court record, including a cursory analysis of the costs and benefits of the AMI program. As a result, we remanded Docket No. 317456 back to the PSC for a contested case hearing. However, in the instant appeal, the majority relies on the same cursory analysis this Court found fatal in our prior opinion.

I conclude that a cursory analysis is a cursory analysis is a cursory analysis, and no amount of parsing can save this case from the required remand. In my opinion, the majority's decision not to remand

[1] I read the Michigan Supreme Court's order as instructing this Court to address the issues preserved in the settlement agreement. In the settlement agreement, the Attorney General explicitly preserved the opt-out tariff issue. That issue is entwined with the recovery of costs issue: a reduced opt-out tariff would affect Consumers' expected revenues. Additionally—and most importantly—the PSC's failure to meaningfully address the issue despite the parties' arguments illustrates why the PSC's extremely brief decision is insufficient.

this case, which has the same lower court record as Docket No. 317456, is contradictory and defies logic.

II. HISTORY OF THE PRESENT CASE

After this Court issued the first opinion in the original companion cases, the Attorney General filed a motion for reconsideration, asking this Court to consider two issues we did not consider in our prior opinion. The Attorney General was correct: our opinion did not address the Attorney General's concerns. Without explanation, the majority denied the Attorney General's request to reconsider our prior opinion and address those two issues. In an attempt to convince the majority that the Attorney General's motion for reconsideration was meritorious, I drafted a 22-page opinion on reconsideration. *In re Application of Consumers Energy to Increase Electric Rates*, unpublished order of the Court of Appeals, entered July 22, 2015 (Docket Nos. 317434 and 317456). At risk of reversal, the majority refused to address the merits of the Attorney General's motion on reconsideration. Appropriately, the Attorney General sought leave to appeal in the Supreme Court.

In what can only be considered the speed of sound by our Supreme Court's standards, the Court reversed that part of our prior opinion relating to Docket No. 317434 for our failure to address the two issues the Attorney General reserved in its stipulated settlement with Consumers. The Supreme Court directed us to consider the arguments raised by the Attorney General in its motion for reconsideration. But rather than respond to the Supreme Court's directive on remand, the majority's present opinion concludes that because the Attorney General did not appeal certain parts of the lower court rulings concerning the cost-benefit

analysis of the AMI program, it is free to ignore the Supreme Court's directive. Because the Court of Appeals is an inferior court to the Supreme Court, this Court has a duty to follow the Supreme Court's remand orders.[2] In my opinion, the majority's response to the Supreme Court's directions on remand risks a second reversal in the present case.

III. ANALYSIS

The Attorney General contends that competent, material, and substantial evidence did not support the PSC's findings below. I agree.

We give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, a final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). Substantial evidence is evidence that a reasonable person would accept as sufficient to support the conclusion. *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 186-187; 682 NW2d 100 (2004).

The Attorney General contested Consumers' right to recover costs. The PSC may allow a utility to recover its costs "only when the utility proves that recovery of the costs is just and reasonable." *In re Applications of Detroit Edison Co*, 296 Mich App 101, 116; 817 NW2d 630 (2012).

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[2] This Court must follow clear instructions in the Michigan Supreme Court's remand orders. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

In this case, Consumers' AMI program called for installation of smart meters at a total cost of $750 million. Consumers asserted that the program would result in a net savings of $42 million dollars. However, only one witness, Lauren Youngdahl, testified regarding the costs and benefits of the program. Youngdahl did not support her testimony with any evidence—neither data nor details—but instead merely speculated on the basis of Consumers' plans for future years and offered conclusory assertions. Consumers refused to respond regarding how it calculated assumed customer savings for the future years and instead stated that it had estimated it would recover more in uncollectable expenses.

In contrast, the Attorney General's expert Sebastian Coppola testified that the cost-benefit analysis yielded a *negative* net result of about $133 million dollars.[3] Coppola supported his testimony with statistical analysis and data and pointed out several flaws in Consumers' methodology, including its small sample sizes. Even Consumers admitted that "[t]he savings related to energy conservation benefits cannot be confirmed at this time . . . ."

Regardless of the shortcomings in Consumers' proofs, in a scant three sentences that provided no reasoning whatsoever, the PSC found that Consumers' proofs were "more than sufficient." The PSC made no specific findings regarding the contested elements of the costs and benefits, but instead stated in general terms that it was not persuaded that the savings were overstated. Unlike the majority, I am not convinced that this analysis was reasonable and supported by

[3] Much like a spouse recently returned from a shopping spree who declares how much they have saved through the use of coupons, when they have still spent an amount far in excess of what they "saved."

sufficient evidence. Consumers' speculative proofs were not sufficient to allow a reasonable person to conclude that Consumers had justified the recovery costs. And regarding the opt-out fee issue (which the majority fails to address entirely), the PSC's decision does not address the Attorney General's concerns or make any specific findings. This Court is unable to conduct a meaningful review of such a deficient decision.

IV. CONCLUSION

On remand, the Supreme Court has ordered us to address the issues preserved in the stipulated settlement agreement. Those issues are (1) whether the AMI program should be suspended because the PSC's decision lacked competent, material, and substantial evidence, and (2) if the program should continue, whether the opt-out tariffs are reasonable. For the reasons stated above, meaningful review of these issues, particularly regarding the opt-out tariffs, is impossible because the record lacks the factual findings necessary to conduct such a review.

For the reasons stated, I would remand this case to the PSC. I would retain jurisdiction.

LAKE v PUTNAM

Docket No. 330955. Submitted June 14, 2016, at Detroit. Decided July 5, 2016, at 9:10 a.m.

Plaintiff, Michelle Lake, filed a complaint in the Washtenaw Circuit Court, Family Division, against defendant, Kerri Putnam, seeking parenting time with a child born to Putnam during the parties' relationship. Lake and Putnam were involved in a romantic relationship from 2001 until 2014 during which time Putnam was artificially inseminated and birthed a child. The parties never married and could not have married in Michigan because of Michigan's ban on same-sex marriage. After the parties' relationship ended, Putnam refused to allow Lake to see the child. Putnam moved for summary disposition of Lake's complaint. The court, Darlene A. O'Brien, J., denied Putnam's motion and ordered that Lake be awarded supervised parenting time with the child. Putnam appealed by leave granted.

The Court of Appeals *held*:

1. It was undisputed that Lake was a third party under the Child Custody Act, MCL 722.21 *et seq*. Under the act, a third party can establish standing to bring a child custody dispute under MCL 722.26b or MCL 722.26c(1)(b), but Lake failed to satisfy the requirements of those statutes. Lake argued that she nonetheless had standing under the equitable-parent doctrine. The equitable-parent doctrine may be applied in cases in which the child at issue was born during a marriage between two persons who acted as the child's parents. Before the United States Supreme Court's decision in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584 (2015), the equitable-parent doctrine was applicable only to disputes involving opposite-sex marriages. After the Supreme Court ruled in *Obergefell* that the ban on same-sex marriage existing in many jurisdictions, including Michigan, was unconstitutional, the equitable-parent doctrine is applicable to cases involving same-sex marriages. In this case, however, the equitable-parent doctrine did not apply because the parties were never married. The equitable-parent doctrine could not be extended to unmarried same-sex couples when it had always been unavailable to unmarried opposite-sex couples. Therefore, the

trial court erred by denying Putnam's motion for summary disposition and by granting Lake supervised parenting time with the child born to Putnam during the parties' relationship.

2. Lake did not having standing to assert the child's constitutional right to equal protection because in general, a party may not assert the constitutional or statutory rights of another person.

Trial court order denying Putnam's motion for summary disposition reversed, parenting-time order vacated, and case remanded for entry of summary disposition in Putnam's favor.

SHAPIRO, J., concurring, agreed that the trial court's denial of Putnam's motion for summary disposition should be reversed and that the trial court's parenting-time order should be vacated, but noted that *Obergefell* demanded extension of the equitable-parent doctrine to those situations in which a party who had been in a same-sex relationship could prove that the parties in the relationship would have married before the child's birth or conception if the right had not been unconstitutionally denied to them. In this case, however, Lake failed to produce any evidence that the parties would have married had they been permitted to do so.

FAMILY LAW — CHILD CUSTODY AND PARENTING TIME — EQUITABLE-PARENT DOCTRINE — SAME-SEX RELATIONSHIP.

The equitable-parent doctrine does not apply to couples who were unmarried at the time a child was conceived or born; this rule applies to both opposite-sex and same-sex couples alike, and there is no exception for same-sex couples who were unconstitutionally prevented from marrying at the time the child was conceived or born.

American Civil Liberties Union Fund of Michigan (by *Jay D. Kaplan*, *Daniel S. Korobkin*, and *Michael J. Steinberg*) and *Sarah Zearfoss* and *Naomi J. Woloshin* for Michelle Lake.

Anne Argiroff PLC (by *Anne Argiroff*) and *Francie L. Novar PLLC* (by *Francie L. Novar*) for Kerri Putnam.

Amici Curiae:

University of Michigan Child Advocacy Law Clinic (by *Frank E. Vandervort*) for Children's Trauma As-

sessment Center, Michigan Chapter of the National Association of Social Workers, and Michigan League for Public Policy.

Before: METER, P.J., and SHAPIRO and O'BRIEN, JJ.

O'BRIEN, J. Defendant, Kerri Putnam, appeals by leave granted the circuit court's October 26, 2015 order denying her summary-disposition motion. *Lake v Putnam*, unpublished order of the Court of Appeals, entered January 28, 2016 (Docket No. 330955). On appeal, defendant additionally challenges the circuit court's November 18, 2015 order awarding plaintiff, Michelle Lake, parenting time with defendant's biological child. We reverse the October 26, 2015 summary-disposition order, vacate the November 18, 2015 parenting-time order, and remand this matter for entry of an order granting summary disposition in defendant's favor.

Plaintiff and defendant were in a romantic relationship from 2001 until 2014. During their relationship, defendant was artificially inseminated and gave birth to the minor child at issue in this case. Shortly after the parties' relationship ended, defendant denied plaintiff's requests to spend time with the child. In light of this refusal, plaintiff filed this lawsuit, seeking parenting time with the child. Defendant filed a summary-disposition motion, arguing that plaintiff, as an unrelated third party, lacked standing to seek parenting time with the child. The circuit court denied defendant's motion on October 26, 2015, and on November 18, 2015, the circuit court awarded plaintiff supervised parenting time with the minor child. Defendant subsequently applied for leave to appeal the circuit court's October 26, 2015 order, and we granted her application.

A circuit court's decision on a summary-disposition motion is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). Similarly, whether a parent has a sufficient basis to assert parental rights under the equitable-parent doctrine also constitutes a question of law that we review de novo. *Killingbeck v Killingbeck*, 269 Mich App 132, 141; 711 NW2d 759 (2005). As it relates specifically to "the resolution of a child custody dispute," Michigan's Child Custody Act, MCL 722.21 *et seq*., provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

On appeal, defendant argues that the circuit court erred by denying her summary-disposition motion because plaintiff lacks standing to pursue parenting time with the child. We agree.

Generally, a party has standing so long as he or she "has some real interest in the cause of action" or its subject matter. *In re Anjoski*, 283 Mich App 41, 50; 770 NW2d 1 (2009) (quotation marks and citations omitted). "However, this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]" *Id*. (quotation marks and citation omitted). This Court and our Supreme Court have specifically and unequivocally held that "a third party does not have standing by virtue of the fact that he or she resides with the child and has a 'personal stake' in the outcome of the litigation." *Id*. at 50-51, citing *Bowie v*

Arder, 441 Mich 23, 42; 490 NW2d 568 (1992). Indeed, a third party may not "create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the child's best interests . . . ." *Id*. at 51 (quotation marks, citations, and brackets omitted). "Rather, under the Child Custody Act the Legislature has limited standing for third parties to two circumstances"—under MCL 722.26b (establishing standing for third-party guardians or limited guardians under certain circumstances) or MCL 722.26c(1)(b) (establishing standing for third parties who satisfy all of the following: the minor child's biological parents never married, one of the child's parents has died or is missing and the other parent does not have legal custody, and the third person is related to the child). *Id*.

In this case, it is undisputed that plaintiff is a third person, see MCL 722.22(k) (defining "third person" as "an individual other than a parent"), not a parent, see MCL 722.22(i) (defining "parent" as "the natural or adoptive parent of a child"). Therefore, as a third person, plaintiff must satisfy the standing requirements under MCL 722.26b or MCL 722.26c(1)(b). She simply does not. Because plaintiff is not a parent or a third party with standing under the Child Custody Act, she lacks standing to create a custody dispute. *Sinicropi v Mazurek*, 273 Mich App 149, 177; 729 NW2d 256 (2006). Accordingly, because the circuit court erred by concluding that plaintiff had standing to pursue parenting time with the child, we reverse its October 26, 2015 order denying defendant's summary-disposition motion, vacate its November 18, 2015 order awarding plaintiff parenting time, and remand this matter for entry of an order granting summary disposition in defendant's favor.

On appeal, plaintiff argues that "she has standing to bring this suit" because she "asserts a right to custody and parenting time . . . under Michigan's equitable-parent doctrine." Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child's natural father if three requirements are satisfied: (1) the husband and the child must mutually acknowledge their father-child relationship, or the child's mother must have cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband must express a desire to have parental rights to the child, and (3) the husband must be willing to accept the responsibility of paying child support. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999); *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). "Once it is determined that a party is an equitable parent, that party becomes endowed with both the rights and responsibilities of a parent." *York v Morofsky*, 225 Mich App 333, 337; 571 NW2d 524 (1997). Plaintiff claims that because she satisfies the three requirements in *Van* and *Atkinson*, she is the child's equitable parent. She is incorrect.

While plaintiff claims that she satisfies all requirements under the equitable-parent doctrine, she ignores one crucial, and dispositive, requirement for the equitable-parent doctrine to apply—*the child must be born in wedlock*. *Van*, 460 Mich at 330 (stating that the equitable-parent doctrine applies only "to a child born or conceived during the marriage"). The child at issue in this case was not born or conceived during a marriage. In fact, it is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. Had the parties married in another jurisdiction, for example, our conclusion might

be different. See, e.g., *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 240-241; 882 NW2d 194 (2015). While we acknowledge that the issue presented in this case is complex, we simply do not believe it is within courts' discretion to, at the request of one party and in light of the United States Supreme Court's decision in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so.

On appeal, plaintiff asks that we follow *Ramey v Sutton*, 2015 OK 79; 362 P3d 217 (2015), a case that is admittedly similar to the one at bar. In that case, a same-sex couple ended their relationship after eight-and-a-half-years. *Id*. at ¶ 6. During their relationship, one of the parties, Kimberly Sutton, was artificially inseminated and gave birth to a child. *Id*. Upon their separation, Charlene Ramey filed a lawsuit against Sutton, requesting that she be recognized as the child's legal parent for parenting-time and custody determinations. *Id*. at ¶ 17. Sutton objected, arguing that Ramey lacked standing because the two were never married. *Id*. The Oklahoma Supreme Court agreed with Ramey and recognized her "as being *in loco parentis* to [the parties'] child and . . . entitled to a best interests of the child hearing." *Id*. Plaintiff asks that this Court reach the same conclusion, but we cannot do so for several reasons.

First, Oklahoma's *in loco parentis* status does not only apply to married couples; rather, it appears to apply to anyone "who has assumed the status and

obligations of a parent without a formal adoption." See *Workman v Workman*, 1972 OK 74, ¶ 10; 498 P2d 1384 (1972) (quotation marks and citation omitted), overruled on other grounds by *Unah v Martin*, 1984 OK 2; 676 P2d 1366 (1984). Michigan's equitable-parent doctrine, on the other hand, applies only to married couples. Additionally, our Supreme Court has squarely rejected the argument that holding oneself out as a child's parent, alone, is sufficient to be considered that child's parent under the equitable-parent doctrine. See, e.g., *Van*, 460 Mich at 330-331 (stating that the equitable-parent doctrine does *not* apply to cases in which the child was not born in wedlock). While again, we understand that the issue presented here is complex, especially in light of the *Obergefell* decision, we simply do not believe it is appropriate for courts to retroactively impose the legal ramifications of marriage onto unmarried couples several years after their relationship has ended. That, in our view, is beyond the role of the judiciary. See *Van*, 460 Mich at 330 ("The creation and extension of rights relating to child custody matters is clearly the province of the Legislature, not the judiciary.").

Plaintiff also argues that such a conclusion violates her constitutional rights to due process and equal protection. "The Fourteenth Amendment of the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' " *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014), quoting US Const, Am XIV, § 1 (alteration in *Sanders*). The Due Process Clause requires, procedurally, "notice and a meaningful opportunity to be heard before an impartial decision-maker," *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014), and substantively, "the

statute need only be rationally related to a legitimate governmental interest," *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

In this case, it is somewhat difficult to discern the basis for plaintiff's due-process and equal-protection claims. It appears that she is, in essence, arguing that she is being treated unfairly due to her sexual orientation, but such an assertion is not factually supported by the record or legally supported by existing authority. Again, had she been married to the child's biological parent, regardless of whether the biological parent was male or female, the outcome of this appeal would have been different. *Stankevich*, 313 Mich App at 237-240. But she was not. In fact, plaintiff has not presented any evidence to support a conclusion that she and defendant would have been married but for the law in Michigan (or in Florida, where the parties also resided for a period of time). Plaintiff has not provided any evidence reflecting the parties' intent to marry, the parties never made an effort to marry in another jurisdiction, the parties chose not to have plaintiff adopt the child in Florida despite being legally able to do so, and defendant adamantly denies that she would have ever married plaintiff even if legally able to do so. Furthermore, we, as well as our Supreme Court, have expressly chosen not to extend the equitable-parent doctrine beyond the context of marriage, *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 191 n 2; 740 NW2d 678 (2007); *Van*, 460 Mich at 330-335, and to do so only for same-sex couples would be improper, *Kolailat v McKennett*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2015 (Docket

No. 328333), pp 2-3 (declining to apply the equitable-parent doctrine to a same-sex couple after the *Obergefell* decision).

Lastly, plaintiff argues that our conclusion violates the child's constitutional right to equal protection. "Generally, persons do not have standing to assert constitutional or statutory rights on behalf of another person." *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). That is precisely what plaintiff is trying to do, i.e., assert the child's constitutional rights. Accordingly, we reject this argument as well.

In sum, while we acknowledge the challenges presented in child-custody disputes, including those involving same-sex couples, we conclude that the equitable-parent doctrine does not extend to unmarried couples. *Van*, 460 Mich at 330-331. This is true whether the couple involved is a heterosexual or a same-sex couple. Consequently, because the equitable-parent doctrine does not apply, plaintiff lacks standing to seek parenting time in this case. The circuit court thus erred by denying defendant's summary-disposition motion for that reason. We therefore reverse the circuit court's October 26, 2015 order denying defendant's summary-disposition motion, vacate the circuit court's November 18, 2015 order awarding plaintiff parenting time, and remand this matter for entry of an order granting summary disposition to defendant.

Reversed and remanded. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

METER, P.J., concurred with O'BRIEN, J.

SHAPIRO, J. (*concurring*). I agree with my colleagues that the trial court's ruling should be reversed and the

motion for parenting time dismissed. I write separately to point out that the facts as alleged by plaintiff do not fully test the scope of *Obergefell*'s[1] application to Michigan's equitable-parent doctrine and that under different facts a different result may be required.

While the parties disagree as to details, it is undisputed that they lived together for more than a decade as a same-sex couple, that about five years into the relationship defendant bore a child by artificial insemination, that for several years the parties each acted as a parent to the child, and that they were both viewed as parents by the child. It is also undisputed that several years later, around September 2014, defendant ended the relationship, moved out with the child, and entered into a new relationship with a different woman. Defendant initially allowed plaintiff visitation with the child, but eventually she refused to do so. In June 2015, plaintiff filed this action seeking parenting time.

MCL 722.22(i) and (k) respectively define the terms "parent" and "third person" for purposes of the Child Custody Act, MCL 722.21 *et seq*. Under these definitions, plaintiff is a "third person," not a "parent," and so she is not provided any parental rights by statute. Accordingly, the only way for her to be entitled to relief is through application of the equitable-parent doctrine, which we defined in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987). The *Atkinson* Court held that under the equitable-parent doctrine,

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and

[1] *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015).

> child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [*Id*. at 608-609.]

Although the husband in *Atkinson* was not the child's biological father, he and the child's mother were married at the time the child was born or conceived. *Id*. at 604-605, 608. Subsequently, in *Van v Zahorik*, 460 Mich 320, 330-331; 597 NW2d 15 (1999), our Supreme Court considered whether to expand this doctrine outside the context of marriage. The parties in *Van* had been living together as an opposite-sex unmarried couple for five years and continued their relationship for several years after they stopped living together; during that time, the defendant gave birth to two children. *Id*. at 323. After the parties ended their relationship, it was determined that the plaintiff was not in fact the biological father of the children. *Id*. at 324. He brought an action seeking parental rights as an equitable parent. *Id*. By a 4-3 vote, our Supreme Court concluded that the equitable-parent doctrine could be applied only to parties that were married when the child was born or conceived. *Id*. at 330-331, 337.

Accordingly, as the parties in the instant case were never married it would appear that *Van* forecloses plaintiff's claim of parental rights under the equitable-parent doctrine. Plaintiff makes two arguments in response. First, she argues that equitable parental rights should be viewed as arising from the best interests of the child and not from the relationship status of the parties. Therefore, if it is in the best interests of the child to establish parental rights in a child's long-term de facto parent, equity requires that

we do so regardless of the precise nature of that person's relationship with the biological parent. This argument, however, was considered and rejected in *Van*, in which it was the basis of Justice BRICKLEY's dissent. Justice BRICKLEY wrote:

> [T]he issue in this case is not, or at least should not be, sexual relationships or the marital status of the parties. Those factors should be considered, if at all, during a best interests hearing conducted by the circuit court pursuant to MCL 722.23; MSA 25.312(3). Rather, this Court's focus should be on the innocent victims in this case, and many others like them: the children of dissolving nonmarital relationships. The issue is the best interests of these children and the role of the court in protecting them. [*Van*, 460 Mich at 338-339 (BRICKLEY, J., dissenting).]

While Justice BRICKLEY's view has merit, it was not the view of the majority of the *Van* Court and, we are bound by the *Van* decision until such time as it is modified by the Supreme Court or the Legislature. Accordingly, I conclude that we must reject plaintiff's request to expand the equitable-parent doctrine beyond marriage, which would require consideration of the best interests of the child rather than the relationship of the parties.

Plaintiff's second argument turns on the fact that the parties were a same-sex couple and so were subject to the near-universal ban on same-sex marriage that existed before the 2015 decision of the United States Supreme Court in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015). Plaintiff correctly points out that because the parties are of the same sex, they were barred from marrying in Michigan and in Florida, their states of residence during their relationship. It is clear that plaintiff, as a member of a same-sex couple, did not have the opportunity afforded to a man in a heterosexual relationship to marry her

female partner when her partner became pregnant. And, given the decision in *Obergefell*, we now know that denial of that opportunity to marry was an unconstitutional deprivation of equal protection under law. *Id*. at ___; 135 S Ct at 2604-2605.

In *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 240, 242; 882 NW2d 194 (2015), we concluded that when a same-sex couple was married in a jurisdiction recognizing the validity of same-sex marriages, the plaintiff had standing to seek relief under the equitable-parent doctrine. I would not limit our application of *Obergefell* to cases in which the parties actually married in another jurisdiction. The fact that marriage was available in some other jurisdiction did not remove the unconstitutional burden faced by same-sex couples residing in a state that barred same-sex marriage within its borders. The impediment was defined by Michigan law, and the existence of that law to those who lived under it should not now be treated as constitutionally insignificant because other states treated the issue differently.

Accordingly, plaintiff is correct that *Obergefell* demands extension of the equitable-parent doctrine. My colleagues are rightfully concerned about retroactively imposing marriage on a same-sex couple simply because one party now desires that we do so. However, that concern is fully addressed by a factual inquiry into the facts as they existed at the time the child was born or conceived. The question is whether the parties would have married before the child's birth or conception but did not because of the unconstitutional laws preventing them from doing so. If they would have married at that time, then the fact that one or both would not marry today should not retroactively impose

a denial of parental rights that but for the unconstitutional bar to same-sex marriage would have been established.

Oregon's Court of Appeals recently addressed this question in *In re Madrone*, 271 Or App 116; 350 P3d 495 (2015), and its analysis offers worthwhile guidance. The Oregon court aptly described the problem: "[T]he distinction between married and unmarried heterosexual couples is that the married couples have chosen to be married while the unmarried couples have chosen not to be." *Id*. at 128. In contrast, a same-sex couple living in a jurisdiction that did not allow or recognize the validity of same-sex marriages was unable to choose whether they would be a married or unmarried couple. The deprivation of that choice was a violation of their equal protection rights. *Obergefell*, 576 US at ___; 135 S Ct at 2604-2605. The *Madrone* court discussed the same concerns that have arisen in this case:

> Extending the statute simply on the basis of intent to be a parent would comport with one purpose of the legislation—protecting the support and inheritance rights of children conceived by artificial insemination—but it would not be consistent with the overall statutory scheme—specifically, the legislature's decision to make the statute apply only to children of married couples. If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, "lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child." Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role. [*In re Madrone*, 271 Or App at 127-128.]

Ultimately, the *Madrone* court concluded that the determination of whether to extend the statute to same-sex couples who would have chosen to marry must be made on a case-by-case basis and suggested several factors that may be relevant:

> Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. In some cases, the answer to that question will be obvious and not in dispute. . . . In other cases, the answer will be less clear. A number of factors may be relevant to the fact finder's determination. A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each other out as spouses; considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married. We hasten to emphasize that the above list is not exhaustive. Nor is any particular factor dispositive (aside from unsuccessfully attempting to get married before same-sex marriages were legally recognized . . .), given that couples who choose not to marry still may do many of those things. Instead, we view the factors as tending to support, but not compelling, an inference that a same-sex couple would have married had that choice been available. [*Id*. at 128-129.]

I would adopt this approach and hold that a party is entitled to seek equitable parental rights arising out of a same-sex nonmarital relationship when a preponderance of the evidence shows that but for the ban on same-sex marriage in the parties' state of residency,

they would have married before the birth of the child. Given that this is a factual question, its resolution requires consideration of the evidence submitted by the parties, and I agree that, as a general rule, it would require an evidentiary hearing. However, like most evidentiary questions, it may be resolved in one party's favor as a matter of law when the other party fails to provide sufficient evidence to create a question of material fact. That is the situation here. While the affidavits presented to the trial court on behalf of plaintiff state that the parties were in a committed relationship and that while in that relationship they raised the child together as coparents, none of the affidavits, including plaintiff's, state or allow for an inference that but for the then-existing unconstitutional barriers to same-sex marriage the parties would have married. Had such evidence been presented, I would have concluded that we should remand the case for the trial court to conduct an evidentiary hearing on the question and, if the trial court answered it affirmatively, for a hearing to determine custody and parenting time in accordance with the best interests of the child. In the absence of such evidence, however, remand proceedings are not required.

In her brief, plaintiff asserts that *Obergefell* held that the denial to same-sex couples of the right to marry was irrational and unjust. She goes on to assert that "[i]t would be equally irrational and unjust for Michigan to deny [the child] the benefits and protections of the equitable-parent doctrine because his parents were unmarried, given that the only reason they were unmarried is that they were unconstitutionally denied the right to marry during their relationship." I fully agree with this view and believe it is consistent with *Obergefell* and the constitutional principles on which *Obergefell* rests. However, on the facts of this

case, I do not believe that plaintiff can establish that she and defendant would have married before the birth or conception of the child but for the unconstitutional ban on same-sex marriage. In another case, the facts may very well be sufficient to demonstrate that the parties would have married if not for the ban on same-sex marriage, and in such a case, I believe the courts would be required to recognize the parental rights of the nonbiological parent and determine custody and parenting time consistent with the best interests of the child.

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 326485. Submitted July 6, 2016, at Detroit. Decided July 12, 2016, at 9:00 a.m. Leave to appeal sought.

South Dearborn Environmental Improvement Association, Inc., and others filed a claim of appeal in Wayne Circuit Court under Michigan's Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, requesting that the court vacate the issuance of a permit by the Department of Environmental Quality (DEQ) that modified and replaced a previously issued permit at a steel plant in Dearborn. The steel plant was operated by Severstal Dearborn, LLC, before AK Steel Corporation acquired Severstal in September 2014. After acquiring Severstal, AK Steel moved to dismiss petitioner's claim of appeal for lack of jurisdiction on the ground that the appeal was untimely, having been filed 59 days after the permit was issued. AK Steel argued that under MCR 7.123(B) and MCR 7.104(A), petitioners had only 21 days after the issuance of the permit to file their claim of appeal. Petitioners argued that under MCL 324.5506(14) they had 90 days after the issuance of the permit to file the appeal. The court, Daniel A. Hathaway, J., agreed with petitioners and denied AK Steel's motion. AK Steel applied for leave to appeal. The Court of Appeals granted the application.

The Court of Appeals *held*:

1. Analysis of the issue begins with provisions of NREPA. Appeals from the DEQ's decisions to issue or deny permits are addressed in MCL 324.5505(8) and MCL 324.5506(14). The permit in this case concerned an existing source, and § 5505(8) provides that appeals of permit actions for existing sources are subject to § 5506(14). The first half of MCL 324.5506(14) describes how an owner of an existing source can appeal the denial of a permit. At issue was the second half of MCL 324.5506(14), which provides that a petition for judicial review is the exclusive means of obtaining judicial review of a permit and that such a petition must be filed within 90 days after the final permit action. The

parties disputed whether that provision applies solely to the "operating" permits referred to in the previous sentence or to any permits. Although the article "a" is often used to mean "any," which is what the circuit court relied on when making its ruling, the second sentence appears within the context of the subsection's discussion of operating permits. The trial court erred by ignoring that context. When read in context, the provision's reference to "a permit" meant an operating permit. This interpretation avoids rendering other portions of the statute surplusage or nugatory. Although this interpretation singles out permits to install for existing sources, which were at issue in this case, as the only type of permit for which there would be no right of review under the statutory scheme, it is not the judiciary's place to rewrite the law—only to interpret it.

2. Because NREPA does not provide a means for petitioners to appeal the DEQ's issuance of the permit to install for existing sources, MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq.*, applied. MCL 600.631 provides that appeals are made in accordance with the Michigan Court Rules. The question was which court rule, MCR 7.119 or MCR 7.123, was applicable. Under MCR 7.119, petitioners would have had 60 days to file their appeal. Under MCR 7.123, petitioners would be subject to the timing requirements of MCR 7.104(A) and would have had only 21 days to appeal. For MCR 7.119 to apply, the case had to be one in which the DEQ's decision to grant the permit to install was a decision to which the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, applied. Under Chapter 5 of the APA, MCL 24.291 *et seq.*, MCL 24.205(1) provides that a license is defined as including a permit, and Subsection (2) defines licensing as agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license. In addition, MCL 24.291 provides that when licensing is required to be preceded by notice and an opportunity for hearing, the provisions of the APA governing a contested case apply. In this case, notice of both a period of public comment and a public hearing occurred. There being no question that the provisions of the APA applied in this case, MCR 7.119 governed and petitioners had 60 days to appeal the DEQ's issuance of the permit in the circuit court. Having appealed 59 days after the issuance of the permit, petitioners' appeal was timely. The trial court reached the right result, albeit for the wrong reason.

Affirmed.

1. ENVIRONMENT — AIR QUALITY — ADMINISTRATIVE LAW — OPERATING PERMITS — EXISTING SOURCES — APPEALS.

The second half of MCL 324.5506(14) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, pertains exclusively to how any person may appeal the issuance or denial of an operating permit related to an existing source.

2. ENVIRONMENT — AIR QUALITY — ADMINISTRATIVE LAW — PERMITS TO INSTALL — EXISTING SOURCES — APPEALS.

Because the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, does not provide a means for any person to appeal the Department of Environmental Quality's issuance of a permit to install for an existing source, such appeals are governed by MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*., rendering MCR 7.119 applicable; the time for filing an appeal is within 60 days after the date of mailing of the notice of the agency's final decision or order.

Olson, Bzdok & Howard, PC (by *Christopher M. Bzdok*), and *Law Office of Tracy Jane Andrews* (by *Tracy Jane Andrews*) for South Dearborn Environmental Improvement Association, Inc.

Great Lakes Environmental Law Center (by *Nicholas Schroeck* and *Stephanie Karisny*) for Detroiters Working for Environmental Justice, Original United Citizens of Southwest Detroit, and Sierra Club.

Driggers, Schultz & Herbst, PC (by *William C. Schaefer* and *Barbara D. Urlaub*), for AK Steel Corporation.

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

SAAD, J. AK Steel Corporation appeals by leave granted the circuit court's denial of its motion to dismiss petitioners' appeal in the circuit court of a decision of respondent Department of Environmental Quality (DEQ). We affirm the denial of AK Steel's motion to dismiss but on different grounds than the circuit court used.

I. BASIC FACTS

AK Steel operates a steel plant in Dearborn, which used to be operated by Severstal Dearborn, LLC, before AK Steel acquired Severstal in September 2014. The plant is subject to regulation under the federal Clean Air Act, 42 USC 7401 *et seq*., and Michigan's Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. Beginning in 2005, Severstal applied for and received a series of permits, which authorized the rebuilding of a particular blast furnace and the installation of three air pollution control devices (known as baghouses). These permits are known as "permits to install" and are identified as PTI 182-05, PTI 182-05A, and PTI 182-05B. Each successive permit modified and replaced the preceding permit. Severstal applied for a fourth permit to update and revise the terms of PTI 182-05B. Subsequently, a period of public comment was held, and after a public hearing, the DEQ issued the new permit, PTI 182-05C, on May 12, 2014. It is undisputed that this permit also is classified as a permit to install.

On July 10, 2014, which was 59 days after the permit was issued, petitioners filed a claim of appeal in the circuit court and requested that the court vacate the issuance of PTI 182-05C and remand the matter back to the DEQ. After acquiring Severstal, AK Steel moved to dismiss petitioners' claim of appeal for lack of jurisdiction, on the ground that the appeal was untimely. AK Steel argued that pursuant to MCR 7.123(B)(1) and MCR 7.104(A), petitioners had just 21 days after issuance of the permit to file their claim of appeal. The circuit court rejected AK Steel's argument and agreed with petitioners that pursuant to MCL 324.5506(14), petitioners had 90 days after issuance of the permit to file their appeal.

II. STANDARDS OF REVIEW

We review a court's decision on a motion to dismiss for an abuse of discretion. *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Thus, it necessarily abuses its discretion when it misapplies the law. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

This Court reviews the interpretation and application of statutes de novo. *Glaubius v Glaubius*, 306 Mich App 157, 164; 855 NW2d 221 (2014). "When interpreting a statute, we must give effect to the Legislature's intent, which we determine by examining first the language of the statute itself." *Id*. In doing so, we give effect to every word, phrase, and clause used and avoid an interpretation that would render any part of the provision surplusage or nugatory. *Id*. If the statutory language is unambiguous, it constitutes a clear expression of the Legislature's intent and judicial construction is neither necessary nor permitted. *Id*. at 165. Further, "[s]tatutory interpretation requires a holistic approach." *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). "A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme." *Id*. (quotation marks and citation omitted). And "[a] general principle of statutory construction is the doctrine of *expressio unius est exclusio alterius*, which means the express mention of one thing implies the exclusion of another." *Id*. (quotation marks and citation omitted; alteration in original).

III. ANALYSIS

A. MCL 324.5505 and MCL 324.5506

Analysis of this issue begins with provisions of the NREPA, specifically §§ 5505 and 5506. Section 5505(1) prohibits the installation, construction, reconstruction, relocation, alteration, or modification of "any process or process equipment without first obtaining from the [DEQ] a permit to install, or a permit to operate authorized pursuant to rules promulgated under subsection (6) if applicable, authorizing the conduct or activity." MCL 324.5505(1). Appeals from the DEQ's decisions to issue or deny a permit are addressed in §§ 5505(8) and 5506(14).

Section 5505(8) states:

> Any person may appeal the issuance or denial by the [DEQ] of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), *for a new source* in accordance with . . . MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. *Appeals of permit actions for existing sources are subject to section 5506(14)*. [MCL 324.5505(8) (emphasis added).]

The substantive provisions of § 5505(8) clearly apply only to new sources. The permit at issue in this case is for an existing source, an appeal of which, according to § 5505(8), is subject to § 5506(14).

Section 5506(14), in turn, provides the following:

> A person who owns or operates an existing source that is required to obtain an operating permit under this

> section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the [DEQ] for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act . . . being [MCL 24.201 to MCL 24.328]. *Any person may appeal the issuance or denial of an operating permit in accordance with* [*MCL 600.631*]. *A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action*. Such a petition may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise. [MCL 324.5506(14) (emphasis added).]

The first portion of this provision allows for owners or operators of existing sources to file a petition with the DEQ in order to obtain a review of the denial of an operating permit, a general permit, or a permit to operate authorized under rules promulgated under § 5505(6). If the owner or operator files such a petition, the review is conducted in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*. If the APA applies, the appeal is governed by MCR 7.119(B)(1), which states that judicial review of a final agency decision or order is obtained by filing a claim of appeal in the circuit court within 60 days after the mailing of the notice of the agency's final decision or order. However, this portion of § 5506(14) does not apply to the instant matter because an entity other than an owner or operator is seeking judicial review of a decision to issue a permit.

The parties agree that the resolution of this issue lies with the interpretation of the following portion of § 5506(14), which provides:

> Any person may appeal the issuance or denial of an *operating permit* in accordance with [MCL 600.631]. A petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action. [MCL 324.5506(14) (emphasis added).]

There is no question that the first sentence pertains only to appeals related to the issuance or denial of *operating permits*. The parties differ on whether the second sentence, which mentions "a permit," refers to the "operating" permit from the preceding sentence or "any" permit. See *Allstate Ins Co v Freeman*, 432 Mich 656, 743-744; 443 NW2d 734 (1989) (opinion by CAVANAGH, J.), citing *Black's Law Dictionary* (5th ed) (noting that the article "a" often is used to mean "any"). The circuit court, while acknowledging that the second sentence "appears within the context of this subsection's discussion of operating permits," nonetheless ruled that the second sentence allowed the appeal of any permit based exclusively on the view that "a" is to be interpreted as "any."

We disagree with the circuit court's ultimate interpretation and agree with AK Steel that the sentence in question refers to the preceding sentence. Thus, the statement, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action," simply relates back to the preceding sentence, which describes how any person can appeal the issuance or denial of an *operating permit*. See *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 563; 777 NW2d 1 (2009)

(stating that the second portion of Subsection 14 details the "review of the issuance or denial of an operating permit"). The circuit court erred by ignoring the plain context of the section and placing far too much importance on the Legislature's use of the indefinite article "a." Our Supreme Court has warned that erroneous interpretations can occur when statutory provisions are read in isolation. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Instead, the context of such provisions is paramount, which requires that they "be read as a whole." *Id*.; see also *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole.") (quotation marks and citation omitted; alteration in original); *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001) ("[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow.") (quotation marks and citation omitted; alteration in original). Accordingly, reading the subsection as a whole, it is clear that the Legislature did not intend for this particular sentence to refer to *any* permit, as the circuit court concluded. Indeed, if this were true, then there would be no need to have any discussion related to other avenues for appeal because this provision would apply to the appeal of any and all permits. This is contrary to our long-established rules of statutory interpretation, under which we seek to avoid an interpretation that would render any part of the statute surplusage or nugatory.[1] *Glaubius*, 306

[1] Petitioners also claim that to avoid this situation, "a permit" refers only to permits for existing sources. But, ironically, one can only get this interpretation by looking at the context of both MCL 324.5505(8), which notes in its last sentence that "[a]ppeals of permit actions for existing sources are subject to section 5506(14)," and earlier in MCL 324.5506(14),

Mich App at 164. We also note that the Legislature was "not required to be overly repetitive in its choice of language." *Robinson*, 486 Mich at 16. While it could have used language that repeated the "operating" descriptor, it did not need to do so.

Therefore, we hold that MCL 324.5506(14) describes two different types of appeals. The first half of this subsection, which is not pertinent to our case, describes how an owner of an existing source can appeal the denial of a permit. The second half of MCL 324.5506(14) pertains exclusively to how any person may appeal the issuance or denial of an operating permit related to an existing source. The sentence at issue in this subsection, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action," is not to be read in isolation. Instead, when read in context, it refers to the preceding sentence, which clarifies that the permit in question is an operating permit. And because the permit at issue is a permit to install, not an operating permit, this provision simply does not apply.

Petitioners argue that our interpretation would mean that the Legislature singled out permits to install for existing sources as the only type of permit for which there would be no right of review under the statutory scheme. But "[i]t is not the role of the

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which refers to "an existing source." However, this runs contrary to their main argument that the indefinite article "a" refers to, literally, "any" permit. Although we agree that context matters, petitioners have not provided any persuasive reason for allowing the cherry-picking of which context to use. In other words, while petitioners would claim that, from context, the term "a permit" refers to "any permit related to an existing source," we cannot ignore the immediately preceding sentence, which specifies that the permit in question must also be for an "operating permit."

judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret—not rewrite—the law." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 149; 644 NW2d 715 (2002); see also *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014); *People v Tucker*, 312 Mich App 645, 678; 879 NW2d 906 (2015).

B. MCL 600.631

The parties correctly acknowledge that if the NREPA does not provide for a means for petitioners to appeal the DEQ's issuance of PTI 182-05C, then MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq.*, applies. MCL 600.631 states the following:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. *Such appeals shall be made in accordance with the rules of the supreme court*. [Emphasis added.]

Petitioners argue that the applicable court rule is MCR 7.119, which provides, in pertinent part:

> (A) Scope. This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.
>
> (B) Appeal of Right.
>
> (1) *Time Requirements*. Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court within 60 days after the date of mailing of the notice of the agency's final decision or order.

Consequently, if this rule applies, then the appeal was proper because petitioners filed their appeal in the circuit court 59 days after the issuance of the permit. If not, then the catch-all provision in MCR 7.123 would apply, which states that the timing requirements of MCR 7.104(A) are used. MCR 7.123(B)(1). MCR 7.104(A), in turn, states that an appeal must be filed within 21 days after the order is issued. As a result, if the catch-all provision of MCR 7.123 is applicable, petitioners' appeal would have to be dismissed as untimely.

Thus, the resolution of this case depends on whether the DEQ's decision to grant PTI 182-05C is a "decision where MCL 24.201 *et seq*. [i.e., the APA] applies." We hold that it does.[2]

On appeal, petitioners claim that the decision to grant a permit is the equivalent of granting a license, which is covered under Chapter 5 of the APA, MCL 24.291 *et seq*. We agree. MCL 24.205(1) defines a "license" as including "the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under the Michigan vehicle code . . . ." And MCL 24.205(2) defines "licensing" as including "agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license." Accordingly, with MCL 24.205(1) expressly referencing a "permit," the permit

[2] Although the DEQ is an agency under the APA given that MCL 24.203(2) defines "agency" as "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action," this is not the end of the inquiry because MCL 600.631 requires that the APA must apply to the *decision* itself.

in question is a license, and the grant of the permit was an act of licensing. See also Department of Environmental Quality, *Air Permits (Permits to Install)* <https://www.michigan.gov/deq/0,4561,7-135-3310_70487-11390--,00.html> (accessed July 7, 2016) [https://perma.cc/3BBK-KQCD] ("A permit to install is a state license to emit air contaminants into the ambient air.").

The relevant provisions of Chapter 5 of the APA include MCL 24.291, which states:

> (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.
>
> (2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under [MCL 24.292].

Here, the issuance of the permit, i.e., the licensing, was required to be preceded by notice and an opportunity for a hearing.[3] Thus, according to MCL 24.291(1), the provisions of the APA that relate to a contested case, i.e., Chapter 4 of the APA, MCL 24.271 *et seq*., apply. And because these provisions applied, that means that the APA applied to the decision to grant PTI 182-05C. As a result, we hold that MCR 7.119 governs and that petitioners had 60 days to appeal the

[3] Indeed, notice was provided of the public comment period, which was held from February 12, 2014, through March 19, 2014, and of the public hearing, which was held on March 19, 2014.

DEQ's issuance of the permit in the circuit court. Since their appeal to the circuit court was within this 60-day period, their appeal was timely, and the circuit court's ultimate decision to deny AK Steel's motion to dismiss for lack of jurisdiction was correct. Although the court erred by applying the provisions of the NREPA, we will not reverse when the lower court reaches the correct result, albeit for the wrong reason. *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012).

Affirmed. Because the appeal involves an issue of public concern, no costs are taxed under MCR 7.219.

RIORDAN, P.J., and M. J. KELLY, J., concurred with SAAD, J.

PEOPLE v CAMPBELL

Docket No. 324708. Submitted July 7, 2016, at Detroit. Decided July 14, 2016, at 9:00 a.m.

Michael D. Campbell was convicted after a jury trial in the Oakland Circuit Court of six counts of indecent exposure, MCL 750.335a, as a sexually delinquent person, MCL 750.10a. Campbell's convictions arose from six occasions during which he was seen exposing himself and masturbating. The trial court, Rudy J. Nichols, J., sentenced Campbell as a fourth-offense habitual offender to concurrent terms of 35 to 82 years in prison for each conviction. Campbell appealed.

The Court of Appeals *held*:

1. Substantial compliance with the requirements in the applicable court rule, MCR 6.005(D) and (E), and relevant caselaw concerning waiver of the assistance of counsel and a defendant's decision to represent himself or herself is sufficient to protect a defendant's constitutional rights to counsel and due process. According to *People v Anderson*, 398 Mich 361 (1976), a trial court must find that a defendant who wishes to represent himself or herself (1) has made an unequivocal request and (2) asserted the right to represent himself or herself knowingly, intelligently, and voluntarily. The court must also find that the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. In addition, before a trial court accepts a defendant's initial waiver of the right to counsel, the trial court must advise the defendant of the charge against him or her, the maximum possible prison sentence for conviction of that charge, any mandatory minimum sentence if convicted of the charge, and of the dangers of self-representation. The trial court should remind the defendant at all subsequent proceedings of the information related to the defendant's decision to represent himself or herself. In this case, although the trial court did not expressly find that Campbell's waiver of counsel was unequivocal, knowing, and voluntary, the court substantially complied with the requirements of MCR 6.005 and *Anderson*, and Campbell consistently indicated his desire to represent himself. Further, Campbell consulted with counsel

before making the decision to represent himself. The trial court determined that Campbell understood the import of his waiver of counsel and that he understood the fundamental aspects of a criminal trial. Campbell also had the advantage of standby counsel during trial. Whatever other procedural requirements were not expressly addressed by the trial court and for which no evidence appears on the record amounted to harmless error that did not affect Campbell's substantial rights. Therefore, Campbell's waiver of counsel and his decision to represent himself were valid.

2. A defendant accused of indecent exposure and being a sexually delinquent person is not entitled to separate trials on the issues; whether separate juries are necessary to determine a defendant's culpability for the charged offense and whether the defendant was a sexual delinquent at the time he or she committed the offense should be decided on a case-by-case basis. The decision to impanel separate juries for this purpose is within the trial court's discretion, and delivery of a limiting instruction to a single jury on the use of the evidence can adequately protect a defendant's rights. In this case, the trial court did not abuse its discretion by refusing to convene two juries and conduct two trials. According to the court, Campbell's acts demonstrated a single scheme, all the acts related to his sexual delinquency, and two trials would result in the same evidence being presented twice, a result that would have inconvenienced and invited harassment of the witnesses.

3. Under MCL 750.335a(2)(c), if a person convicted of indecent exposure was a sexually delinquent person at the time of the crime, the indecent exposure is punishable by imprisonment for an indeterminate term, the minimum of which is one day and the maximum of which is life. The indeterminate sentence in MCL 750.335a(2)(c) should be imposed on a defendant convicted of indecent exposure as a sexually delinquent person rather than a sentence determined using the statutory sentencing guidelines. Although *People v Buehler*, 477 Mich 18 (2007), held that the sentencing guidelines controlled over the version of MCL 750.335a in effect at the time of the offense at issue in that case, in this case Campbell's offenses were committed after a 2005 amendment of the statutory language made application of MCL 750.335a(2)(c) mandatory rather than permissive. Further, in *People v Lockridge*, 498 Mich 358 (2015), our Supreme Court held that the sentencing guidelines are now merely advisory. As a result of these changes, the conflict between MCL 750.335a(2)(c) and the sentencing guidelines, MCL 769.34, had to be resolved in

favor of applying MCL 750.335a(2)(c). Therefore, the trial court erred by sentencing Campbell under the sentencing guidelines, and Campbell's sentence had to be vacated.

4. The statute defining a criminal sexual psychopathic person was repealed effective August 1, 1968, and did not prevent Campbell from being convicted as a sexual delinquent.

Affirmed in part, vacated in part, and case remanded for resentencing.

CRIMINAL LAW — SENTENCING — INDECENT EXPOSURE BY A SEXUALLY DELINQUENT PERSON.

A defendant convicted of indecent exposure who was a sexually delinquent person at the time of the crime must be sentenced in accordance with MCL 750.335a(2)(c) rather than under the sentencing guidelines.

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

Michael D. Campbell, *in propria persona*, and State Appellate Defender (by *Erin Van Campen*) for defendant.

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM. Defendant, Michael David Campbell, appeals by right his jury convictions of six counts of indecent exposure as a sexually delinquent person. MCL 750.335a; MCL 750.10a. The trial court sentenced Campbell as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of 35 to 82 years for each conviction. On appeal, Campbell raises several claims of error that he asserts warrant a new trial and further argues that the trial court erred when it sentenced him under the sentencing guidelines. We conclude that there were no errors warrant-

ing a new trial but that the trial court erred when it sentenced Campbell under the sentencing guidelines. See MCL 769.34. For these reasons, we affirm Campbell's convictions but remand for resentencing.

I. BASIC FACTS

The prosecution charged Campbell with six counts of indecent exposure that allegedly occurred at various times from April 2013 through August 2013. At Campbell's trial, five women testified about six incidents during which Campbell stood outside their apartments, exposed himself, and masturbated. Campbell testified on his own behalf and admitted that he was present during each incident, but he stated that he had an artificial penis and shook it in front of the women as a prank. He denied exposing his penis and he denied masturbating.

The prosecution also presented testimony and evidence concerning several prior incidents involving Campbell. One witness testified that in April 2003 she saw Campbell standing alongside the road as she slowed down to make a turn. He pulled down his pants, exposed his penis, and then pulled his pants up. A police officer also testified about an incident in January 2010 when Campbell was caught peeping into the windows of a private residence. Another witness testified about an incident in October 2011 when he saw Campbell walking through the back of an apartment complex where the witness lived. The witness confronted Campbell and Campbell ran. The prosecution presented evidence that Campbell was convicted of crimes arising from these incidents.

The jury rejected Campbell's proffered defense and found him guilty on each of the six counts of indecent exposure. The jury also found that Campbell was a

sexually delinquent person at the time he committed the crimes. Campbell now appeals in this Court.

II. WAIVER OF RIGHT TO COUNSEL

A. STANDARDS OF REVIEW

Campbell first argues that the trial court erred when it let him represent himself at trial. More specifically, he argues that the trial court did not adequately inform him about the risks of self-representation, failed to reaffirm at all subsequent proceedings his decision to waive the right to counsel, and never determined that he made a knowing, voluntary, and intelligent waiver of his right to counsel. Because Campbell did not properly raise these issues before the trial court, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court reviews de novo whether a defendant waived his Sixth Amendment right to counsel, but reviews for clear error any factual findings underlying the trial court's decision. *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). This Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

B. ANALYSIS

A person accused of a crime and facing the possibility of incarceration has a constitutional right to have the assistance of a lawyer at every critical stage of the criminal process. *Williams*, 470 Mich at 641. "The United States Constitution does not, however, force a lawyer upon a defendant; a criminal defendant may choose to waive representation and represent himself." *Id*.

When confronted with a defendant who wishes to represent himself or herself, the trial court must determine that the three requirements stated in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), have been met: the court must ensure (1) that "the defendant's request is unequivocal," (2) that "the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation," and (3) that "the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing *Anderson*, 398 Mich at 367-368. Similarly, "[a trial court] may not permit the defendant to make an initial waiver of the right to be represented by a lawyer" unless the trial court first advises 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[.]" MCR 6.005(D)(1). The court must also "offer[] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer." MCR 6.005(D)(2).

Trial courts must substantially comply with the requirements stated in *Anderson* and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id*. at 726-727. "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated

with requiring courts to engage in a word-for-word litany approach." *Id*. at 727. "[I]t is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel." *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004).

Campbell initially retained Leslie Posner as his lawyer. At a hearing held almost three months before trial, Posner informed the trial court that Campbell wanted to represent himself. At a hearing held five days later, the court asked Posner if she was ready to go to trial in three weeks, but Campbell interjected: "No, your honor. I'm ready to go with her as a stand-by or an assistant but I'm trying to do this myself." After the court informed him that Posner would take over representation if he disrupted the trial, Campbell inquired about obtaining different standby counsel. The court asked Campbell if he wanted his previous court-appointed lawyer to take over, but Campbell reasserted that he wanted to defend himself: "No your honor, I wanna represent myself . . . ." The court again warned that Campbell's standby lawyer—no matter who it was—would take over representation if Campbell disrupted the trial. The court then asked Campbell if he still wanted to represent himself under this arrangement. Campbell stated that he did and was "ready to go to trial." Finally, the court inquired if he had consulted with Posner about this decision and, after Campbell confirmed that he had, the court again asked if he still wanted to represent himself. Campbell responded, "[Y]es ma'am." Thus, Campbell repeatedly and unequivocally stated that he wanted to represent himself. The trial court also asked Campbell if he was freely and voluntarily asking to represent himself, and he stated, "[A]h—yes, your honor."

Both the prosecutor and the trial court asked Campbell a series of questions to ascertain whether he fully understood the dangers of self-representation. For example, the prosecutor asked Campbell if he understood that he would have to follow the rules of evidence and that the lawyers had to go to law school and pass the bar exam before they could practice; Campbell answered that he understood. The prosecutor also asked Campbell if he realized that he would be held to the same standard as a lawyer and that the trial court could not assist him. Campbell again asserted that he understood and still wished to represent himself. The prosecutor questioned whether Campbell realized that "most would say" that it was "unwise" for an untrained person to represent himself in court, and Campbell stated that he knew and wanted to represent himself in any event.

As for the court, it too questioned Campbell in a way that emphasized how difficult self-representation might be. The court inquired whether Campbell knew how to issue notices and subpoenas, to which Campbell replied that he did not want to call any witnesses that were not already on the witness list. The court asked Campbell if he had any exhibits to introduce, and he indicated that he did not. The court questioned Campbell about the number of peremptory challenges that he was entitled to exercise, and Campbell said he had 15. Campbell affirmed that he would take part in jury selection, and when asked, he was able to explain that a juror's preexisting bias was grounds for challenging the juror. Campbell also explained the nature of a leading question and stated that he knew what hearsay meant.

"A waiver is sufficient if the defendant knows what he is doing and his choice is made with eyes open."

Williams, 470 Mich at 642 (quotation marks and citations omitted). Taken together, the questions and Campbell's answers demonstrated that he knew the perils of self-representation and was willing to take the risk. Consequently, the trial court substantially complied with the requirements stated in *Anderson*.

As already described, the court and the prosecutor informed Campbell of the risks of self-representation. The trial court also asked Campbell if he knew the length of the sentence he could receive if he was convicted, and Campbell stated what the guidelines range would be, even though he disagreed with the court's previous ruling that the sentencing guidelines would apply. The trial court also told Campbell that he could potentially face life in prison. But the trial court did not specifically list the charges against him. Nonetheless, the court did inquire whether Campbell knew if there were any lesser included offenses, and Campbell recognized that he could be convicted of "simple indecent exposure." Thus, there is record support that Campbell was fully aware of the charges against him. Accordingly, the failure to specifically restate the charges at the time of his request was harmless. See *Carines*, 460 Mich at 763.

The prosecutor also asked whether Campbell wanted to consult with a lawyer before making the decision to represent himself, but Campbell declined. And the trial court inquired whether he had consulted with Posner about his decision to represent himself, and Campbell responded that he had already discussed his decision with her. These discussions were sufficient to satisfy the requirements of MCR 6.005(D).

On appeal, Campbell also questions whether the trial court could rely on the prosecutor's questions in determining whether his waiver was properly made.

As Campbell correctly notes, the prosecutor is an adversarial party, but the "prosecutor [also] has the responsibility of a minister of justice, not simply that of an advocate." *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). Moreover, the prosecutor has a vested interest in ensuring that a defendant's waiver is knowingly, intelligently, and voluntarily made. Therefore, we conclude that the prosecutor's questions were a proper attempt to ensure that Campbell was fully informed before making a decision to waive his right to counsel. Moreover, because the substantial compliance rule is a nonformulaic rule, the trial court could properly consider the prosecutor's questions and Campbell's responses as part of its "short colloquy" to determine whether Campbell fully understood the import of his waiver. *Adkins*, 452 Mich at 726-727.

Campbell also correctly contends that the trial court never explicitly found that his waiver request was unequivocal, knowing, and voluntary. He contends that such a finding must be on the record for a waiver to be valid, but the authorities he cites do not support this proposition. See *Russell*, 471 Mich at 187-188; *Anderson*, 398 Mich at 367-368. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins*, 452 Mich at 726-727. It is clear from the proceedings that the court endeavored to make the requisite determinations and that it actually found that Campbell's waiver was unequivocal, knowing, and voluntary. Consequently, we do not agree that the trial court's failure to specifically state its findings amounted to plain error warranting relief. See *Carines*, 460 Mich at 763.

Campbell also contends that he is entitled to a new trial because the trial court failed to reaffirm his waiver at each subsequent proceeding. Under MCR 6.005(E), the trial court must advise a defendant who has waived the assistance of a lawyer of his or her continued right to a lawyer's assistance at subsequent proceedings:

> Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

Unlike the rules relating to an initial waiver of counsel, the procedure outlined in MCR 6.005(E) does not stem from any constitutional requirement. See *People v Lane*, 453 Mich 132, 139; 551 NW2d 382 (1996). And a trial court's failure to strictly comply with these requirements can be harmless error. See *id*. at 140-142.

Campbell maintains that the trial court failed to reaffirm his waiver at the three hearings subsequent to his initial waiver and also on the second and third days of trial. The first hearing after his initial waiver

concerned Posner's motion to withdraw as standby counsel. At that hearing, the trial court allowed Posner to withdraw on the ground that the attorney-client relationship had broken down.[1] The court also asked a potential replacement standby attorney, Mitchell Ribitwer, to enter an appearance and talk with Campbell. The trial court inquired whether Campbell still wanted to represent himself, and he responded, "[Y]es, your honor." Although the trial court did not explicitly remind Campbell that he had the continued right to the assistance of counsel, it is evident that Campbell was aware of that right and continued to assert his right to represent himself. Further, there is no indication that the failure to explicitly remind Campbell affected the outcome of the proceedings. Therefore, any error was harmless. See *Carines*, 460 Mich at 763; see also *Lane*, 453 Mich at 140-142.

At the next hearing identified by Campbell, Ribitwer appeared with Campbell, and the court reminded Campbell that he had the right to be represented by an attorney at public expense if he could not afford one. The court stated that Ribitwer had informed the court that Campbell wished to continue representing himself but wanted Ribitwer to act as standby counsel. Campbell did not express any disagreement. This was sufficient to satisfy the requirements of MCR 6.005(E).

The final pretrial hearing occurred in September 2014. The trial court asked whether Campbell still wanted to represent himself, and Campbell confirmed that he did. Campbell also said he had no objection to Ribitwer acting as his standby counsel. The court explained that "the law requires that I ask you every time" and that if Campbell had "a change of mind . . .

[1] Posner further asserted that Campbell had fondled himself at one of their meetings and refused to see her.

you need to let [the court] know." The trial court did not specifically advise Campbell that he had the continuing right to the assistance of a lawyer, but it was again evident that Campbell understood this given that he had accepted standby counsel and had asserted his right to represent himself. It was not plain error that warranted a new trial. See *Carines*, 460 Mich at 763.

On the first day of trial, the court informed Campbell that he had the right to the assistance of a lawyer, but Campbell again stated that he did not want a lawyer to represent him. He did agree to let Ribitwer sit beside him in case he had any questions. This was sufficient to satisfy the requirements of MCR 6.005(E). Campbell contends that the trial court nevertheless failed to comply with MCR 6.005(E) on subsequent days of trial. However, MCR 6.005(E) requires the court to confirm the waiver before a subsequent "proceeding," such as a "trial." It does not require the trial court to confirm the waiver on each day of trial. There was no plain error.

The trial court substantially complied with the requirements applicable to Campbell's waiver of the right to have a lawyer represent him. The court also adequately ensured that Campbell continued to waive his right at subsequent proceedings, and any technical deficiencies did not amount to plain error affecting Campbell's substantial rights. See *Carines*, 460 Mich at 763.

III. SEPARATE TRIALS

A. STANDARDS OF REVIEW

Campbell next argues that the trial court erred when it refused to bifurcate the proceedings or hold separate trials because the same jury should not have

been permitted to hear both the evidence relating to whether he committed indecent exposure and the evidence relating to whether he was a sexually delinquent person. After Campbell began to represent himself, he raised this issue in an informal oral motion for reconsideration of the trial court's earlier decision to hold a single trial. This Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration. *People v Perkins*, 280 Mich App 244, 248; 760 NW2d 669 (2008). However, to the extent that Campbell challenges the trial court's decision on constitutional grounds, his challenge is unpreserved. Consequently, we shall review it for plain error. See *Carines*, 460 Mich at 763.

B. ANALYSIS

In *People v Breidenbach*, 489 Mich 1, 4; 798 NW2d 738 (2011), our Supreme Court overruled *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978), which had mandated separate juries when a defendant is charged with both a primary sexual offense and the enhancement for sexually delinquent persons. The *Breidenbach* Court held that "determinations whether separate juries are needed should be made on a case-by-case basis in accordance with the Michigan Court Rules," and the decision to impanel separate juries is within the discretion of the trial court. *Breidenbach*, 489 Mich at 4. Under the totality of the circumstances, we conclude that the trial court did not abuse its discretion when it determined that it would be appropriate to hold a single proceeding.

The prosecution filed a notice of intent to introduce Campbell's other crimes or wrongs under MRE 404(b) for the purpose of demonstrating that the charged acts of indecent exposure were not a mistake, to show a

common scheme, to rebut any claim of fabrication, and to demonstrate that Campbell was a sexual delinquent. The rules of evidence allow the admission of other-acts evidence both to establish an underlying crime and a defendant's sexual delinquency. For that reason, the admission of such evidence does not preclude joinder:

> *Helzer*'s concern regarding the high potential for automatic conviction if the same jury is allowed to hear both charges—and in the process hear evidence of a defendant's history of sexual misconduct—is not very compelling when such evidence can be, and often is, admitted anyway under the Michigan Rules of Evidence or the doctrine of chances. Specifically, MRE 404(b) provides that evidence of other "crimes, wrongs, or acts" may be admissible in order to prove a defendant's motive, intent, preparation, scheme, plan, system of doing an act, or absence of mistake or accident, among other purposes. . . . Accordingly, *Helzer*'s rule mandating separate juries, however well-intentioned, does not take into account the practical reality that evidence of a defendant's history of sexual misbehavior will often come before the jury even when the charges are severed. This reality undermines *Helzer*'s policy rationale because, as we explained in *People v Williams*, [483 Mich 226, 237; 769 NW2d 605 (2009)] "[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial." Limiting instructions are the classic means by which trial courts direct juries to consider certain evidence for its proper purpose only. There is no indication that a proper limiting instruction would be any less appropriate or effective in this type of case. [*Breidenbach*, 489 Mich at 11-13.]

The trial court's initial order stated that one trial would be held and one jury would be impaneled "[f]or the reasons stated by the People." Namely, only one trial would be held and one jury impaneled because the alleged acts at issue demonstrated a single scheme, the

acts related to sexual delinquency under MCL 750.10a, and two trials would require presentation of the same evidence twice, resulting in inconvenience to and harassment of the witnesses. The trial court similarly denied Campbell's motion for reconsideration because separate juries would have heard the same information. Given the substantial overlap in the evidence and the trial court's ability to adequately protect Campbell's rights with a limiting instruction concerning the evidence that was admissible only to prove that Campbell was a sexually delinquent person, we conclude that the trial court's decision to hold a single trial was within the range of reasonable and principled outcomes. See *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010).

Campbell also contends that the trial court abused its discretion by failing to sever under the court rules. MCR 6.120(B) states in relevant part:

> Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential

> for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

Campbell asserts that the complexity of the case caused prejudice and confusion of the issues. He points out that the trial judge confused one of the victims with one of the witnesses. But contrary to Campbell's argument, the case and the evidence were not particularly complex. That there were six charges of indecent exposure coupled with six enhancements related to Campbell's status as a sexually delinquent person did not make the issues difficult to distinguish and separate. There were six charges of indecent exposure because there were six separate instances of indecent exposure. Additionally, the drain on the parties' resources, the potential for harassment of the witnesses, and the convenience of the witnesses all weighed in favor of not bifurcating the trial. Given these considerations, the trial court selected an outcome within the range of principled outcomes. *Rose*, 289 Mich App at 524.

Campbell also argues that the trial court's decision to hold a single trial violated his constitutional rights to due process and a fair trial. Due process "imports the right to a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence." *Napuche v Liquor Control Comm*, 336 Mich 398, 403; 58 NW2d 118 (1953) (quotation marks and citation omitted). Campbell's primary argument is that the expert's testimony relating to his sexual delinquency was inadmissible with respect to the charges of indecent exposure. He points out that the court did not provide a jury instruction directing the jurors to limit the use of the expert's testimony solely to the issue of sexual delinquency. He also points out that MCL 750.335a(2)(c) provides that a

person must be a sexual delinquent at the time of the indecent exposure in order to convict the person of sexual delinquency.

The expert's testimony was relevant to the charges of being a sexually delinquent person. Therefore, the issue is whether the court handled the introduction of this evidence effectively within the context of the charges presented to the jury. Giving the jury a limiting instruction (as the court did on the use of other-acts evidence) would have helped ensure that the effect of the testimony was focused on the six charges of being a sexually delinquent person. However, the evidence of Campbell's guilt—in relation to both indecent exposure and sexual delinquency—was overwhelming. All the relevant witnesses were able to identify Campbell and describe his offending actions. Further, Campbell's defense—that he was merely engaging in vulgar pranks with a "dildo"—was entirely unpersuasive and pointedly rejected by two of the witnesses. On this record, the trial court's failure to provide a cautionary instruction on the expert's testimony was harmless. Consequently, it did not amount to plain error warranting relief. See *Carines*, 460 Mich at 763.

Campbell also maintains that Posner's stipulation that separate trials were not required amounted to ineffective assistance. Posner merely conceded that separate trials were no longer mandatory after our Supreme Court's decision in *Breidenbach*, which was an accurate statement of the law. And, after discovery of the transcripts and the filing of supplemental briefs, Campbell established that he preserved his claim by asking the trial court to reconsider its decision to hold a single trial. On this record, Campbell has not demonstrated that Posner's concession likely affected the outcome of the lower court proceedings. See *People v*

Gioglio (On Remand), 296 Mich App 12, 23; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012).

Campbell also argues that the trial court erred when it allowed the jury to learn about both the indecent exposure charges and the charges of being a sexually delinquent person. Campbell relies on *Breidenbach*, 489 Mich at 8 n 15, for this proposition, but the procedure identified in that footnote applies to situations in which the trial court has determined that there should be separate trials, which was not the case here. Hence, the trial court did not plainly err by not following that procedure. See *Carines*, 460 Mich at 763.

The trial court did not abuse its discretion when it determined that a single proceeding was proper, and conducting a single proceeding did not deny Campbell his due process right to a fair trial. See *Rose*, 289 Mich App at 524.

IV. SENTENCING

A. STANDARD OF REVIEW

Campbell argues that the trial court did not have the discretion to determine a minimum and maximum sentence under the sentencing guidelines. Now that the sentencing guidelines are advisory, he maintains, trial courts are required to sentence a person convicted of indecent exposure as a sexually delinquent person to serve one day to life in prison. This Court reviews de novo the proper interpretation of statutes. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

B. ANALYSIS

"Our primary task in construing a statute is to discern and give effect to the intent of the Legislature,"

as indicated by the language used in the statute. *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). If the statutory language is clear and unambiguous, then no judicial construction is necessary or permitted. *Davis*, 468 Mich at 79. "[A] statute that is unambiguous on its face can be rendered ambiguous by its interaction with and its relation to other statutes." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (quotation marks and citations omitted).

The issue here is whether MCL 750.335a or the statutory sentencing guidelines control Campbell's sentence for indecent exposure as a sexually delinquent person. This Court previously addressed the conflict between MCL 750.335a and the sentencing guidelines and determined that the sentencing guidelines should control because they were more recently enacted. *People v Buehler (On Remand)*, 271 Mich App 653, 657-659; 723 NW2d 578 (2006), rev'd on other grounds 477 Mich 18 (2007). The Court in *Buehler* noted that 2005 PA 300 amended MCL 750.335a, but because the offense occurred before the effective date of the amendment, the Court expressed no opinion as to whether the guidelines or MCL 750.335a controlled after the amendment. *Id*. at 659 n 4. While reversing on other grounds, our Supreme Court agreed that the guidelines controlled over the version of MCL 750.335a in effect at the time of the offense and agreed that it was unnecessary to determine whether the amended statute would alter that conclusion for future offenders. *People v Buehler*, 477 Mich 18, 24 n 18; 727 NW2d 127 (2007).

Campbell now challenges whether the amended version of MCL 750.335a supersedes the sentencing

guidelines. As our Supreme Court recognized, at the time the *Buehler* defendant committed his crime, MCL 750.335a provided that the crime of indecent exposure as a sexually delinquent person "*may* be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life . . . ." *Buehler*, 477 Mich at 21 n 5 (emphasis added; quotation marks and citation omitted). But the 2005 amended version in effect when Campbell committed his crimes provided that commission of the crime of indecent exposure as a sexually delinquent person "*is* punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." MCL 750.335a(2)(c), as amended by 2005 PA 300 (emphasis added).[2] Campbell argues that the change in statutory language from "may be punishable" to "is punishable" indicates that the Legislature intended that the indeterminate sentence of one day to life be a mandatory sentence, notwithstanding the sentencing guidelines.

We agree that the conflict between the statutory language provided under MCL 750.335a(2)(c) and the sentencing guidelines, MCL 769.34, must now be resolved in favor of applying MCL 750.335a(2)(c). Our Supreme Court has determined that the sentencing guidelines were unconstitutional to the extent that the guidelines required trial courts to determine a defendant's minimum sentence on the basis of facts "beyond those admitted by the defendant or found by the jury beyond a reasonable doubt . . . ." *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). Although the Supreme Court determined that the guidelines should

[2] 2014 PA 198 also amended MCL 750.335a, but that amendment postdated Campbell's crimes and did not alter the relevant statutory language.

still be scored by trial courts, it nevertheless held that trial courts are no longer required to sentence a defendant to a minimum sentence within the range provided by the guidelines—that is, the guidelines are now merely advisory. *Id*. at 365. By contrast, the sentence provided under MCL 750.335a(2)(c) is stated in mandatory terms. Consequently, after the decision in *Lockridge*, trial courts must sentence a defendant convicted of indecent exposure as a sexually delinquent person consistently with the requirements of MCL 750.335a(2)(c).

The trial court erred when it failed to sentence Campbell consistently with MCL 750.335a(2)(c).

V. CRIMINAL SEXUAL PSYCHOPATHIC PERSON

Campbell also argues that he qualifies as a criminal sexual psychopathic person under a repealed statute and, for that reason, should not have been convicted as a sexual delinquent. He relies on the decision in *People v Griffes*, 13 Mich App 299; 164 NW2d 426 (1968). However, the court in that case recognized that the statute had been repealed, effective August 1, 1968. *Id*. at 302 n 2. Consequently, that classification no longer exists, and the trial court did not plainly err by failing to apply it. See *Carines*, 460 Mich at 763.

VI. CONCLUSION

There were no errors warranting a new trial. However, the trial court erred when it sentenced Campbell under the sentencing guidelines rather than using the mandatory sentence provided under MCL 750.335a(2)(c). Accordingly, we vacate his sentences and remand this case to the trial court for resentencing consistent with this opinion.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

RIORDAN, P.J., and SAAD and M. J. KELLY, JJ., concurred.

PEOPLE v ASSY

Docket No. 326274. Submitted July 6, 2016, at Detroit. Decided July 14, 2016, at 9:05 a.m.

Fady Y. Assy was charged in the Wayne Circuit Court with two counts of offering for sale without proper invoices tobacco products other than cigarettes with an aggregate wholesale price of $250 or more, MCL 205.428(3), and one count of manufacturing tobacco products without a license, MCL 205.428(3). Defendant moved to dismiss the charges. The court, Mark T. Slavens, J., granted defendant's motion and dismissed the charges, concluding that the statute under which the charges were brought, the Tobacco Products Tax Act, MCL 205.421 *et seq*., was unconstitutionally vague and overbroad because the Legislature did not make clear to whom those statutory provisions applied. The prosecution appealed.

The Court of Appeals *held*:

1. A statute may be challenged as unconstitutionally vague on the basis that it does not provide fair notice of the conduct proscribed, that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or that its coverage is overbroad and impinges on First Amendment freedoms. A statute is not vague if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so he or she may act accordingly. A statute must also provide explicit standards for those who apply them to ensure that the statutory requirements are not applied in an arbitrary and capricious manner. An appellate court will uphold the constitutionality of a statute if the Legislature identified the conduct proscribed and provided adequate guidance to avoid the potential for arbitrary and discriminatory application.

2. MCL 205.426(1) of the act requires every retailer to keep documentation that substantiates the purchase of each tobacco product at the location where the tobacco product is offered for sale for a period of four months from the date of the purchase or acquisition. Under MCL 205.426(6), it is presumed that a tobacco product is kept in violation of that act if a tobacco product other than cigarettes is found in a place of business or otherwise in the

possession of a retailer without the proper substantiation of required invoices or other records.

3. MCL 205.422(q) defines the term "retailer" to mean a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail. The act, under MCL 205.422(o), defines "person" to include both individuals and legal entities. Applying the dictionary definition of the term "operate" and analyzing the statutory scheme of the act as a whole, the Legislature clearly intended the MCL 205.426(1) documentation requirements to apply to a person who directs or manages the business—that is, a person who has control over the business's day-to-day operation. The requirement to retain documentation is not limited to the owner of the store; by defining retailer to mean a person who operates the place of business—as opposed to a person who owns the business—the Legislature indicated that the person or entity who directs or manages the day-to-day operations is the one responsible for ensuring compliance with the act.

4. In this case, MCL 205.426(1) unambiguously provides persons with ordinary intelligence reasonable notice that a retailer is presumed to possess tobacco products other than cigarettes in violation of the act if he or she does not keep documentation capable of substantiating the purchase of each tobacco product at his or her retail location for a period of four months from the date of purchase or acquisition. The act's definition of retailer is sufficiently precise that it places persons of ordinary intelligence on notice that the person who directs or manages the operation of a place of business that makes retail sales of tobacco products must maintain proper documentation or face possible criminal prosecution. The statutory scheme of the act is also sufficiently definite that it precludes arbitrary or discriminatory enforcement. Accordingly, the trial court erred as a matter of law when it concluded that MCL 205.426(1) was unconstitutionally vague and erred when on that basis it dismissed the charges against defendant.

Reversed and remanded.

1. CONSTITUTIONAL LAW — DUE PROCESS — TOBACCO PRODUCTS TAX ACT — VAGUENESS.

MCL 205.426(1) of the Tobacco Products Tax Act, MCL 205.421 *et seq*., is not unconstitutionally vague because it provides persons with ordinary intelligence reasonable notice that a retailer is presumed to possess tobacco products other than cigarettes in violation of the act if he or she does not keep documentation

capable of substantiating the purchase of each tobacco product at his or her retail location for a period of four months from the date of purchase or acquisition.

2. STATUTES — TOBACCO PRODUCTS TAX ACT — WORDS AND PHRASES — RETAILERS.

Under MCL 205.422(q) of the Tobacco Products Tax Act, MCL 205.421 *et seq*., the term "retailer" is defined as a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail; the term "retailer" is not limited to a person or entity who owns the business but rather also includes a person who directs or operates the business or has control over the business's day-to-day operations.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Lamar D. Moreland*, Assistant Attorney General, for the people.

Law Offices of Salem F. Samaan, PC (by *Salem F. Samaan*), for defendant.

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the constitutionality of the Tobacco Products Tax Act (the Tobacco Act), MCL 205.421 *et seq*., the prosecution appeals by right the circuit court's decision to dismiss the charges against defendant, Fady Yohanna Assy. On appeal, we conclude that the circuit court erred when it determined that the Tobacco Act was unconstitutionally vague and overbroad and dismissed the charges against Assy on that basis. Accordingly, we reverse and remand.

I. BASIC FACTS

Todd Berdan testified that he was a detective with the Michigan State Police department's tobacco squad.

In May 2013, he conducted an administrative tobacco inspection at King's Hookah, a business located in Dearborn, Michigan. Assy arrived during the inspection and told Berdan that he was the store's manager. Berdan informed Assy that there did not appear to be invoices for more than $250 worth of tobacco. Berdan also asked Assy about the bulk tobacco on the counter, and Assy informed him that he would make the bulk stock by combining two or three different flavors of tobacco, which he then sold by weight. Assy agreed to help produce the invoices for the tobacco, but he could not produce them. Berdan and the other inspectors inventoried and seized the tobacco. Berdan determined that neither King's Hookah nor Assy had a license to manufacture tobacco products.

Berdan returned to King's Hookah in June 2013 to conduct another inspection. Assy told Berdan that he did the purchasing for the store along with the owner but stated that the owner had been out of the country. Berdan discovered that some of the stored tobacco was missing shipping labels from the original manufacturer and some of the tobacco was not supported by the proper invoices. Berdan stated that the amount of tobacco without proper invoices had a wholesale value of more than $250.

In May 2014, the prosecution charged Assy with two counts of violating the Tobacco Act on the basis of the May 2013 inspection. The prosecution specifically charged him with possessing, acquiring, transporting, or offering for sale tobacco products other than cigarettes with an aggregate wholesale price of $250 or more without proper invoices, MCL 205.428(3), and with manufacturing tobacco products without a license, MCL 205.428(3). The prosecution also charged Assy in a separate case with one count of possessing,

acquiring, transporting, or offering for sale tobacco products other than cigarettes with an aggregate wholesale price of $250 or more without proper invoices arising from the June 2013 inspection.

The district court held a preliminary examination in September 2014. Assy moved to dismiss the charges on various grounds, but the district court determined that the prosecution had presented sufficient evidence to bind Assy over to the circuit court for trial.

In February 2015, Assy moved the circuit court to dismiss the charges against him. The circuit court held a hearing on the motion that same month. During the hearing, the circuit court expressed concern that the Legislature defined a retailer under the statute as someone who operates a place of business for the purpose of making sales of tobacco, but did not clarify what constitutes the operation of a place of business. On that basis, the court determined the statute was "vague and over broad" because it could encompass a "seventeen year old selling those cigarettes, and I don't think that was the intent of the legislature whatsoever." Accordingly, the circuit court dismissed the charges against Assy.

The prosecution now appeals the circuit court's dismissal in this Court.

II. VAGUE OR OVERBROAD STATUTE

A. STANDARDS OF REVIEW

The prosecution argues that the trial court erred when it granted Assy's motion to quash on the ground that the statute was unconstitutionally vague or overbroad. This Court reviews a trial court's decision to grant a motion to quash for an abuse of discretion. *People v McKerchie*, 311 Mich App 465, 470-471; 875

NW2d 749 (2015). This Court reviews de novo whether a trial court correctly determined that a statute is unconstitutional. *IME v DBS*, 306 Mich App 426, 433; 857 NW2d 667 (2014). This Court also reviews de novo whether the trial court properly interpreted the relevant statutory provisions. *McKerchie*, 311 Mich App at 471.

B. ANALYSIS

In dismissing the charges against Assy, the circuit court indicated that the statute was vague and overbroad, but it did not offer an explanation of its reasoning; it merely stated that as written the statute could apply to a seventeen-year-old retailer who sells cigarettes. It then asserted—without any analysis—that it did not believe the Legislature intended the statutory requirements to apply to a seventeen-year-old retailer who sells cigarettes. The circuit court does not appear to have determined that the Legislature lacked the authority to enact a statute that requires a seventeen-year-old retailer of tobacco products to maintain the requisite invoices, or that the Legislature lacked the authority to impose a recordkeeping requirement on any person who participates in the sale of tobacco products, however minor his or her role might be.[1] In addition, the statutory scheme plainly does not involve

[1] To the extent the circuit court determined that the statute does not pass constitutional scrutiny under the rational basis test, it plainly erred. The statutory scheme does not interfere with any fundamental rights and, given the harmful nature of tobacco products and the possibility of illicit sales, the Legislature could—if it chose—reasonably require a person who participates in any way in the sale of tobacco products to maintain the requisite invoices. See *IME*, 306 Mich App 438-439 (stating that when a statute does not interfere with fundamental rights, it need only be reasonably related to a legitimate government interest).

First Amendment freedoms. See *People v Howell*, 396 Mich 16, 20-21; 238 NW2d 148 (1976) (noting that a statute may be challenged for vagueness on three grounds, one of which is when a statute is overly broad and impinges on First Amendment freedoms). For these reasons, it appears that the trial court determined the statute was unconstitutional because it did not "provide fair notice of the conduct proscribed" or conferred "on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed." *Id*. at 20.

"Vague laws," our Supreme Court has stated, "offend several important values." *Id*. at 20 n 4 (quotation marks and citation omitted). A vague law "may trap the innocent by not providing fair warning." *Id*. Accordingly, courts "insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Id*. Further, the law must "provide explicit standards for those who apply them." *Id*. When a law is vague, there is a danger that the law will be enforced "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id*. If the Legislature identified the conduct proscribed and provided adequate guidance to avoid the potential for arbitrary and discriminatory application, we must uphold the constitutionality of the Tobacco Act. See *Bonner v Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014) (explaining that courts will presume the validity of an act and will only refuse to sustain the validity of the act when its "invalidity appears so clearly as to leave no room for reasonable doubt that it violates" the Constitution).

The prosecution charged Assy with, in relevant part, two counts of possessing tobacco products other than

cigarettes without keeping the required documentation at the retail location.[2] Under the Tobacco Act, every retailer must keep documentation to substantiate the purchase of each tobacco product at his or her retail location:

> A retailer shall keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or acquisition. [MCL 205.426(1).]

Moreover, if "a tobacco product other than cigarettes is found in a place of business or otherwise in the possession of a . . . retailer . . . without proper substantiation by invoices or other records as required by this section, the presumption shall be that the tobacco product is kept in violation of this act." MCL 205.426(6).

This statutory scheme is unambiguous and provides persons with ordinary intelligence reasonable notice of what is prohibited: a retailer is presumed to possess tobacco products other than cigarettes in violation of the act if he or she does not keep documentation capable of substantiating the purchase of each tobacco product at his or her retail location for a period of four months from the date of purchase or acquisition. And the possession of "tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more" contrary to the Tobacco Act is a felony, "punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both." MCL 205.428(3).

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[2] The circuit court did not directly address the manufacturing count, but appears to have applied the same reasoning in granting the motion to quash.

In determining that this statute is vague or overbroad, the circuit court apparently determined that the statute was not sufficiently clear to place persons of ordinary intelligence on notice as to who must keep the necessary documentation or did not provide sufficient guidance to those charged with enforcing the law to enable them to ascertain who may be held criminally responsible for possessing tobacco products other than cigarettes without the necessary documentation. A fair reading of the statutory scheme, however, shows that the Legislature provided sufficient guidance to survive this constitutional challenge.

The Legislature imposed the recordkeeping requirements on retailers, MCL 205.426(1), and defined the term "retailer" to mean "a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail," MCL 205.422(q). It is undisputed that the store at issue was a place of business for selling tobacco products at retail. Thus, the person or persons who operated the "place of business" had the obligation to maintain the documentation or risk being charged with the possession of tobacco products in contravention of the Tobacco Act.

The circuit court worried that the term "retailer," as defined under the statute, could encompass any employee—including a seventeen-year-old cashier—because it was unclear what constitutes operating a business. The Legislature defined the term "person" to include both individuals and legal entities. MCL 205.422(o). Nevertheless, in ordinary speech, one does not normally refer to a cashier or stocker as the operator of a business. The verb "to operate," when used in its transitive sense, means "[t]o direct the working of; to manage, conduct, work (a railway, busi-

ness, etc.); to carry out or through, direct to an end (a principle, an undertaking, etc.)." *The Oxford English Dictionary* (2d ed, 1991). When MCL 205.426(1) and MCL 205.422(q) are read together and in the proper context, see *Hayes v Parole Bd*, 312 Mich App 774, 779; 886 NW2d 725 (2015), it is evident that the Legislature intended the term "retailer" to have this more limited meaning; it intended the term to refer to a person who directs or manages the business—to someone who has control over the business's day-to-day operations. Accordingly, we do not share the circuit court's concern that the statute might be applied to a variety of low-level employees.

In contrast to the circuit court's apparent concern, Assy argues on appeal that the term "operates" necessarily refers to the owner or owners of the store, which in this case is an artificial entity. Although the owner of a business may directly control or manage a business, the owner may also delegate that responsibility to another person or entity. Thus, by defining the word "retailer" to mean a person who operates the place of business, as opposed to a person who owns the business, the Legislature indicated that the person or entity who actually directs or manages the day-to-day operations is the party responsible for ensuring compliance with the Tobacco Act. If a person or entity has control over the day-to-day operations of a "place of business for the purpose of making sales of a tobacco product at retail," that person is a retailer notwithstanding that he or she does not own the place of business. MCL 205.422(q).

The Legislature defined the term "retailer" with sufficient precision to place persons of ordinary intelligence on notice that the person or persons who direct or manage the operation of a place of business that

makes tobacco sales at retail must maintain proper documentation or possibly face criminal charges. Similarly, the statutory scheme is sufficiently definite to preclude arbitrary or discriminatory enforcement. See *People v Hayes*, 421 Mich 271, 284, 286; 364 NW2d 635 (1984). Therefore, the trial court erred when it determined that the statutory scheme was unconstitutionally vague or overbroad.[3]

On appeal, Assy discusses the definition of "sale at retail" from the General Sales Tax Act, MCL 205.51 *et seq*., when interpreting the term "retailer." However, the authorities he cites are inapposite because the term "retailer" was not defined in the General Sales Tax Act. We similarly reject his contention that because MCL 205.27a only imposes the duty to maintain corporate tax and accounting records on officers, MCL 205.426(1) cannot be understood to impose criminal liability on persons other than officers for failing to keep business records. MCL 205.426(1) plainly imposes a duty on persons who operate the place of business and not just officers.

III. CONCLUSION

The trial court erred as a matter of law when it determined that MCL 205.426(1) was unconstitutional. Consequently, it necessarily abused its discretion when it granted Assy's motion to quash the charges on the basis of this error of law. *McKerchie*, 311 Mich App at 471.

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[3] Assy moved to dismiss the charges on other grounds as well. However, because the circuit court only addressed whether the statute at issue is unconstitutionally vague or overbroad, we have limited our analysis accordingly. Whether there are alternate bases for dismissing the charges should be addressed by the circuit court on remand, if necessary.

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

RIORDAN, P.J., and SAAD and M. J. KELLY, JJ., concurred.

PEOPLE v HELLER

Docket No. 326821. Submitted June 7, 2016, at Grand Rapids. Decided July 14, 2016, at 9:10 a.m.

Trenity D. Heller pleaded guilty in the Hillsdale Circuit Court to possession of methamphetamine, MCL 333.7403(2)(b)(*i*). The court, Michael R. Smith, J., conducted defendant's sentencing via two-way interactive videoconference and sentenced him to 30 to 120 months' imprisonment despite the fact that his sentencing guidelines score placed him in a minimum sentencing guidelines range of 0 to 17 months, citing defendant's lengthy offense history, engagement in the manufacture of methamphetamine, and persistent drug abuse as justification for the departure. Defendant sought leave to appeal on both procedural and substantive grounds, and the Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

1. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness as required by *People v Lockridge*, 498 Mich 358 (2015). Because the trial court sentenced defendant before the Supreme Court decided *Lockridge*, and because *People v Steanhouse*, 313 Mich App 1 (2015), dictates that implementation of the reasonableness standard requires remand for consideration of the sentence's proportionality pursuant to *People v Milbourn*, 435 Mich 630 (1990), the trial court must be permitted to reconsider defendant's sentence unless defendant elects to avoid reconsideration.

2. MCR 6.006(A) lists the proceedings in which two-way interactive video technology may be used in Michigan courts: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show-cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations. Felony sentencing is not a proceeding on the list of permissible uses for two-way interactive video technology. Defendant's absence from the sentencing was fundamentally unfair and nullified the dignity of the proceeding

and its participants. Defendant must be physically present in the courtroom should he elect to be resentenced.

Case remanded for resentencing at defendant's option.

CRIMINAL LAW — FELONY SENTENCING — PRESENCE OF DEFENDANT — TWO-WAY INTERACTIVE VIDEO TECHNOLOGY.

MCR 6.006(A) lists the proceedings in which two-way interactive video technology may be used in Michigan courts: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show-cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations; two-way interactive video technology may not be used for felony sentencing; a defendant must be physically present in the courtroom for felony sentencing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Neal A. Brady*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: STEPHENS, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM. Defendant, Trenity D. Heller, pleaded guilty to possession of methamphetamine, MCL 333.7403(2)(b)(*i*). The trial court sentenced Heller by videoconference, with Heller located in the county jail. Heller's counsel was present in the courtroom but raised no objection to his client's physical absence. The sentence imposed departed substantially from the guidelines recommendation.

Sentencing by videoconference plainly contravenes MCR 6.006, which identifies the criminal proceedings in which two-way interactive video technology may be

used. Felony sentencing is not one of them. We remand for resentencing consistent with this opinion.

I

The prosecutor charged Heller with operating or maintaining a methamphetamine laboratory, MCL 333.7401c; possession of methamphetamine, MCL 333.7403(2)(b)(*i*); and possession of marijuana, MCL 333.7403(2)(d). Immediately after his videoconferenced arraignment from the jail, Heller pleaded guilty to possession of methamphetamine. In exchange for this plea, the prosecutor promised to dismiss the other two counts, to dismiss a pending district court case, and to withhold an habitual offender charge. MCR 6.006(A) permits courts to use two-way interactive video technology during "initial arraignments on the warrant or complaint" and "pleas."

The trial court also conducted Heller's sentencing by videoconference. Heller was not advised that he had an option to appear personally. Nor did the court offer Heller an opportunity to privately communicate with counsel during the hearing. Heller's lawyer informed the court that he had met with Heller a few days earlier to go over the presentence information report, which had not yet arrived at the jail. Counsel stated, "I assume that he has now received it[.]" The court made no effort to confirm counsel's assumption.

Heller's sentencing guidelines score placed him in a minimum sentencing guidelines range of 0 to 17 months. The trial court sentenced him to 30 to 120 months' imprisonment, justifying the departure and its extent on Heller's lengthy offense history, his engagement in the manufacture of methamphetamine, and his persistent drug abuse. Heller's delayed application for leave to appeal advanced both procedural

and substantive complaints concerning his sentence. We granted leave as to both. *People v Heller*, unpublished order of the Court of Appeals, entered May 22, 2015 (Docket No. 326821).

II

We first consider Heller's challenge to the length of his sentence. The trial court sentenced Heller before our Supreme Court decided *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). In *Lockridge*, the Court directed that "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id*. at 392. In *People v Steanhouse*, 313 Mich App 1, 48; 880 NW2d 297 (2015), this Court held that implementation of the reasonableness standard requires remand for consideration of the sentence's proportionality pursuant to *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), following the remand procedure adopted in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). Given *Steanhouse*'s directive, the trial court must be permitted to reconsider defendant's sentence in the light of *Milbourn*. Heller may avoid reconsideration of his sentence if he chooses, consistent with *Crosby*.

III

Should Heller elect to be resentenced, he must be physically present in the courtroom.

MCR 6.006(A) catalogs the proceedings in which two-way interactive video technology may be used in Michigan courts. Listed are: "initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show

cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations." Felony sentencing is not on the list.

"The express mention of one thing in a statute implies the exclusion of other similar things." *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999). We apply the same interpretive principle to court rules. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). By carefully delineating the proceedings amenable to the employment of two-way interactive video technology, the Supreme Court has telegraphed that this means of communication may not be used elsewhere.

Why did the Supreme Court omit felony sentencings from MCR 6.006(A)? Presumably because sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984), and virtual appearance is not a suitable substitute for physical presence. "The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty." *United States v Villano*, 816 F2d 1448, 1452 (CA 10, 1987) (en banc). Our court rules and common law invest sentencing with profound significance, for this grave moment in the criminal process often seals a defendant's fate or dictates the contours of his or her future. Individualized sentencing furthers the goal of rehabilitation by respecting the inherent dignity of each person the law deprives of freedom, civil rights, or property. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). A defendant's right to allocute before sentence is passed—to look a judge in the eye in a public courtroom while making his or her plea—stems from our legal tradition's centuries-

old recognition of a defendant's personhood, even at the moment he or she is condemned to prison. Sentencing is "an intensely human process—after all, we are dealing not with machines and equipment, but with human lives." *United States v Davern*, 970 F2d 1490, 1516 (CA 6, 1992) (Jones, J., dissenting).

Undoubtedly, two-way interactive video technology saves courts money and time, and it dramatically lessens security concerns. But in the felony sentencing context, it is simply inconsistent with the intensely personal nature of the process. After all, "[s]entencing is the point where the heart of the law—and its human face—is most clearly revealed." Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L Rev 1, 179 (2008). Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom. Moreover, a courtroom "is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers[.]" *Estes v Texas*, 381 US 532, 561; 85 S Ct 1628; 14 L Ed 2d 543 (1965) (Warren, C.J., concurring). The courtroom setting provides "a dignity essential" to the process of criminal adjudication. *Id*. Isolating a defendant from that setting during what may be the most decisive moment of his or her life clashes with the judge's duty to acknowledge the humanity of even a convicted felon.

Canadian philosopher Marshall McLuhan's famous quote, "the medium is the message," bears relevance to this discussion. In McLuhan's words:

> [I]t is the medium that shapes and controls the scale and form of human association and action. The content or uses

> of such media are as diverse as they are ineffectual in shaping the form of human association. Indeed, it is only too typical that the "content" of any medium blinds us to the character of the medium. [McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: MIT Press, 1994), p 9.].

The medium itself—here, videoconferencing from a jail—delivers content of its own. That content, in turn, influences the perceptions of the participants. Abundant social science research demonstrates that video conferencing "as a mediating technology" may color a viewer's assessment of a person's credibility, sincerity, and emotional depth. Salyzyn, *A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*, 50 Osgoode Hall L J 429, 445 (2012).[1] Some studies suggest that "individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators." *Id*. at 447. Courts, too, have recognized that "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v Lawrence*, 248 F3d 300, 304 (CA 4, 2001). Alternatively phrased: "In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life . . . ." *Stoner v Sowders*, 997 F2d 209, 213 (CA 6, 1993).

Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of "the true moral fiber of another," *Del Piano v United States*, 575 F2d 1066,

[1] This article offers a thorough and insightful discussion of the unintended, negative effects of videoconferencing in the legal world.

1069 (CA 3, 1978), a task made far more complex when the defendant speaks through a microphone from a remote location. The trial judge who sentenced Heller never met or sat in the same room with him. In our view, Heller's absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair.

We remand for resentencing at Heller's option. We do not retain jurisdiction.

STEPHENS, P.J., and BECKERING and GLEICHER, JJ., concurred.

PEOPLE v SIMMONS

Docket No. 331116. Submitted July 6, 2016, at Detroit. Decided July 19, 2016, at 9:00 a.m.

Michael L. Simmons was charged in the Genesee Circuit Court with carrying a concealed weapon, MCL 750.227, possession of a firearm by a person convicted of a felony, MCL 750.224f, possession of ammunition by a person convicted of a felony, MCL 750.224f(6), receiving and concealing a stolen firearm, MCL 750.535b, possession of a firearm during the commission of a felony, MCL 750.227b, and operating a motor vehicle with a suspended license, MCL 257.904(3)(a), in connection with a traffic stop performed on a vehicle he was driving. The police officer stopped the vehicle because it did not have a metal registration plate attached at the rear. The vehicle did have a piece of paper on the left side of the rear window, but the officer could not read the paper either from his vehicle or when he was 3 to 4 feet away from the car as he approached the driver's side on foot. The writing was very dim, which made the paper illegible, and the officer did not see any numbers or letters. The officer did not stop to verify whether the paper was a temporary tag. The officer approached defendant and requested his identification, vehicle registration, and proof of insurance. Defendant provided a state identification card, but not a driver's license, and did not provide the registration. The officer performed a computer search and learned that defendant's driver's license was suspended. Defendant was arrested for driving with a suspended license and placed in the officer's car. The officer received permission to search the car from its owner, who was a passenger in the vehicle, and found a firearm or firearms. The officer later determined that the paper was a valid temporary license plate. Defendant moved to suppress the physical evidence, asserting he was subjected to an unlawful search and seizure in violation of the United States and Michigan Constitutions, US Const, Am IV; Const 1963, art 1, § 11, because the officer lacked a lawful basis for the traffic stop. The court, Richard B. Yuille, J., agreed and granted defendant's motion, finding that the officer should have taken five seconds to verify the validity of the temporary paper plate in the rear window.

The Court of Appeals *held*:

The officer's traffic stop was based on a reasonable suspicion that traffic laws were being violated. Under MCL 257.225 of the Michigan Vehicle Code, MCL 257.1 *et seq.*, a vehicle registration plate must be attached at the rear of the vehicle and must be clearly visible, clearly legible, and free from foreign materials that obscure or partially obscure the registration information. The officer testified that he could not see a plate before pulling the vehicle over and that he could not read the paper in the window from 3 to 4 feet away. Therefore, the plate was not in a clearly visible position or in a clearly legible condition. The officer did not have to take the time to determine whether the paper was a valid plate because even though valid, the plate was still in violation of MCL 257.225. The officer's questions regarding defendant's license and the vehicle's registration were reasonable questions concerning the violation of the law, and defendant's failure to provide a driver's license justified the officer's computer check. The officer had an articulable and reasonable suspicion that there was a violation of the law, and defendant was detained for a reasonable period in order to permit the officer to ask reasonable questions concerning the violation of the law and its context.

Reversed and remanded.

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

Nicholas R. Robinson for defendant.

Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] the trial court's opinion and order granting defendant's motion to suppress evidence. We reverse and remand for further proceedings consistent with this opinion.

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[1] *People v Simmons*, unpublished order of the Court of Appeals, entered February 18, 2016 (Docket No. 331116).

This case arises from a traffic stop of the vehicle defendant was driving during the evening hours of December 14, 2014. Officer Robert Cavett, a Flint Township police officer, pulled over the vehicle because it did not have a metal registration plate attached at the rear. When Officer Cavett pulled over the car, he saw that there was a piece of paper on the left side of the rear window, but he could not read the piece of paper. Officer Cavett looked at the paper again from approximately 3 to 4 feet away as he approached the driver's side of the vehicle, but he could not see any of the letters or numbers. The writing was very dim, which made the paper illegible. Officer Cavett did not stop to read the paper. He explained that he did not do so for safety reasons because there was a potential that the occupants of the car could harm him, get out of the car, or flee the scene. However, he admitted that he did not have a reason to fear for his safety at that time and that it would have taken approximately five seconds to verify the temporary license plate.

He approached the vehicle and asked defendant, who was driving the car, for his identification, registration, and proof of insurance. Defendant provided a state identification card, but not a driver's license. He also did not provide the registration. Officer Cavett performed a computer search with regard to defendant and learned that defendant's driver's license was suspended. Defendant was arrested for driving with a suspended license, and he was placed in Officer Cavett's patrol car. Officer Cavett subsequently searched the vehicle with the permission of the owner, who was a passenger in the car, and found a firearm or firearms. He later determined that the paper was a valid temporary license plate. From that traffic stop, defendant was charged with carrying a concealed weapon, MCL 750.227, possession of a firearm by a

person convicted of a felony, MCL 750.224f, possession of ammunition by a person convicted of a felony, MCL 750.224f(6), receiving and concealing a stolen firearm, MCL 750.535b, possession of a firearm during the commission of a felony, MCL 750.227b, and operating a motor vehicle with a suspended license, MCL 257.904(3)(a).

Defendant moved to suppress the physical evidence, asserting he was subjected to an unlawful search and seizure in violation of the United States and Michigan Constitutions. He argued that the officer lacked a lawful basis for the traffic stop and that the court should suppress all evidence seized from the vehicle. The court heard defendant's motion to suppress evidence, and Officer Cavett testified regarding the traffic stop. The trial court entered an opinion and order granting defendant's motion to suppress evidence, finding that Officer Cavett should have taken five seconds to verify the validity of the temporary paper plate in the rear window.

The prosecution argues that the court erred by granting defendant's motion to suppress because Officer Cavett's search and seizure of the vehicle defendant was driving was reasonable and lawful. We agree.

"This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error, and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made." *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The trial court's ultimate ruling on a motion to suppress is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "[T]he

reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Williams*, 472 Mich at 314, quoting *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Under the Fourth Amendment, stopping a vehicle and detaining the occupants amounts to a seizure. *People v Williams*, 236 Mich App 610, 612 n 1; 601 NW2d 138 (1999). A traffic stop is justified if the officer has "an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *Id*. at 612. This includes a violation of a traffic law. See *Davis*, 250 Mich App at 363 ("Because Officer Hopkins had probable cause to believe defendant was in violation of three traffic laws, the stop was permissible."). For a traffic stop to be reasonably related in scope to the circumstances justifying the stop, the driver should be "detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *Williams*, 472 Mich at 315. "The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced." *Id*.

In this case, Officer Cavett's stop was based on a reasonable suspicion that traffic laws were being violated. Under the Michigan Vehicle Code, MCL 257.1 *et seq*., a vehicle registration plate should be attached to the rear of the vehicle. MCL 257.225(1). The plate must be in a clearly visible position, "in a clearly legible condition," and "shall be maintained free from foreign materials that obscure or partially obscure the regis-

tration information." MCL 257.225(2). A violation of MCL 257.225 amounts to a civil infraction. MCL 257.225(7). At the motion hearing, Officer Cavett testified that he could not see a plate before pulling over the vehicle. He could not read the paper in the window when he approached the vehicle from 3 or 4 feet away, and the writing on the paper was very "dim." Therefore, he was justified in pulling over the vehicle for a violation of MCL 257.225(2) because the plate was not in a clearly visible position or in a clearly legible condition. See *People v Dunbar*, 499 Mich 60, 70; 879 NW2d 229 (2016) (noting that there is a duty to maintain the license plate so that it can be read).

Defendant asserts that the search and seizure became unreasonable when Officer Cavett asked defendant for his license, registration, and insurance, rather than taking five seconds to examine the paper plate affixed to the rear window of the vehicle and determine its validity. Despite defendant's argument to the contrary, Officer Cavett's actions were reasonably related in scope to the circumstances of the stop. Even had Officer Cavett taken the time to examine the paper plate more closely to determine whether it appeared to be a valid temporary registration plate, the plate would still have been in violation of MCL 257.225(2). Officer Cavett could not read the plate from his car, nor could he make out the plate from 3 or 4 feet away in the dark. Thus, the temporary paper license plate was not in a clearly visible position or in a clearly legible condition. Officer Cavett's questions regarding defendant's license and registration were reasonable questions concerning the violation of the law. When defendant handed Officer Cavett a Michigan identification card rather than a driver's license and failed to provide registration, Officer Cavett had a justification for running a computer check. Furthermore, a computer

check is a routine and generally accepted practice by the police during a traffic stop. See *Davis*, 250 Mich App at 366 (explaining that "a review of Michigan cases demonstrates a recognition that the running of [Law Enforcement Information Network (LEIN)] checks of vehicle drivers is a routine and accepted practice by the police in this state"). Therefore, Officer Cavett was permitted to ask questions related to defendant's identity and the vehicle registration. Accordingly, Officer Cavett had an articulable and reasonable suspicion that there was a violation of the law, and defendant was detained for a reasonable period in order to permit Officer Cavett to ask reasonable questions concerning the violation of the law and its context. See *Williams*, 472 Mich at 315; *Williams*, 236 Mich App at 612.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ., concurred.

In re KLEIN ESTATE

Docket No. 329715. Submitted July 7, 2016, at Lansing. Decided July 19, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 947.

The Department of Community Health (DCH), the predecessor of the Department of Health and Human Services, filed a claim and moved for summary disposition in the Saginaw Probate Court, alleging that it was entitled to recovery of Catherine Klein's estate pursuant to MCL 400.112g, which permits estate recovery for services paid by Medicaid, and that, by failing to apply for a hardship waiver, Sharon Pumford, the personal representative of the estate, forfeited any right to such a waiver. Pumford also moved for summary disposition, asserting that the estate was exempt from the Medicaid claim given its value and that, pursuant to the plain language of MCL 400.112g(3)(e)(*i*), the estate was entitled to a hardship waiver as a matter of law. The court, Patrick J. McGraw, J., denied DCH's summary-disposition motion and granted summary disposition in favor of the estate. DCH appealed.

The Court of Appeals *held*:

MCL 400.112g(3)(e)(*i*) provides, in relevant part, that DCH shall seek appropriate changes to the Michigan Medicaid state plan and that, at the time an individual enrolls in Medicaid for long-term care services, DCH shall provide to the individual written materials explaining the process for applying for a waiver from an estate recovery due to hardship, which includes, but is not limited to, an exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the Medicaid recipient's homestead is located as of the date of the medical assistance recipient's death. MCL 400.112g(3)(e)(*i*) does not create a statutory entitlement to a hardship waiver; it merely instructs DCH to seek approval from the federal government on the topics enumerated in its subsections. Summary disposition in DCH's favor is appropriate when an estate fails to apply for a hardship waiver. In this case, Pumford did not apply for a hardship waiver despite the fact that she was undisputedly informed that she was required to do so, and the estate was not

statutorily entitled to a hardship waiver under MCL 400.112g(3)(e)(*i*). Therefore, Pumford's failure to apply for a waiver, alone, was dispositive, and summary disposition in DCH's favor was required by law. The probate court erred by denying DCH's summary-disposition motion and by granting summary disposition in favor of the estate.

Reversed; case remanded for entry of an order granting summary disposition in DCH's favor.

SOCIAL SERVICES — SOCIAL WELFARE ACT — MICHIGAN MEDICAID ESTATE RECOVERY — HARDSHIP WAIVERS.

MCL 400.112g(3)(e)(*i*) provides that the Department of Health and Human Services (DHHS), formerly the Department of Community Health, shall seek appropriate changes to the Michigan Medicaid state plan and that, at the time an individual enrolls in Medicaid for long-term care services, DHHS shall provide to the individual written materials explaining the process for applying for a waiver from an estate recovery due to hardship, which includes, but is not limited to, an exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the Medicaid recipient's homestead is located as of the date of the medical assistance recipient's death; MCL 400.112g(3)(e)(*i*) does not create a statutory entitlement to a hardship waiver; summary disposition in DHHS's favor is appropriate when an estate fails to apply for a hardship waiver.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Brian K. McLaughlin*, Assistant Attorney General, for the Department of Health and Human Services.

Bendure & Thomas (by *Mark R. Bendure*) and *Douglas W. Taylor, PC* (by *Douglas W. Taylor*), for Sharon Pumford.

Before: OWENS, P.J., and BORRELLO and O'BRIEN, JJ.

O'BRIEN, J. The Department of Community Health (DCH or the Department), which has merged with the Department of Human Services and is now known as

the Department of Health and Human Services, see Executive Order No. 2015-4, appeals as of right the probate court's September 28, 2015 order denying its summary-disposition motion and granting summary disposition to the Estate of Catherine Klein (the estate). We reverse and remand for the entry of an order granting summary disposition in DCH's favor.

I. FACTUAL AND PROCEDURAL BACKGROUND

Catherine Klein passed away in December 2013. Before her death, Sharon Pumford, who was authorized to act on Klein's behalf, signed a Medicaid application that provided, in pertinent part, that she "ha[d] received and reviewed a copy of the Acknowledgements . . . ." The Acknowledgements provided, in pertinent part, as follows:

> I understand that upon my death the Michigan Department of Community Health [MDCH] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery call 1-877-791-0435.

At the time of her death, Klein's only asset was her home in Chesaning, Michigan, which was "valued at $45,521.77," according to Pumford. In March 2014, DCH filed a claim against the estate for $133,786.90, an amount reflective of the Medicaid benefits that were paid to Klein before her death. Pumford, as the personal representative of the estate, disallowed DCH's claim, asserting that Klein's home was exempt from

the Medicaid claim because of its value. In January 2015, DCH filed the instant claim in the probate court estate proceeding, seeking "a judgment allowing the Department's estate recovery claim in full" as well as an order requiring "payment according to the priority of the claims provision of MCL 700.3805." DCH subsequently moved for summary disposition pursuant to MCR 2.116(C)(4) and (10), arguing that it was entitled to estate recovery pursuant to MCL 400.112g. Specifically, DCH argued that, by signing the Medicaid application, Pumford acknowledged that the estate was subject to recovery as well as that, by failing to apply for a hardship waiver, the estate forfeited any right to such a waiver. Pumford responded to DCH's summary-disposition motion as well as filed her own summary-disposition motion on behalf of the estate. She argued that, pursuant to the plain language of MCL 400.112g(3)(e)(*i*) alone, the estate was entitled to a hardship waiver as a matter of law. Further, Pumford contended that any other requirements implemented by DCH "eviscerated the statutory exemption and ignored the language and intent of the statutory exemption." Therefore, Pumford asserted, the estate was entitled to summary disposition pursuant to MCR 2.116(I)(2).

The probate court denied DCH's summary-disposition motion and granted summary disposition in the estate's favor. The court explained as follows:

> The Court is not in agreement that everyone has to apply for the hardship in every case.
>
> * * *
>
> The Court believes that MCL [4]00.112g(3), the Court finds that the statute mandates by the word shall, an exemption for the portion of the value of a Medicaid

> recipient's home shall be given, this is in the statute or, quote, state plan. The Court finds it to be unambiguous.
>
> The department of health and human services has not clarified this or ruled by the secretary of health and human services on this. In the Court's opinion this exemption applies as mandatory and shall be given that the disallowance of the claim is upheld.
>
> The Court does find that there is this inconsistency between the statute and administrative law issues and pursuant to MCR 2.116, I believe it's [(I)(2)], the party opposing the motion for summary disposition has stated grounds that would allow them to have summary disposition granted in their place of claim, that summary disposition shall be granted and that's what [the] Court is going to do.

The probate court entered a written order reflecting its decision on September 28, 2015, and DCH appealed that order.

II. ANALYSIS

On appeal, DCH argues that it, not Pumford, was entitled to summary disposition because MCL 400.112g(3)(e)(*i*) does not create a hardship waiver. And, because Pumford did not apply for a hardship waiver in this case, DCH contends that summary disposition in DCH's favor was appropriate. We agree.

A. STANDARDS OF REVIEW

The application and interpretation of statutes, as well as the application and interpretation of administrative rules and regulations, present questions of law that are reviewed de novo. *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). A statute's, rule's, or regulation's words and phrases must be applied and inter-

preted according to their plain and ordinary meanings. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). A trial court's decision to grant summary disposition is also reviewed de novo. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 16; 831 NW2d 897 (2012).

B. HARDSHIP WAIVER UNDER MCL 400.112g(3)(e)(*i*)

At issue in this case is MCL 400.112g(3)(e)(*i*), which provides, in pertinent part, as follows:

> (3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:
>
> * * *
>
> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:
>
> (*i*) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.

The estate argues, and the probate court held, that DCH was statutorily required to grant plaintiff a home-of-modest-value hardship waiver under MCL 400.112g(3)(e)(*i*). We disagree.

C. THE ESTATE'S FAILURE TO APPLY FOR A HARDSHIP WAIVER

To begin, as DCH correctly recognizes, this Court has previously held that summary disposition in DCH's favor is appropriate when an estate fails to apply for a hardship waiver. *In re Clark Estate*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015 (Docket No. 320720), p 6. The Court elaborated, stating that an estate's personal representative "cannot now attempt to avail himself [or herself] of the waiver's benefits without having followed the procedural rules necessary to claim the benefit." *Id*. Because we find it persuasive, we adopt *Clark*'s reasoning in this regard. In this case, Pumford, the personal representative of the estate, admittedly did not apply for a hardship waiver despite the fact that she was undisputedly informed that she was required to do so. Therefore, we hold that her failure to apply for a waiver, alone, is dispositive, and summary disposition in DCH's favor "was required by law[.]" *Id*.

D. THE APPLICATION AND INTERPRETATION OF MCL 400.112g(3)(e)(*i*)

Additionally, this Court has previously held that, on the basis of its plain and unambiguous language, "MCL 400.112g(3) merely instructs DCH to seek approval from the federal government on the topics enumerated in its subsections." *Id*. at 7. We find *Clark*'s interpretation of MCL 400.112g(3) persuasive and adopt it as our own. That is, MCL 400.112g(3) is not, in and of itself, a statutory provision that "prohibits DCH from pursuing estate recovery against estates

that include homes valued at 'equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.' " *Id*. (citation omitted). In this case, as in *Clark*, "MCL 400.112g(3) merely instructs DCH to seek approval from the federal government on the topics enumerated in its subsections," including Subsection (3)(e)(*i*), and DCH did precisely that with its current state plan and Bridges Administrative Manual 120, which sets forth DCH's policies. *Id*.; see *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 491-495; 887 NW2d 226 (2016). It does not, as Pumford contends and as the probate court concluded, create a statutory entitlement to a hardship waiver. As this Court has previously explained,

> [i]f the Legislature had wanted to automatically prohibit DCH from pursuing estate recovery against estates that included homes valued at "equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death," it would have prefaced such language with an explicit mandate, as in MCL 400.112g(2) and MCL 400.112g(8). [*Clark*, unpub op at 7 n 6.]

Therefore, we hold that the estate is not statutorily entitled to a hardship waiver under MCL 400.112g(3)(e)(*i*).

The estate's arguments against this conclusion are without merit. First, it argues that *Clark*, as an unpublished opinion, is nonbinding. See MCR 7.215(J)(1). While legally correct, that assertion fails to acknowledge *Clark*'s persuasiveness. See *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Furthermore, as mentioned earlier, binding authority, i.e., *Ketchum*, compels an outcome consis-

tent with that of *Clark*. Second, the estate argues that "there is no contention or evidence offered by the Department that it made any effort at all to even try to implement the 50% hardship exemption that the statute makes mandatory ("shall"). Clark did not provide the Department with the authority to ignore the statutory mandate." As also discussed earlier, however, DCH's current state plan and Bridges Administrative Manual 120 undermine that assertion. See *Ketchum*, 314 Mich App at 491-495. Third, the estate contends that "the Clark Court did not consider, much less decide, the mandatory nature of MCL 400.112g(3)(e)(*i*)" or "the inability of a department to act contrary to the directives of authorizing legislation." But, again, this Court did address the mandatory nature of MCL 400.112g(3)(e)(*i*), *Clark*, unpub op at 7 (stating that MCL 400.112g(3)(e)(*i*) "is not a binding mandate that prohibits DCH from pursuing estate recovery"), and DCH has complied with the requirements of MCL 400.112g(3)(e)(*i*), see *Ketchum*, 314 Mich App at 501-507. Lastly, to the extent the estate argues that DCH's definition of "undue hardship" is inconsistent with what is required by MCL 400.112g(3)(e)(*i*), that argument is belied by the statutory provision's own language. Specifically, contrary to the estate's assertions, MCL 400.112g(3)(e) contains "express language ('includes, but not limited to, the following') granting the DHHS discretion to include *other* requirements for the hardship exemption." *Id*. at 502.

III. CONCLUSION

Accordingly, we conclude that the probate court erred by denying DCH's summary-disposition motion and by granting summary disposition in the estate's

favor. We therefore reverse its September 28, 2015 order and remand for the entry of an order granting summary disposition in DCH's favor. In light of this conclusion, we need not address DCH's argument that the probate court lacked subject-matter jurisdiction over the hardship-eligibility determination.

Reversed and remanded. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

OWENS, P.J., and BORRELLO, J., concurred with O'BRIEN, J.

PEOPLE v GARNES

Docket No. 324035. Submitted February 9, 2016, at Detroit. Decided July 19, 2016, at 9:10 a.m.

Theola L. Garnes was convicted following a jury trial in the Oakland Circuit Court of unlawful imprisonment, MCL 750.349b, and assault with a deadly weapon (felonious assault), MCL 750.82, in connection with actions she and her three daughters took because they believed the victim stole two rings from one of the daughters. The court, Martha D. Anderson, J., sentenced defendant to concurrent prison terms of 43 months to 15 years for unlawful imprisonment and 32 months to 4 years for felonious assault. Defendant appealed.

The Court of Appeals *held*:

Under *People v Lockridge*, 498 Mich 358, 364 (2015), the sentencing guidelines, MCL 777.1 *et seq*., are no longer mandatory to the extent that they are scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt. Although there was ample record evidence to support the scoring of Offense Variables (OVs) 3, 4, 7, and 8, to which defendant objected on appeal, none of the facts used to score the OVs—physical and psychological injury, level of brutality, and asportation or captivity beyond the time necessary to commit the offense—was necessarily found by the jury when convicting defendant of false imprisonment and felonious assault. And caselaw indicates that a fact is not admitted by the defendant merely because it is contained in a statement that was admitted into evidence. Rather, the phrase "admitted by a defendant," as used in *Lockridge*, means formally admitted by the defendant to the court in a plea, in testimony, by stipulation, or by some similar or analogous means. Consequently, defendant did not make a formal admission in this case and was entitled to a remand for possible resentencing in accordance with *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Remanded.

SAWYER, J., concurred in the result only.

SENTENCES — SENTENCING GUIDELINES — SCORING — FACTS ADMITTED BY THE DEFENDANT.

For purposes of determining whether a trial court has improperly imposed a mandatory sentence using sentencing guidelines scored on the basis of facts beyond those found by the jury or admitted by the defendant, which was deemed unconstitutional in *People v Lockridge*, 498 Mich 358, 364 (2015), "admitted by the defendant" means formally admitted by the defendant to the court in a plea, in testimony, by stipulation, or by some similar or analogous means (MCL 777.1 *et seq*.).

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.

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

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

RONAYNE KRAUSE, P.J. Defendant was convicted by a jury of unlawful imprisonment, MCL 750.349b, and assault with a deadly weapon (felonious assault), MCL 750.82. The trial court sentenced defendant to concurrent prison terms of 43 months to 15 years for unlawful imprisonment and 32 months to 4 years for felonious assault. Defendant raises no argument on appeal challenging her convictions, but she argues that the trial court improperly scored her sentencing guidelines variables and, therefore, imposed an improper sentence. We are constrained to agree, in part, and we remand for possible resentencing.

The crimes at issue in this matter involve defendant, defendant's three daughters (codefendants Kelli Hyde and Tamara Stephens, who appealed separately, and

Anika Garnes, who pleaded guilty and whose application for leave was previously denied), and their apparent belief that the victim stole two rings from Hyde.[1] The victim visited defendant's house, where Hyde was also living, to visit Anika. The victim was taken to a bedroom where she was asked about the rings. The victim testified that when she denied taking the rings, Hyde began to beat her with her fists while Stephens repeatedly struck her with a bat. The victim testified that Stephens also sodomized her with the bat. The victim testified that while Stephens and Hyde were assaulting her, defendant was in the room "smoking cigarettes, orchestrating the whole thing." Asked to explain what she meant by "orchestrating," the victim explained, "[defendant] was telling Tamara and Kelli what to do. 'Get—take those—get—make sure you take those shoes off. Get them toes. Get them knees so she can't run.' " The victim testified that Hyde and Stephens obeyed defendant. A police officer who interviewed defendant the day after the incident testified that defendant admitted she "sat back on the bed and essentially watched . . . and gave instruction."

After the assault, the victim was escorted to an SUV and driven from the home. The victim testified that defendant was giving the driver directions on where to go. The officer who interviewed defendant the day after the incident testified that defendant indicated it was her idea to put the victim in the car because, in the officer's words, defendant "wanted to teach her a lesson." The victim reported that defendant said at one point, " 'We should leave her butt naked, saying pussy for sale.' " The victim's cell phone, voter registration card, and Social Security card were taken from her,

[1] This appeal was submitted for decision with the appeals of Hyde and Stephens (Docket Nos. 324802 and 324804).

and she was left on a sparsely populated street in East Detroit. She went to the first house she saw; the owner allowed her to use a phone to summon assistance to take her to a hospital, where her injuries were documented and treated.

Defendant contends that the trial court improperly based her sentence on sentencing guidelines scored "using facts beyond those found by the jury or admitted by the defendant," which "change[d] the applicable guidelines minimum sentence range." *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015). We agree.

Defendant specifically objects to the scoring of Offense Variables 3, 4, 7, and 8. To summarize, Offense Variable (OV) 3 was scored at 10 points, requiring that "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). OV 4 was scored at 10 points, requiring that "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). OV 7 was scored at 50 points, requiring that "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).[2] OV 8 was scored at 15 points, requiring that "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a).

We note that there is ample record evidence to support these scores. However, under *Lockridge*, the sentencing guidelines are no longer mandatory to the extent they are "scored on the basis of facts beyond

[2] MCL 777.37 was amended subsequent to defendant's sentencing; we refer to the language in place at the time.

those admitted by the defendant or found by the jury beyond a reasonable doubt." *Lockridge*, 498 Mich at 364. A departure from the guidelines now needs only to be "reasonable," *id*. at 392, and "trial courts must assess the 'highest number of points possible' to each variable, 'whether using judge-found facts or not,' " *People v Stokes*, 312 Mich App 181, 196; 877 NW2d 752 (2015), quoting *Lockridge*, 498 Mich 392 & n 28. However, because the sentence at issue here was imposed before *Lockridge*, it was imposed as a mandatory sentence rather than a departure. We do not entirely understand how this new scheme is either more comprehensible or better able to protect defendants from possible judicial capriciousness, but nevertheless, we must evaluate whether defendant's OV scores can be upheld *strictly* by facts necessarily found by the jury or admitted by defendant.

We are therefore constrained to conclude that defendant's OV scores were unsupported. The guidelines were scored for defendant's unlawful imprisonment conviction. A conviction for felonious assault does not require an actual injury. See *People v Davis*, 216 Mich App 47, 53-54; 549 NW2d 1 (1996). Indeed, neither physical nor psychological injury is an element of either of defendant's convicted offenses. Neither is any particular level of brutality or any asportation or captivity "beyond the time necessary to commit the offense." Consequently, we agree with defendant that none of the facts on which these OVs could have been scored was *necessarily* found by the jury.

The answer to the question whether any facts supporting the scoring of the OVs were "admitted by the defendant" is less obvious. *Lockridge* did not define that phrase. Defendant did not testify, but of

course, there are a variety of evidentiary rules under which a statement she might have made outside the courtroom could nonetheless be admitted into evidence. We conclude, however, that a fact is not "admitted by the defendant" merely because it is contained in a statement that is admitted. We note that, significantly, in the leading case relied on by the Michigan Supreme Court in *Lockridge*, the United States Supreme Court held that a statement made by the defendant outside the courtroom could not be used to affect the defendant's sentencing despite the trial judge finding a police officer's testimony about that statement credible and admissible. *Apprendi v New Jersey*, 530 US 466, 469-471; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The United States Supreme Court contrasted that situation with another case in which a defendant admitted something at a plea hearing. *Id*. at 487-489. Also in contrast, this Court has concluded that a defendant had "admitted" to prior crimes by previously pleading guilty to them and then stipulating to those convictions within the case culminating in his sentence. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 433-436; 884 NW2d 297 (2015).

We hold that "admitted by the defendant" under *Lockridge* means *formally* admitted by the defendant *to the court* in a plea, in testimony, by stipulation, or by some similar or analogous means. Defendant did not make any such formal admission here. Consequently, the OVs discussed earlier in this opinion were impermissibly scored, and we are required to remand for possible resentencing in accordance with *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as set forth in *Lockridge*. See *Stokes*, 312 Mich App at 197-203.

Remanded for possible resentencing in accordance with the *Crosby* procedure. We do not retain jurisdiction.

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

SAWYER, J. (*concurring*). I concur in the result only.

INTERNATIONAL BUSINESS MACHINES CORPORATION v DEPARTMENT OF TREASURY

Docket No. 327359. Submitted July 12, 2016, at Detroit. Decided July 21, 2016, at 9:00 a.m. Leave to appeal dismissed 500 Mich 894.

International Business Machines Corporation (IBM) brought an action in the Court of Claims against the Department of Treasury, challenging the department's ruling that IBM was not entitled to apportion its business income tax base and modified gross receipts tax base using the three-factor apportionment formula provided in the Multistate Tax Compact, MCL 205.581 *et seq*., and was instead required to apportion its income using the sales-factor formula in the Business Tax Act (BTA), MCL 208.1101 *et seq*., when calculating its state taxes for 2008. The Court of Claims, Joyce A. Draganchuk, J., granted summary disposition in favor of the department, ruling that the BTA mandated the use of the sales-factor apportionment formula. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO, J. (RIORDAN, J., concurring), affirmed the order in an unpublished opinion per curiam, issued November 20, 2012 (Docket No. 306618). The Supreme Court granted IBM's application for leave to appeal. 494 Mich 874 (2013). In a lead opinion by Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, and a concurring opinion by Justice ZAHRA, the Supreme Court held that the modified gross receipts tax is an income tax for purposes of the Multistate Tax Compact and that IBM was entitled to use the compact's elective three-factor apportionment formula to calculate its 2008 Michigan taxes. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642 (2014). The Supreme Court remanded the case to the Court of Claims for entry of an order granting summary disposition in favor of IBM. The department moved for rehearing, and before the Supreme Court rendered a decision on the motion, the Legislature enacted 2014 PA 282, which amended the BTA, retroactively rescinding Michigan's membership in the compact, effective January 1, 2008, and precluding foreign corporations such as IBM from using the three-factor apportionment formula that had been available under the compact. The Supreme Court denied the motion for rehearing. 497 Mich 894 (2014). On remand, the Court of Claims, MICHAEL J. TALBOT, C.J., initially

entered judgment in favor of IBM as directed by the Supreme Court, but subsequently granted, on reconsideration, summary disposition in favor of the department, determining that the law-of-the-case doctrine did not apply because 2014 PA 282 represented an intervening change of law. IBM appealed.

The Court of Appeals *held*:

Under the law-of-the-case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same; the appellate court's decision binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Under the rule of mandate, when an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order. The rule of mandate is similar to, but broader than, the law-of-the-case doctrine and provides that any trial court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it. The trial court may decide anything not foreclosed by the mandate, but the trial court commits jurisdictional error if it takes actions that contradict the mandate. In this case, the analysis was governed by the rule of mandate, not by the law-of-the-case doctrine. The Supreme Court specifically mandated entry of an order granting summary disposition in favor of IBM, the mandate foreclosed all other possibilities and any renewed litigation over IBM's 2008 business taxes, and the Court of Claims erred by taking an action that contradicted the mandate, effectively exceeding the remand's jurisdictional scope. In ignoring the remand directive and ordering application of 2014 PA 282 to IBM's 2008 taxes in connection to the apportionment formula, the Court of Claims improperly reversed the Supreme Court's ruling in *Int'l Business Machines Corp*, 496 Mich 642, and impermissibly authorized legislative reversal of a judicial decision. The Court of Appeals' decision in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015), that 2014 PA 282 was constitutionally sound did not change the analysis. IBM was entitled to the protection afforded it under *Int'l Business Machines Corp*, 496 Mich 642; however, other taxes not addressed in that opinion but caught under the umbrella of 2014 PA 282 would be subject to 2014 PA 282 as construed by the *Gillette* panel. A distinction existed between impermissibly applying 2014 PA 282, as upheld in *Gillette*, to

alter the Supreme Court's specific resolution of the apportionment-formula question pertaining to IBM's 2008 taxes and applying 2014 PA 282 to all other pending tax disputes. The Court of Claims erred by failing to grant summary disposition in favor of IBM.

Reversed; case remanded for entry of judgment in favor of IBM.

APPEALS — PERMISSIBLE ACTIONS ON REMAND — RULE OF MANDATE.

Under the rule of mandate, when an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order; the rule of mandate is similar to, but broader than, the law-of-the-case doctrine and provides that any trial court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it; the trial court may decide anything not foreclosed by the mandate, but the trial court commits jurisdictional error if it takes actions that contradict the mandate.

Miller, Canfield, Paddock & Stone, PLC (by *Clifford W. Taylor*, *Gregory A. Nowak*, *Michael P. Coakley*, and *Maria Baldysz*), for International Business Machines Corporation.

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

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

PER CURIAM. Plaintiff, International Business Machines Corporation (IBM), appeals as of right a Court of Claims order granting, on reconsideration, summary disposition in favor of defendant, Department of Treasury (the Department). We reverse and remand for entry of judgment in favor of IBM consistently with our Supreme Court's directive in this case in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014).

In *Int'l Business Machines*, *id*. at 644-645, the Supreme Court opened its opinion by alluding to the issue presented, describing the nature of the case, and setting forth its holding:

> In this case, we must determine whether [IBM] could elect to use the three-factor apportionment formula under the Multistate Tax Compact (the Compact)[, MCL 205.581 *et seq*.,] for its 2008 Michigan taxes, or whether it was required to use the sales-factor apportionment formula under the Michigan Business Tax Act (BTA)[, MCL 208.1101 *et seq*]. The Department . . . rejected IBM's attempt to use the Compact's apportionment formula and, instead, required IBM to apportion its income using the BTA's sales-factor formula.
>
> We conclude that IBM was entitled to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes and that the Court of Appeals erred by holding otherwise on the basis of its erroneous conclusion that the Legislature had repealed the Compact's election provision by implication when it enacted the BTA. We further hold that IBM could use the Compact's apportionment formula for that portion of its tax base subject to the modified gross receipts tax of the BTA.
>
> Accordingly, we reverse the Court of Appeals' judgment in favor of the Department, reverse the Court of Claims' order granting summary disposition in favor of the Department, *and remand to the Court of Claims for entry of an order granting summary disposition in favor of IBM*. [Emphasis added.]

The Department filed a motion for rehearing, and before the Supreme Court rendered a decision on the motion, the Legislature enacted 2014 PA 282, amending the BTA, retroactively rescinding Michigan's membership in the Compact, effective January 1, 2008, and precluding foreign corporations such as IBM from using the three-factor apportionment formula that had been available under the Compact. The Department

filed supplemental authority in support of its pending motion for rehearing, alerting our Supreme Court to the statutory amendment. Subsequently, the Supreme Court denied the motion for rehearing absent any explanation or elaboration. *Int'l Business Machines Corp v Dep't of Treasury*, 497 Mich 894 (2014). On remand, the Court of Claims initially entered judgment in favor of IBM as directed by the Supreme Court. However, the Court of Claims later granted the Department's motion for reconsideration, determining that 2014 PA 282 represented an intervening change of law, thereby excepting application of the law-of-the-case doctrine.

"When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order." *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012); see also *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 706; 854 NW2d 509 (2014) ("The trial court erred by failing to comply on remand with the very specific directives of this Court."); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (clear instructions in a remand order must be followed); *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994) ("It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court."). In this case, the Court of Claims did not have any discretion or authority to rule in favor of the Department. The Court of Claims was specifically instructed to enter an order granting summary disposition in favor of IBM, and it erred by ultimately failing to do so.

The procedural posture of this case resulted in arguments regarding the applicability of the law-of-

the-case doctrine, which doctrine is subject to an exception when there is an intervening change of law. See *People v Olear*, 495 Mich 939 (2014); *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), our Supreme Court explained the nature of the law-of-the-case doctrine:

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [Citations and quotation marks omitted.]

The Department maintains that the law-of-the-case doctrine is not controlling because the legal question concerning the effect of 2014 PA 282 on IBM's 2008 taxes was not passed on by the Supreme Court in its opinion nor, expressly, in its order denying the Department's motion for rehearing and because 2014 PA 282 represented an intervening change of law, assuming that the doctrine was initially implicated. We conclude that the analysis in this case is not governed by the law-of-the-case doctrine; however, contrary to the Department's view, this does not mean that the Court of Claims was free to try anew under 2014 PA 282 the issue regarding the apportionment formula applicable to IBM's 2008 taxes. Rather than apply the law-of-the-case doctrine, we hold that the principle alluded to earlier—that a lower court cannot exceed the scope of a

remand order—controls and is distinguishable from the law-of-the-case doctrine. We find instructive a recent decision by the United States Court of Appeals for the Ninth Circuit in *Stacy v Colvin*, 825 F3d 563, 567-568 (CA 9, 2016), wherein the federal court, distinguishing the law-of-the-case doctrine from what it coined the "rule of mandate," observed:

> The rule of mandate is similar to, but broader than, the law of the case doctrine. The rule provides that any district court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it. The district court may, however, decide anything not foreclosed by the mandate. But the district court commits "jurisdictional error" if it takes actions that contradict the mandate. [Citations and quotation marks omitted.][1]

Although the terminology "rule of mandate" has apparently not been used in Michigan caselaw, it quite plainly embodies the well-accepted principle in our jurisprudence that a lower court must strictly comply with, and may not exceed the scope of, a remand order. *Glenn*, 305 Mich App at 706; *Russell*, 297 Mich App at 714; *K & K Constr*, 267 Mich App at 544; *Rodriguez*, 204 Mich App at 514. In this case, the Supreme Court mandated ministerial entry of judgment in favor of IBM, the mandate foreclosed all other possibilities and any renewed litigation over IBM's 2008 business taxes, and the Court of Claims erred by taking an action that contradicted the mandate, effectively exceeding the remand's jurisdictional scope. The distinction we recognize today between the law-of-the-case doctrine and the rule of mandate, as implicated by the Supreme

[1] The Ninth Circuit concluded that an administrative law judge (ALJ) did not violate the rule of mandate in the case by taking new evidence on a matter because the "remand order did not preclude the ALJ from taking [the] new evidence . . . ." *Stacy*, 825 F3d at 568.

Court's explicit directive in *Int'l Business Machines*, 496 Mich at 645, is further buttressed by the principles of the law-of-the-case doctrine, which is a discretionary doctrine that expresses the general practice of the courts and is not a limit on the power of the courts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 & n 13; 476 NW2d 112 (1991); *Grace*, 253 Mich App at 363. The plain and unambiguous remand directive cannot be construed as having provided any room for the exercise of discretion by the Court of Claims, and the directive most certainly placed a strict limit on the power of the Court of Claims on remand, which limit was exceeded. For all intents and purposes, the case was over once it left the jurisdiction of the Michigan Supreme Court; there was not to be any further substantive litigation, proceedings, or decision-making. The Court of Claims was simply to perform the nondiscretionary, ministerial task of entering judgment in favor of IBM. Indeed, the Supreme Court itself had the option of entering the judgment. MCR 7.316(A)(7) (stating that the Supreme Court may "enter any judgment . . . that ought to have been entered").

Further, the Department's position that the Court of Claims should be able to examine the issue of IBM's 2008 taxes under 2014 PA 282 is untenable. In *Int'l Business Machines*, 496 Mich at 645, our Supreme Court conclusively determined that IBM could use the Compact's apportionment formula for purposes of the 2008 taxes. Under the Department's theory, the issue of the proper apportionment formula relative to IBM's 2008 taxes could be litigated endlessly on the basis of any future statutory changes bearing on the question. Collateral estoppel principles preclude such an approach. See *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). Again, the case had effectively been concluded, except for the formal entry

of the judgment. Additionally, it is well established that "the Legislature may not reverse a judicial decision," *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 372-373; 803 NW2d 698 (2010), and that "only the Supreme Court has the authority to overrule its own decisions," *People v Crockran*, 292 Mich App 253, 256; 808 NW2d 499 (2011). If 2014 PA 282 is specifically applied in order to ascertain the apportionment formula available to IBM with respect to its 2008 business taxes, it would effectively result in the impermissible legislative reversal of *Int'l Business Machines*. Similarly, in ignoring the remand directive and ordering application of 2014 PA 282 to IBM's 2008 taxes in connection to the apportionment formula, the Court of Claims essentially and improperly reversed the Supreme Court's ruling in *Int'l Business Machines*. And recall that the Supreme Court was fully cognizant of 2014 PA 282 when ruling to deny the Department's motion for rehearing. If the Supreme Court wishes to revisit the issue on an application for leave to appeal, it of course has that prerogative, but neither this Court nor the Court of Claims is in a position to alter the ruling and ignore the remand directive in *Int'l Business Machines*.

Finally, this Court's opinion in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394; 878 NW2d 891 (2015), does not and cannot change our analysis. *Gillette* addressed numerous state and federal constitutional arguments challenging 2014 PA 282 and the retroactive character of the legislation. This Court found that 2014 PA 282 is constitutionally sound. *Id*. at 401. That said, the *Gillette* opinion could not overrule or reverse the Supreme Court's earlier opinion in *Int'l Business Machines* and the resolution of the specific tax issues addressed therein. See *Crockran*, 292 Mich App at 256.

IBM is entitled to the protection afforded it under the *Int'l Business Machines* decision; however, *other taxes* not addressed in the opinion but caught under the umbrella of 2014 PA 282 would be subject to 2014 PA 282 as construed by the *Gillette* panel. There is a distinction between applying 2014 PA 282, as upheld in *Gillette*, to alter the specific resolution in *Int'l Business Machines* of the apportionment-formula question pertaining to IBM's 2008 taxes, which is not permissible under the ruling and remand directive, and applying 2014 PA 282 to all other pending tax disputes, recognizing that the Legislature was free to change the law in response to *Int'l Business Machines*.

Reversed and remanded for entry of judgment in favor of IBM. We do not retain jurisdiction. Having fully prevailed on appeal, taxable costs are awarded to IBM under MCR 7.219.

WILDER, P.J., and MURPHY and O'CONNELL, JJ., concurred.

GRASS LAKE IMPROVEMENT BOARD v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 326571. Submitted July 13, 2016, at Detroit. Decided July 21, 2016, at 9:05 a.m. Leave to appeal sought.

The Grass Lake Improvement Board (the Board) appealed in the Ingham Circuit Court the decision reached by an Administrative Law Judge (ALJ) in the second of two contested cases involving the parties. The first contested case arose when the Board applied for a permit from the Department of Environmental Quality (the DEQ) to use an augmentation well to pump water into Grass Lake. The DEQ initially denied the Board's application for a permit, and the Board petitioned for administrative review. The dispute in the first contested case centered on whether the Board's proposal would "enlarge" the lake and whether the DEQ had to abide by its own definition of that term as set forth in Mich Admin Code, R 281.811(1)(e) or whether it could interpret the term differently under MCL 324.30102(1). The ALJ ultimately ruled in favor of the Board, and the Board received a permit to proceed. The ALJ concluded that what the Board proposed was not an enlargement under the administrative rule promulgated by the DEQ. The Board initiated a second contested case to recover the attorney fees it expended in the first contested case. The Board claimed that the DEQ was liable for the Board's attorney fees because the DEQ's position in the first contested case was devoid of arguable legal merit considering the DEQ's own definition of enlargement. The ALJ denied the Board's request for attorney fees, reasoning that the first contested case had presented a number of complex and technical issues and in that context the DEQ's position could not be considered devoid of arguable legal merit. The Board then appealed the ALJ's denial in the circuit court. The court, William E. Collette, J., reversed the ALJ's conclusion, ruling that the DEQ's position was devoid of legal merit and awarding attorney fees to the Board. According to the court, the DEQ's initial denial of the Board's application for a permit caused unnecessary litigation and compelled the court's award of attorney fees. The DEQ appealed, and the Board cross-appealed.

The Court of Appeals *held*:

Attorney fees are properly awarded to a prevailing party—other than an agency—after the administrative disposition of a contested case when the agency involved in the proceeding advanced a frivolous position. In this case, the Board contended that the DEQ's position was frivolous, that is, that the position was devoid of arguable legal merit. A position is devoid of arguable legal merit when it is not sufficiently grounded in law or fact. In this case, there was a tension between Mich Admin Code, R 281.811(1)(e) and MCL 324.30102(1) concerning the enlargement of lakes. The statute governs when there is conflict between a statute and an administrative rule even though administrative agencies are bound to follow their own rules. However, the rule and the statute did not directly conflict—the tension between them arose from the fact that the term "enlarge" was narrowly defined in the rule whereas it was not defined in the statute. The Board urged the ALJ to adopt the definition in the rule, and the ALJ ruled in the Board's favor. However, because there was a bona fide dispute over whether the statute or the rule controlled, and because the case concerned complex and technical issues, the DEQ's position was not devoid of arguable legal merit. The circuit court applied the wrong standard to its review of the Board's request for attorney fees. The circuit court reviewed the DEQ's position in the previous contested case for legal merit only—not *arguable* legal merit. The Board was not entitled to its attorney fees for the previous contested case.

Reversed.

Clark Hill, PLC (by *Douglas R. Kelly*), and *Charles E. Dunn, PLC* (by *Charles E. Dunn*), for Grass Lake Improvement Board.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Daniel P. Bock*, Assistant Attorney General, for the Department of Environmental Quality.

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

WILDER, P.J. In this appeal and cross-appeal arising out of a contested administrative proceeding, the par-

ties challenge the circuit court's order reversing the decision of an administrative law judge (ALJ) and awarding attorney fees to petitioner, Grass Lake Improvement Board (the Board). We reverse the circuit court and reinstate the decision of the ALJ.

I. FACTUAL BACKGROUND

The attorney fees at issue were incurred in a previous contested case under the Administrative Procedures Act (APA), MCL 24.201 *et seq*., that was initiated by the Board against respondent, the Department of Environmental Quality (DEQ). The dispute between the parties arose after the Board filed an application seeking a permit to use an augmentation well to pump water into Grass Lake and thereby increase its water level. In June 2009, the DEQ denied the Board's application. In response, the Board filed a petition seeking review of the DEQ's decision and initiated the first contested case.

The pivotal issue in the first contested case was whether the Board's proposed augmentation well would "enlarge" Grass Lake as that term is used in Part 301 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30101 *et seq*., specifically in MCL 324.30102(1) ("Except as provided in this part, a person without a permit from the department shall not . . . [c]reate, *enlarge*, or diminish an inland lake or stream.") (emphasis added). Part 301 of the NREPA does not define the term "enlarge," but at the time the DEQ denied the Board's application, the Michigan Administrative Code provided a definition at Mich Admin Code, R 281.811(1)(e):

> "Enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of

> water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.[1]

The Board argued that, under this definition of "enlarge," its proposed activity of raising the water level by constructing an augmentation well did not constitute an enlargement of Grass Lake. Thus, the Board argued, DEQ's denial of the Board's application was improper under the DEQ's own administrative rules.

The DEQ responded that, as interpreted by both the DEQ and an advisory opinion of our Attorney General's office, "the plain language of the statute [MCL 324.30102(1)] . . . clearly includes adding water to a lake to increase its volume and surface area[.]" The DEQ acknowledged that this interpretation of MCL 324.30102(1) was contrary to Mich Admin Code, R 281.811(1)(e). Nevertheless, citing the well-settled principle that "when a statute and an administrative rule conflict, the statute controls," the DEQ argued that, to the extent its administrative rule conflicted with the plain meaning of MCL 324.30102(1), the DEQ was required to follow the statute and ignore the rule.

In reply, the Board argued that, under established Michigan law, administrative agencies, such as the DEQ, have a duty to follow their own duly promulgated administrative rules. Citing in support *Micu v City of Warren*, 147 Mich App 573; 382 NW2d 823 (1985), the Board further argued that the DEQ's duty to follow Rule 281.811(1)(e) extended even to a situation, such as this one, in which the DEQ believed the rule was contrary to the plain meaning of a statute.

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[1] Mich Admin Code, R 281.811 has since been amended to remove the definition at issue here. 2015 Mich Reg 5, p 75 (April 1, 2015).

After considering the matter, the ALJ decided in the Board's favor, reasoning as follows:

> The [DEQ] contends that it "has worked for years to change the existing administrative rule [Rule 281.811(1)(e)], but such changes can take a very long time due to debate amongst the relevant stakeholders as to what should be changed, and how it should be changed, etc." By making this statement, the [DEQ] is acknowledging the very reason why it must follow its administrative rules. When the [DEQ] is able to ignore its own administrative rule, it is able to create and enforce policy without considering the input and interests of relevant stakeholders. Reconciling stakeholder interests is an important part of the rulemaking process. Allowing the [DEQ] to circumvent its rules through an alternate interpretation bypasses the steps which were created in the APA to account for and protect relevant stakeholders and public interests. The statutory language taken on its own seems broad enough to include the [Board]'s proposed activity (i.e. lake enlargement). However, the rule defining the term "enlargement" clearly limits the [DEQ]'s jurisdiction to activities taking place on bottomlands. Based upon the application of the Rule . . . and other documentary evidence submitted, the proposed lake augmentation project does not implicate Part 301 jurisdiction.
>
> I conclude as a matter of law that the proposed lake augmentation project, that is the act of adding water to the lake without activity on bottomlands, does not implicate the Department's jurisdiction under Part 301. There is no enlargement of Grass Lake.

Following a motion for reconsideration, the ALJ's opinion and order was adopted by DEQ Director Dan Wyant. Thereafter, the remaining issues were summarily dismissed by stipulation of the parties, the contested case was concluded, and the DEQ issued the requested permit to the Board.

Afterward, the Board initiated a second contested case, in which it sought its attorney fees related to the

first contested case. Relevant to this appeal, the Board argued that, under MCL 24.323(1), it was entitled to such fees because the DEQ's legal position in the prior contested case was "devoid of arguable legal merit." The ALJ denied the Board's request for attorney fees, deciding that the DEQ's legal position had at least *some* arguable legal merit:

> Entitlement to relief under § 123(1)(c) may . . . be summarily eliminated based on the [Board]'s argument, that "[t]his case is one that has numerous complex legal and technical issues." In reviewing the proceedings and pleadings in this case, the [Board]'s characterization of the "numerous complex legal . . . issues," is accurate. Given this, the [DEQ]'s positions cannot be deemed to be devoid of arguable legal merit under MCL 24.323(1)(c).

The Board appealed in the circuit court, which reversed the ALJ's fee decision:

> The ALJ below found that the [DEQ]'s position was not devoid of arguable legal merit . . . . The [Board] argues, and this Court agrees, that this determination fails as a reasoned determination by an administrative agency. The ALJ failed to make any conclusions of fact or law. The ALJ failed to point out any particulars within the record to support such a conclusion. He cited no legal authority and provided no reasoning whatsoever in support of his conclusion. This is the very definition of arbitrary and capricious: unreasoned, without reference to guiding principles or considerations, and a decisive exercise of will or caprice.
>
> Furthermore, [the Board] argues that the [DEQ]'s position was frivolous by being devoid of legal merit. This Court agrees. The [DEQ]'s position was that there existed a conflict of law between a statute, . . . MCL 324.0101 *et seq*., and an administrative rule, . . . Rule 281.811. The [DEQ] argued that where such conflicts exist, the statute prevails over the rule . . . .
>
> However, the Director [Wyant] found in his final order that . . . the language of the statute and the language of

> the Rule were not conflicting per se. The statute at issue does not define what it means to "enlarge" a lake or stream, where that is precisely what the Rule does. The Rule's narrow interpretation of the statute is not a direct conflict.
>
> Furthermore, Michigan case law makes it clear that administrative agencies must follow their own rules once properly promulgated. *MICU v City of Warren*, 147 Mich App 573, 584; 382 NW2d 823 (1985). . . . Here, not only did the [DEQ] knowingly violate its own rule, it apparently did so for years without attempting to re-promulgate a new rule. Given the overwhelming case law that condemns this exact behavior, it is clear the reliance on a policy that prescribes that behavior is devoid of legal merit, and therefore, the [DEQ]'s position in this case was frivolous. This Court grants [the Board]'s motion for fees and costs incurred defending its case in the Michigan Administrative Hearing System.

The instant appeals followed.

II. STANDARDS OF REVIEW

We review the circuit court's decision to determine whether it "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *City of Sterling Heights v Chrysler Group, LLC*, 309 Mich App 676, 681; 873 NW2d 342 (2015) (quotation marks and citation omitted). We review de novo the circuit court's interpretation and application of statutes. *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 702; 854 NW2d 509 (2014). On the other hand, an administrative agency's statutory interpretation is reviewed under the standard first enunciated in *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935):

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most

> respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*In re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quotation marks and citations omitted; second alteration in original), quoting *Boyer-Campbell*, 271 Mich at 296-297.]

"Respectful consideration" of an agency's statutory interpretation is not akin to "deference," at least as that "term is commonly used in appellate decisions" today. *Rovas*, 482 Mich at 108. While an agency's interpretation can be a helpful aid in construing a statutory provision with a "doubtful or obscure" meaning, our courts are responsible for finally deciding whether an agency's interpretation is erroneous under traditional rules of statutory construction. *Id*. at 103, 108.

III. ANALYSIS

On appeal, the DEQ argues that the circuit court applied incorrect legal principles when it reversed the ALJ's decision. We agree.

In pertinent part, MCL 24.323 provides:

> (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, *if the presiding officer finds that the position of the agency to the proceeding was frivolous*. To find that an agency's position was frivolous, the presiding officer shall determine that *at least 1* of the following conditions has been met:

> (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
>
> (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
>
> (c) *The agency's legal position was devoid of arguable legal merit*.
>
> (2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. [Emphasis added.]

Under MCL 24.325(1), "a party that is dissatisfied with the final action taken by the presiding officer under section 123 [MCL 24.323] in regard to costs and fees may seek judicial review of that action pursuant to chapter 6." The reviewing court "may modify" the presiding officer's "action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence." MCL 24.325(2); *Widdoes v Detroit Pub Sch*, 218 Mich App 282, 289-290; 553 NW2d 688 (1996). "If the court awards costs and fees to a prevailing party upon judicial review of the final action of a presiding officer in a contested case," then "the court shall award those costs and fees provided for in [MCL 24.323], if the court finds that the position of the state involved in the contested case was frivolous." MCL 600.2421d; see also *Widdoes*, 218 Mich App at 289.

The circuit court decided that, under MCL 24.323(1)(c), the DEQ's legal position in the original contested case was frivolous. In reaching that conclusion, the circuit court applied an incorrect legal standard. The circuit court reasoned that because the DEQ's legal position was "devoid of legal merit," it

necessarily followed that the DEQ's legal "position in this case was frivolous." But whether an argument has "legal merit" is not the proper legal question to be considered by the circuit court. Rather, the standard, as set forth in MCL 24.323(1)(c), is whether the DEQ's legal position "was devoid of *arguable* legal merit." (Emphasis added.)

There is little authority interpreting the language of MCL 24.323(1)(c). Fortunately, however, there are many cases interpreting the nearly identical language found in MCL 600.2591(3)(a).[2] See, e.g., *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 367 & n 27; 844 NW2d 143 (2013), citing *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 439; 830 NW2d 785 (2013). We find such authority highly persuasive here. "A claim is not frivolous merely because the party advancing the claim does not prevail on it." *Adamo*, 303 Mich App at 368. Instead, "a claim is devoid of *arguable* legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent." *Id*. at 369 (quotation marks and citations omitted; emphasis added).

Here, although the DEQ did not prevail in the prior contested case, its legal position was sufficiently

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[2] MCL 600.2591(3)(a) provides:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

grounded in law so as to have some *arguable* legal merit. There is an undeniable tension between the legal rules cited by the parties in the prior contested case. On one hand, as the DEQ argued below, Michigan courts have long recognized that, due to the very nature of an administrative agency's rulemaking power, when a statute and an administrative rule conflict, the statute necessarily controls. See *Rovas*, 482 Mich at 98 ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."); *Mich Sportservice, Inc v Dep't of Revenue Comm'r*, 319 Mich 561, 566; 30 NW2d 281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act."); *Acorn Iron Works, Inc v State Bd of Tax Admin*, 295 Mich 143, 151; 294 NW 126 (1940) ("The State board of tax administration from time to time has changed its construction and method of enforcing the sales tax law as it affects building trade transactions; but in this connection it is sufficient to note that liability for payment of the sales tax is controlled by statute. It cannot be imposed by rulings or regulations of the board."); *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 254; 621 NW2d 450 (2000) ("[I]nterpretative rules are invalid when they conflict with the governing statute, extend or modify the statute, or have no reasonable relationship to a statutory purpose.").

On the other hand, it is equally well settled, as the Board argued below, that agencies are bound to follow their own duly promulgated rules. See *Detroit Base Coalition for Human Rights of the Handicapped v Dep't*

of Social Servs, 431 Mich 172, 189; 428 NW2d 335 (1988) ("An agency is under a duty to follow its own rules."); *Micu*, 147 Mich App at 584 ("[O]nce promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules."); *Rand v Civil Serv Comm*, 71 Mich App 581, 586; 248 NW2d 624 (1976) ("An administrative agency, in addition to following constitutional and statutory mandates, must also comply with its own rules.").

Given the tension between such precedents as they apply to the facts of the prior contested case, we conclude that the ALJ did not clearly abuse his discretion. The DEQ's legal position was sufficiently grounded in law as to have at least some arguable legal merit, and hence it was not frivolous under MCL 24.323(1)(c).[3]

Accordingly, we reverse the circuit court and reinstate the decision of the ALJ. As the prevailing party, the DEQ may tax costs pursuant to MCR 7.219.

MURPHY and O'CONNELL, JJ., concurred with WILDER, P.J.

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[3] Having reached that conclusion, we need not address the additional issues raised in the appeals regarding the propriety of the *amount* of costs and attorney fees awarded by the circuit court.

PEOPLE v HYATT

Docket No. 325741. Submitted May 18, 2016, at Lansing. Decided July 21, 2016, at 9:10 a.m. Leave to appeal sought.

Kenya A. Hyatt was convicted following a jury trial in the Genesee Circuit Court of first-degree felony murder, MCL 750.316(1)(b), conspiracy to commit armed robbery, MCL 750.529, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was 17 years old at the time of the crimes. The court, Judith A. Fullerton, J., sentenced defendant to life in prison without the possibility of parole for the first-degree murder conviction. Defendant appealed, and the Court of Appeals consolidated defendant's appeal with the appeals of his codefendants. *People v Perkins*, unpublished order of the Court of Appeals, entered April 26, 2016 (Docket Nos. 323454, 323876, and 323741). In a published opinion released January 19, 2016, the Court of Appeals, TALBOT, C.J., and CAVANAGH, and K. F. KELLY, JJ., concluded that *Miller v Alabama*, 567 US 460 (2012), did not require that a jury determine a juvenile offender's eligibility for a life-without-parole sentence under the sentencing scheme set forth in MCL 769.25. *People v Perkins*, 314 Mich App 140 (2016). The *Perkins* Court asserted that *People v Skinner*, 312 Mich App 15 (2015), was incorrectly decided to the extent it concluded that before a juvenile defendant may receive a life-without-parole sentence, a jury, not a judge, was to be the decision-maker at the *Miller* hearing required by MCL 769.25. The *Perkins* Court noted the conflict with *Skinner* pursuant to MCR 7.215(J)(2) and stated that it was compelled to follow *Skinner* and remand for resentencing so that a jury could determine whether defendant should receive a sentence of life in prison without the possibility of parole. The Court of Appeals ordered that a special panel be convened to resolve the conflict with *Skinner* and vacated Part IV(C) of the *Perkins* opinion. *People v Perkins*, 314 Mich App 801 (2016). The Court of Appeals vacated its earlier order consolidating defendant's appeal with that of his codefendants to allow defendant's appeal to proceed before the special panel.

On consideration by the special panel, the Court of Appeals *held*:

1. Because juveniles have less culpability and a greater capacity for reform, they are constitutionally different from adults for purposes of sentencing. Specifically, juveniles lack maturity and have an underdeveloped sense of responsibility, they are more vulnerable to negative influences and outside pressures, they have limited control over their environment, and their character is not as well-formed as an adult's; therefore, a juvenile offender's youth and those attendant characteristics of youth must be considered when a juvenile is sentenced. The *Miller* Court recognized that the Eighth Amendment bans the death penalty for juveniles and that a life-without-parole sentence for juveniles, which is the harshest penalty that may be imposed on a juvenile, was like being sentenced to the death penalty. For that reason, the *Miller* Court concluded that the Eighth Amendment's right against disproportionate punishment, US Const, Am VIII, bars mandatory life-without-parole sentences for juvenile offenders in homicide cases because it prevents the sentencing court from considering the juvenile's youthfulness, diminished culpability, and increased potential for reform. Although the Court did not impose a categorical ban on life-without-parole sentences for juveniles, it stated that imposing that sentence would be unusual because of the great difficulty of distinguishing at that early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption. *Miller*, however, did not suggest that a defendant has the right to a jury determination of a life-without-parole sentence. Instead, *Miller* simply held that the Eighth Amendment required a framework of protections to ensure that if a sentencing court imposed a life-without-parole sentence on a juvenile offender, the individualized sentence would be proportionate to the offender and the offense. The sentencing considerations set forth in *Miller* are sentencing factors that mitigate punishment through consideration of the juvenile offender's age, not elements that must be found before a more severe punishment is authorized.

2. In *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), the United States Supreme Court concluded that *Miller* applied retroactively and admonished that for all but the rarest of children whose crimes reflect irreparable corruption and permanent incorrigibility, a sentence of life in prison without the possibility of parole would be a disproportionate sentence. While the Court concluded that *Miller* was a substantive rule, it also

noted that the holding had a procedural component that requires a sentencing court to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. The Supreme Court in *Montgomery* acknowledged that *Miller* did not require trial courts to make findings of fact regarding a child's "incorrigibility" but emphasized that in order to avoid a disproportionate punishment in violation of the Eight Amendment, it was incumbent on states to develop procedures to enforce *Miller*'s substantive guarantee of individualized sentencing for juvenile offenders facing the possibility of life without parole.

3. In a line of cases involving the Sixth Amendment of the United States Constitution that began with *Apprendi v New Jersey*, 530 US 466 (2000), and concluded with *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), the United States Supreme Court held that other than a prior conviction, any fact that increases either the statutory floor or ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury's verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. As long as the sentencing court sentenced the defendant within the statutorily prescribed limits, any facts functioned as sentencing factors, rather than as elements of an aggravated offense. The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. By definition a fact is an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.

4. Beginning with *Ring v Arizona*, 536 US 584 (2002), and culminating with *Hurst v Florida*, 577 US ___; 136 S Ct 616 (2016), the United States Supreme Court extended *Apprendi* and ultimately concluded that the respective statutes in Arizona and Florida violated the Sixth Amendment because although the statutory maximum for the homicide offense of which the adult defendant was convicted authorized the death penalty, a sentencing court could only impose the death penalty on the basis of findings beyond the jury's verdict; in other words, the death penalty was not available but for judicial fact-finding regarding certain aggravating factors that had not been submitted for jury determination beyond a reasonable doubt. However, *Apprendi* and its progeny do not prohibit judicial fact-finding. Instead, a judge acting within the range of punishment authorized by statute may exercise his or her discretion—and find facts and

consider factors related to the offense and the offender—without violating the Sixth Amendment. Because the reasoning of that line of cases addressed the intersection of Eighth Amendment considerations and Sixth Amendment jury entitlements, that line of cases provided analysis relevant to this case.

5. In response to *Miller*'s directive about individualized juvenile sentencing, the Legislature enacted MCL 769.25. MCL 769.25(2) provides that for certain enumerated homicide offenses, the prosecuting attorney may move to sentence a defendant who was less than 18 years of age at the time he or she committed the offense to life in prison without the possibility of parole. If the prosecuting attorney does not file the motion, MCL 769.25(4) and (9) require the court to sentence the juvenile to a term of years with a maximum of not more than 60 years and a minimum of not less than 25 years or more than 40 years. If the prosecuting attorney does file a motion seeking a life-without-parole sentence, however, MCL 769.25(6) requires the court to conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court must consider the factors listed in *Miller* and may consider any other criteria relevant to its decision, including the juvenile's record while incarcerated. Under MCL 769.25(7), the court must specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing. MCL 769.25 does not violate the Sixth Amendment because it does not alter the statutory maximum sentence that may be imposed solely on the basis of the jury's verdict—life in prison without the possibility of parole—and does not make imposition of that statutory maximum sentence dependent on any particular finding of fact by the sentencing court. MCL 769.25 does not create a default sentence of a term of years in all instances; instead, the statute allows the prosecuting attorney to file a motion to seek the maximum sentence of life without the possibility of parole, and the trial court has discretion to impose a sentence up to that statutory maximum. The statute's requirements mirror that which is required by *Miller*—individualized sentencing.

6. The individualized sentencing mandate set forth in *Miller*, as incorporated by MCL 769.25, does not violate the Sixth Amendment precedent of *Apprendi* and its progeny. The MCL 769.25 sentencing scheme is different from those at issue in *Apprendi* and its progeny because it allows the prosecuting attorney to file a motion to sentence the juvenile defendant up to

the maximum penalty allowed by the jury's verdict—life in prison without the possibility of parole; it does not alter that maximum sentence if certain factors are found by the sentencing court, which was the concern in *Apprendi*. Under MCL 769.25, a judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence. The prosecuting attorney's motion does not trigger a factual finding that may increase the maximum sentence but instead initiates the Eighth Amendment protections *Miller* demands. The sentencing court's consideration of the *Miller* factors under MCL 769.25(6) does not aggravate punishment but instead acts as a means of mitigating punishment because it acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict unless the juvenile defendant is the rare individual whose crime reflects irreparable corruption. The *Miller* factors act as a means of mitigating a juvenile defendant's sentence under the MCL 769.25 sentencing scheme because it requires the sentencing court to consider those factors when deciding whether to impose a life-without-parole sentence.

7. The prior panel reached the correct conclusion in this case. Neither *Miller* nor MCL 769.25 implicates the right to a jury trial under *Apprendi* and its progeny. Rather, MCL 769.25 implements *Miller*'s Eighth Amendment protections by establishing a procedural framework for protecting a juvenile offender's Eighth Amendment rights at sentencing. MCL 769.25(6) and (7) do not require judicial fact-finding that increases the maximum penalty for juveniles convicted of certain homicide offenses. The MCL 769.25 statutory scheme does not make imposition of a life-without-parole sentence contingent on any particular finding. Under MCL 769.25, if the prosecuting attorney files the requisite motion, the maximum sentence for a juvenile offender is life without parole, and when imposing that sentence, the sentencing court is not required to find any particular fact before making that decision.

8. When sentencing a juvenile defendant on a case-by-case basis under MCL 769.25(6), a court must begin its analysis with the understanding that life without parole is appropriate only in rare cases. A sentence of life in prison without the possibility of parole violates the Eighth Amendment when a juvenile's crime reflects unfortunate yet transient immaturity instead of irreparable corruption. The sentencing court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, to determine whether the juvenile is the truly rare juvenile for whom life without parole is constitutionally propor-

tionate. This approach is required because it is difficult for even a trained psychologist, let alone a sentencing court, to make a definitive determination regarding a juvenile's capacity for reform.

9. An appellate court applies a three-fold standard when reviewing a juvenile offender's sentence of life in prison without the possibility of parole: a trial court's findings of fact are reviewed for clear error, questions of law are reviewed de novo, and the trial court's ultimate decision regarding the sentence imposed is reviewed for an abuse of discretion. Imposition of a life-without-parole sentence for juveniles requires a heightened degree of appellate scrutiny when determining whether the sentence is proportionate to a particular juvenile offender. To give effect to our Supreme Court's decision regarding judicial sentencing in *People v Milbourn*, 435 Mich 630 (1990), and the United States Supreme Court's direction in *Miller*, meaningful appellate review requires the reviewing court to remain mindful that life without parole is the maximum punishment that may be imposed on a juvenile offender and that imposition of a life-without-parole sentence on a juvenile offender is inherently suspect. An appellate court must review the record with the understanding that more likely than not, the sentence is disproportionate; it may not simply rubber-stamp the trial court's sentence because that punishment is available in only the most serious and extreme circumstances. A life-without-parole sentence for a juvenile offender imposed under MCL 769.25 may constitute an abuse of the sentencing court's discretion if the court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case. In this case, the trial court erred as a matter of law by failing to consider the *Miller* directive regarding the rarity with which a life-without-parole sentence should be imposed. While the trial court focused on the *Miller* factors, it gave no credence to *Miller*'s warnings that a life-without-parole sentence should only be imposed on the rare juvenile offender. The court's focus on testimony by a psychologist that defendant's prognosis for change in the next five years was poor was improper because *Miller* held that a life-without-parole sentence would be proportionate for the juvenile who is irreparably corrupt and incapable of change, not one who is incapable of change within a certain number of years.

Sentence vacated and case remanded for resentencing.

BECKERING, J., joined by SHAPIRO, P.J., concurring, wrote separately to express concern that the issue before the conflict panel—whether a judge or a jury must determine whether a juvenile should be sentenced to life without parole under MCL 769.25—incorrectly presumes that it is permissible under Michigan's Constitution, Const 1963, art 1, § 16, to impose a life-without-parole sentence on a juvenile offender. If the issue were addressed, Judge BECKERING would conclude that given the inherent difficulty in reliably assessing whether a still-developing juvenile is irreparably corrupt, the case-by-case sentencing scheme set forth in MCL 769.25 is too imprecise to pass muster under the Michigan Constitution. There is increasing scientific knowledge regarding the human brain and recognition that a juvenile is different from an adult because of his or her diminished culpability and greater capacity for reform. The characteristics of youth make a determination of irreparable corruption or permanent incorrigibility difficult. Because of these characteristics, a sentencing court is to a large degree guessing whether a juvenile is capable of reform on the basis of information that is widely recognized as unreliable given the malleability of a juvenile's still-developing brain. If imposition of life-without-parole sentences is to be permitted, like in death penalty cases, when a court conducts a hearing to decide whether to sentence a juvenile defendant to life in prison without the possibility of parole, the juvenile's defense team should include two attorneys, a mitigation specialist, and an investigator to reduce the difficulties inherent in determining whether a juvenile offender is irreparably corrupt.

METER, J., joined by M. J. KELLY and RIORDAN, JJ., concurred in Parts I, II, and III of the majority opinion but would not have vacated defendant's sentence and remanded for resentencing; the sentencing procedure was constitutional, and the sentence was proportionate to the circumstances surrounding the offense and offender.

1. CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — CONSIDERATION OF MITIGATING FACTORS.

The Eighth Amendment allows the imposition of an individualized life-without-parole sentence in homicide cases in the rare situation of a juvenile whose crime reflects irreparable corruption; juveniles lack maturity and have an underdeveloped sense of responsibility, they are more vulnerable to negative influences and outside pressures, they have limited control over their environment, and their character is not as well-formed as that of an adult; therefore, a juvenile offender's youth and those attendant characteristics of youth, including diminished culpability and increased potential for

reform, are relevant to a court's determination of whether a particular juvenile is the rare offender whose crime reflects irreparable corruption; the Eighth Amendment requires a framework of protections to ensure that if a sentencing court imposes a life-without-parole sentence on a juvenile offender, the individualized sentence will be proportionate to the offender and the offense; the sentencing considerations required by MCL 769.25(6) are sentencing factors that mitigate punishment through consideration of the juvenile offender's age, not elements that must be found before a more severe punishment is authorized; a sentence of life in prison without the possibility of parole violates the Eighth Amendment when a juvenile's crime reflects unfortunate yet transient immaturity instead of irreparable corruption (US Const, Am VIII).

2. CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — JUDGE DECIDES SENTENCE.

MCL 769.25(2) provides that for certain enumerated homicide offenses, the prosecuting attorney may move to sentence a defendant who was less than 18 years of age at the time he or she committed the offense to life in prison without the possibility of parole; if the prosecuting attorney does not file the motion, MCL 769.25(4) and (9) require the court to sentence the juvenile to a term of years with a maximum of not more than 60 years and a minimum of not less than 25 years or more than 40 years; if the prosecuting attorney does file a motion seeking a life-without-parole sentence, however, MCL 769.25(6) requires the court to conduct a hearing on the motion as part of the sentencing process; MCL 769.25 does not violate the Sixth Amendment because it does not alter the statutory maximum sentence that may be imposed solely on the basis of the jury's verdict—life in prison without the possibility of parole—and does not make imposition of that statutory maximum sentence dependent on any particular finding of fact by the sentencing court; under MCL 769.25, a judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence.

3. SENTENCES — JUVENILES — HOMICIDE — LIFE WITHOUT PAROLE — STANDARD OF REVIEW — PROPORTIONALITY — HEIGHTENED SCRUTINY.

An appellate court must apply a three-fold standard when reviewing a juvenile offender's sentence of life in prison without the possibility of parole: a trial court's findings of fact are reviewed for clear error, questions of law are reviewed de novo, and the trial court's ultimate decision regarding the sentence imposed is reviewed for an abuse of discretion; imposition of a life-without-parole sentence for juveniles requires a heightened degree of

> appellate scrutiny when determining whether the sentence is proportionate to a particular juvenile offender; meaningful appellate review requires the reviewing court to remain mindful that the imposition of a life-without-parole sentence on a juvenile offender is inherently suspect; an appellate court must review the record with the understanding that more likely than not, the sentence is disproportionate; it may not simply rubber-stamp the trial court's sentence because that punishment is available in only the most serious and extreme circumstances.

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.

Ronald D. Ambrose for defendant.

Before: SHAPIRO, P.J., and MARKEY, METER, BECKERING, STEPHENS, M. J. KELLY, and RIORDAN, JJ.

BECKERING, J. Pursuant to MCR 7.215(J), this Court convened a special conflict panel to resolve the conflict between the previous opinion issued in this case in *People v Perkins*, 314 Mich App 140; 885 NW2d 900 (2016),[1] and the decision issued in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015). The issue involves whether a juvenile, whom the prosecution seeks to subject to a sentence of life without parole under MCL 769.25, is entitled under the Sixth Amendment of the United States Constitution to have a jury determine whether life without parole is warranted. As evidenced by the existence of this special conflict panel, we recognize that this is a difficult issue. Also not lost on this

[1] The instant matter involving defendant, Kenya Hyatt, was initially consolidated with Docket Nos. 323454 and 323876, but this Court has since, on its own motion, vacated its previous order consolidating the cases to allow defendant Hyatt's case to proceed on its own before this special conflict panel. *People v Perkins*, unpublished order of the Court of Appeals, entered April 26, 2016 (Docket Nos. 323454, 323876, and 325741).

panel is the understanding that juveniles who commit a heinous offense, while undoubtedly deserving of punishment, are categorically less culpable than their adult counterparts and are less deserving of the maximum punishment available under the law. As the United States Supreme Court has made unmistakably clear, it is only the truly rare juvenile who will be deserving of the harshest penalty available under the laws of this state, and a life-without-parole sentence is an unconstitutional penalty for all juveniles but those whose crimes reflect irreparable corruption. For this reason, while we conclude that a judge, not a jury, is to make this determination, the sentencing judge must honor the mandate that was made abundantly clear in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and other recent Eighth Amendment caselaw: a sentence of life without parole is to be reserved for only the rarest of juvenile offenders so as to avoid imposing an unconstitutionally disproportionate life-without-parole sentence on a transiently immature offender. This mandate necessarily affects not only the way a trial court is to exercise its discretion when meting out punishment, but also the way an appellate court is to review a life-without-parole sentence for a juvenile offender. In short, youth matters when it comes to sentencing, and to avoid an unconstitutional sentence, our courts, at sentencing and on appeal, must carefully take this into account when going about the exceedingly difficult task of determining whether a juvenile is irreparably corrupt—meaning incapable of rehabilitation for the remainder of his or her life.

I. FACTS

The facts of this case are fully set forth in the prior opinion and do not bear repeating, save for a few

pertinent details. Following trial, a jury convicted defendant Kenya Hyatt of first-degree felony murder, MCL 750.316(1)(b), conspiracy to commit armed robbery, MCL 750.529, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b(1). At a sentencing hearing conducted pursuant to MCL 769.25(6), the trial court sentenced defendant, who was 17 years old at the time of the offenses, to life without the possibility of parole for the first-degree murder conviction. The prior panel reversed his sentence because the trial judge, not a jury, was the sentencer, and because it was bound to follow the decision reached by the majority in *Skinner*, 312 Mich App 15. *Perkins*, 314 Mich App at 165-179. Nevertheless, the prior panel in the instant case noted that but for *Skinner*, it would have affirmed the sentence because it concluded that a judge, not a jury, was to determine a juvenile's eligibility for a life-without-parole sentence under MCL 769.25. *Id*. Because it disagreed with *Skinner* on this point, the prior panel declared a conflict with *Skinner*, and the Court of Appeals ordered a special conflict panel convened. *People v Perkins*, unpublished order of the Court of Appeals, entered February 12, 2016 (Docket Nos. 323454, 323876, and 325741).

II. STANDARD OF REVIEW

Resolution of the conflict in this case requires us to construe MCL 769.25 and to examine defendant's constitutional rights under the Sixth Amendment and the Eighth Amendment of the United States Constitution. We review de novo these issues of law. *People v Humphrey*, 312 Mich App 309, 314; 877 NW2d 770 (2015) (statutory construction); *People v Al-Shara*, 311 Mich App 560, 567; 876 NW2d 826 (2015) (constitutional law).

III. ANALYSIS

As was recognized in *Skinner* and by the prior panel in this case, the instant case involves the confluence of Sixth Amendment and Eighth Amendment jurisprudence. We begin by briefly touching on the pertinent Eighth Amendment caselaw.

A. RECENT EIGHTH AMENDMENT CASELAW

1. *MILLER v ALABAMA*

In *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court considered an Eighth Amendment challenge to mandatory life-without-parole sentences for juvenile offenders in homicide cases and concluded that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence [life without parole], such a scheme poses too great a risk of disproportionate punishment." The Court emphasized that the unique characteristics of youth warranted treating juveniles differently from adults for purposes of sentencing. In particular, drawing on past Eighth Amendment precedent in *Roper v Simmons*, 543 US 551, 578; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (imposing a categorical ban on capital punishment for all juvenile offenders), and *Graham v Florida*, 560 US 48, 82; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (banning life-without-parole sentences for juveniles in nonhomicide cases), the Court noted that juveniles have "lesser culpability" and a greater capacity for reform and thus "are constitutionally different from adults for purposes of sentencing." *Miller*, 567 US at 470-471. Specifically, the Court explained that *Roper* and *Graham* recognize "three significant gaps between juveniles and adults":

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. [*Id*. at 471 (citations and quotation marks omitted; alterations in original).]

In addition to noting that the characteristics of youth warranted treating juveniles differently, the Court recognized the severity of a life-without-parole sentence for juveniles. Particularly, the Court took notice of the idea that the majority in *Graham* "likened life without parole for juveniles to the death penalty itself . . . ." *Id*. at 470. See also *Graham*, 560 US at 69-71. The *Graham* majority did so by noting that life without parole was especially harsh for a juvenile offender, who will "almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.' " *Miller*, 567 US at 475, quoting *Graham*, 560 US at 70. And given that *Roper* categorically banned the death penalty for juvenile offenders, life without parole became the "ultimate penalty for juveniles . . . ." *Miller*, 567 US at 475. Because *Graham* likened life without parole for juveniles to the death penalty, the Court reasoned that *Graham* made death-penalty caselaw—which imposed the requirement of individualized sentencing through consideration of the offender's character and record, along with the circumstances of the offense and other mitigating or aggravating factors—relevant to the issue at hand. *Id*.

In light of the characteristics of youth and pertinent

Eighth Amendment precedent, the Court concluded that mandatory life-without-parole sentencing schemes for juveniles, "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at 476. "And still worse," continued the Court, "each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve." *Id*. at 477. Accordingly, the Court barred mandatory life-without-parole sentences for juvenile offenders in homicide cases and provided a number of nonexhaustive factors[2] that a sentencer should consider before imposing a life-without-parole sentence:

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

The Court stopped short of considering a categorical ban on life-without-parole sentences for juveniles be-

[2] As will be discussed, our Legislature, in MCL 769.25, dubbed these the "*Miller* factors."

cause that issue was not before it but held that the Eighth Amendment forbids the imposition of a mandatory penalty because it "prevent[s] the sentencer from taking account of" the offender's youthfulness, diminished culpability, and increased potential for reform. *Id*. at 476. Yet, while not imposing a categorical ban, the Court was careful to note that because of a juvenile's "diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. at 479. "That is especially so," reasoned the Court, "because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 479-480 (citations and quotation marks omitted).

2. *MONTGOMERY v LOUISIANA*

The first—and perhaps most pressing—issue left in *Miller*'s wake was the issue of retroactivity. A number of states took aim at this issue, including this Court and the Michigan Supreme Court.[3] The United States Supreme Court resolved this issue in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), a case of which neither *Skinner* nor *Hyatt* had the benefit. The majority ruled—in a holding that is

[3] See *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), vacated sub nom *Davis v Michigan*, 577 US___; 136 S Ct 1356 (2016) (the United States Supreme Court vacated the Michigan Supreme Court's decision in *Carp* and remanded the case for further consideration in light of *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016); the Michigan Supreme Court ultimately vacated the *Carp* defendant's sentence, *People v Carp*, 499 Mich 903 (2016)).

not of particular relevance for resolving the issue in the present case—that *Miller* applied retroactively. *Id*. at ___; 136 S Ct at 736. More relevant to our discussion in the instant case was *Montgomery*'s admonition—continued from *Miller*—that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." *Id*. at ___; 136 S Ct at 726 (citation and quotation marks omitted). The Court also acknowledged, in the context of concluding that the rule in *Miller* was substantive and thus subject to retroactive application, that *Miller* did not forbid states from imposing life-without-parole sentences altogether. *Id*. at ___; 136 S Ct at 734. However, *Miller* nevertheless barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility"; "[f]or that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id*. at ___; 136 S Ct at 734.

Also relevant to our discussion, the Court in *Montgomery* acknowledged that the holding in *Miller*, while substantive, nevertheless "has a procedural component" in that it requires "a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id*. at ___; 136 S Ct at 734. This procedural component—a hearing at which " 'youth and its attendant characteristics' are considered as sentencing factors"—was necessary to give effect to *Miller*'s "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id*. at ___; 136 S Ct at 735. The Supreme Court, in rejecting an argument made in that case, acknowledged that *Miller* did not require trial courts to make findings of fact regarding a child's "incorrigibility." *Id*. at ___; 136 S Ct at 735. However,

"[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id*. at ___; 136 S Ct at 735. In the absence of express procedural requirements or factfinding requirements set forth in *Miller*, the Court in *Montgomery* emphasized that it was incumbent on states to develop procedures to enforce *Miller*'s substantive guarantee of individualized sentencing for juvenile offenders facing the possibility of life without parole. *Id*. at ___; 136 S Ct at 735.

B. MCL 769.25—OUR RESPONSE TO *MILLER*

In response to *Miller*'s directive about individualized sentencing, our Legislature enacted 2014 PA 22, which, in relevant part, added MCL 769.25. For certain enumerated homicide offenses, the statute allows the prosecuting attorney to "file a motion under this section to sentence" a juvenile offender "to imprisonment for life without the possibility of parole . . . ." MCL 769.25(2). With a nod toward *Miller*, the statute provides that:

> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, [567] US [460]; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may

> consider evidence presented at trial together with any evidence presented at the sentencing hearing. [MCL 769.25.]

However, absent a motion by the prosecuting attorney seeking the penalty of life without parole, MCL 769.25(4), or "[i]f the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years," MCL 769.25(9).

C. *APPRENDI* AND SIXTH AMENDMENT JURISPRUDENCE

1. *APPRENDI*

The issue at the heart of this conflict case is whether *Miller*—and how our Legislature has chosen to implement *Miller*'s guarantee of individualized sentencing in MCL 769.25—runs afoul of Sixth Amendment caselaw concerning a defendant's right to have a jury decide those facts that increase the maximum available punishment. Neither *Miller* nor *Montgomery* had occasion to address this issue. In *People v Carp*, 496 Mich 440, 490-491, 491 n 20; 852 NW2d 801 (2014)—a pre-*Montgomery* case dealing with the retroactivity of *Miller*—our Supreme Court declined to address the issue.[4] Accordingly, we must turn our attention to pertinent Sixth Amendment caselaw.

In one of the more influential cases in this line of precedent, *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact

[4] The opinion in *Carp* was later vacated as described in note 3 of this opinion.

of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi*, the defendant pleaded guilty to a weapons offense for which the prescribed penalty range was 5 to 10 years' imprisonment. *Id*. at 469-470. Subsequent to the trial court accepting the plea, the prosecutor filed a motion to extend the term of imprisonment based on a "hate crime" statute. *Id*. at 470. The trial court found that the defendant acted "with a purpose to intimidate" under the statute, which allowed the court to enhance the defendant's maximum sentence to 10-20 years' imprisonment. *Id*. at 471.

The Supreme Court agreed with the defendant's challenge to his sentence in *Apprendi*, concluding that the due-process guarantee of the Fourteenth Amendment as well as the Sixth Amendment right to a jury trial "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id*. at 477 (citation and quotation marks omitted; alteration in original). Any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Id*. at 490.

While the *Apprendi* Court held that elements of the offense must be submitted to the jury, it was careful to specify that the holding in that case did not suggest

> that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of

> this nature in imposing sentence *within statutory limits* in the individual case. [*Id*. at 481.]

Provided that a sentencing judge operated within the limits of punishment as provided by statute and did not increase the maximum punishment, the judge properly exercised his or her sentencing authority. See *id*. at 482-483. In such an instance, any facts found functioned as mere sentencing factors, rather than elements of an aggravated offense. See *id*. at 482-483, 485-486. See also 6 LaFave et al, Criminal Procedure (4th ed), § 26.4(h), p 1007.

The *Apprendi* Court also took care to note the historical distinction in its jurisprudence "between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 US at 490 n 16. The former requires a jury to find the fact proved beyond a reasonable doubt, while the latter does not. *Id*. As to mitigating factors, the Court explained:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme. [*Id*.]

2. EXPANSION OF *APPRENDI*

In the years since it issued *Apprendi*, the Supreme Court has expanded the territorial limits of "*Apprendi*-

land"—a term coined by Justice Scalia[5]—to include, among other matters, judicial fact-finding on the aggravating factors required for imposition of the death penalty, *Ring v Arizona*, 536 US 584, 609; 122 S Ct 2428; 153 L Ed 2d 556 (2002), judicial fact-finding that affected sentencing-guideline-range maximums, see *United States v Booker*, 543 US 220, 226-227, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005); *Blakely v Washington*, 542 US 296, 305, 313; 124 S Ct 2531; 159 L Ed 2d 403 (2004), determinate sentencing tiers under which the trial judge, not the jury, was given authority to find facts that exposed a defendant to an elevated sentence, see *Cunningham v California*, 549 US 270, 274-275, 293; 127 S Ct 856; 166 L Ed 2d 856 (2007), mandatory minimum sentences, see *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155, 2163-2164; 186 L Ed 2d 314 (2013),[6] and criminal fines, *Southern Union Co v United States*, 567 US 343, 346; 132 S Ct 2344; 183 L Ed 2d 318 (2012). In each of these cases, the Court reiterated that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See, e.g., *Blakely*, 542 US at 301. For purposes of *Apprendi*, this statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*. at 303-304. It does not matter for purposes of *Apprendi* whether the enhancement of the maximum sentence occurs on the basis of the finding of

[5] *Ring v Arizona*, 536 US 584, 613; 122 S Ct 2428; 153 L Ed 2d 556 (2002) (Scalia, J., concurring).

[6] In response to *Alleyne*, our Supreme Court struck the statutory requirement that made the use of sentencing guidelines—used to calculate a defendant's minimum sentence in Michigan—mandatory. *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015).

a single, specified fact, several specified facts, or on any aggravating fact: the Sixth Amendment violation is the same regardless. *Id*. at 305. Hence, if a statute provides for a particular term of imprisonment as well as an enhanced term, a judge cannot, when the jury's verdict only authorized the lower term, find facts that increase the maximum punishment. *Cunningham*, 549 US at 288. A defendant has the right to have a "jury find the existence of any particular fact that the law makes essential to his punishment." *Booker*, 543 US at 232 (citation and quotation marks omitted). The Court has repeatedly stressed that a "judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 US at 306.

The Supreme Court's Sixth Amendment jurisprudence has emphasized that the *Apprendi* rule was not concerned with the label—element or sentencing factor—assigned to a particular factual finding. Rather, it was the *effect* of the particular finding that mattered. That is, did the fact or facts found by the sentencing judge increase the statutory maximum sentence from that which was authorized by the jury's verdict? *Booker*, 543 US at 231; *Blakely*, 542 US at 306; *Apprendi*, 530 US at 494. See also *Alleyne*, 570 US at ___; 133 S Ct at 2158 ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense. . . . [A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed."); *Cunningham*, 549 US at 290 ("If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the

Sixth Amendment requirement is not satisfied."). A particular fact functions as an "element" if, by law, it increases the penalty for that crime. *Alleyne*, 570 US at ___; 133 S Ct at 2155.

3. *HURST* AND *RING*

In addition to these extensions of *Apprendi*, we note an area of caselaw to which the parties pay particular attention in the instant case: the extension of the *Apprendi* rule to cases involving aggravating factors used to enhance a sentence for purposes of imposing the death penalty. See *Hurst v Florida*, 577 US ___; 136 S Ct 616; 193 L Ed 2d 504 (2016); *Ring*, 536 US 584. Although these cases dealt with the imposition of the death penalty on adult offenders, the sentencing schemes—and the intersection of Eighth Amendment considerations and Sixth Amendment jury entitlements at issue in both *Hurst* and *Ring*—provide useful analysis for addressing the sentencing scheme at issue in the instant case.

In *Ring*, 536 US at 589, 591, the jury convicted the defendant, Timothy Ring, of felony murder for the death of the victim during the robbery of an armored car, but deadlocked on the charge of premeditated murder. The issue in that case concerned whether the jury's verdict authorized the imposition of the death penalty under Arizona law. "Under Arizona law, [the defendant] could not be sentenced to death, the statutory maximum penalty for first-degree murder, *unless further findings were made*." *Id*. at 592 (emphasis added). In particular, Arizona's first-degree murder statute authorized the penalty of death or life imprisonment, but, for purposes of determining which penalty to impose, Arizona law directed the trial judge to "conduct a separate sentencing hearing to determine

the existence or nonexistence of [certain enumerated] circumstances . . . ." *Id*. (citation and quotation marks omitted; alteration in original). The sentencing scheme at issue provided that the trial judge was to determine whether any of the enumerated aggravating factors existed, as well as any mitigating circumstances, and that the judge could only impose the death penalty "if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency." *Id*. at 593 (citation and quotation marks omitted).

The defendant in *Ring* contended that the Sixth Amendment required jury findings on the statutory aggravating factors. *Id*. at 597 n 4. The aggravating factors required by Arizona law were added by the state's legislature in large part due to Eighth Amendment caselaw concerning the imposition of death sentences and the requirement of aggravating factors. *Id*. at 606, citing *Maynard v Cartwright*, 486 US 356, 362; 108 S Ct 1853; 100 L Ed 2d 372 (1988); *Furman v Georgia*, 408 US 238; 92 S Ct 2726; 33 L Ed 2d 346 (1972). The Supreme Court in *Ring* remarked that the addition of aggravating factors was an "element" that was "constitutionally required" by the Eighth Amendment. *Ring*, 536 US at 606-607.

The Supreme Court found that Arizona's sentencing scheme could not be reconciled with *Apprendi* because, "[b]ased solely on the jury's verdict finding [the defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment," not death. *Id*. at 597. See also *id*. at 609 (holding that the Arizona sentencing scheme violated the Sixth Amendment because it "allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the

death penalty"). "This was so because, in Arizona, a death sentence may not legally be imposed" under state law "*unless* at least one aggravating factor is found to exist beyond a reasonable doubt." *Id*. at 597 (citation and quotation marks omitted; emphasis added). Reviewing *Apprendi*, the Court stated that the "dispositive question" was " 'one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602, quoting *Apprendi*, 530 US at 494. In *Ring*, the "effect" of the statutory scheme required the finding of an aggravating fact *before* a defendant could be exposed to a greater punishment—death—than was authorized by the jury's verdict alone. *Ring*, 536 US at 604. "Because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id*. at 609 (citation and quotation marks omitted).

In *Hurst*, another case dealing with the imposition of the death penalty, the Court dealt with a variation on the issue raised in *Ring*. In that case, the defendant, Timothy Hurst, was convicted of first-degree murder. *Hurst*, 577 US at ___; 136 S Ct at 619-620. Under Florida law, the maximum sentence that could be imposed for the offense was life imprisonment. *Id*. at ___; 136 S Ct at 620. An offender could only receive a death sentence if the trial court made additional findings of fact. *Id*. at ___; 136 S Ct at 620. The Florida sentencing proceeding was a hybrid proceeding in which following an evidentiary hearing, the jury would first render an "advisory verdict" of life or death without specifying the factual basis for its recommendation. *Id*. at ___; 136 S Ct 620. Afterward, the trial judge would weigh the aggra-

vating and mitigating factors and then decide between a sentence of life imprisonment or death, regardless of the jury's recommendation. *Id*. at ___; 136 S Ct at 620. Further, "[i]f the court imposes death, it must set forth in writing its findings upon which the sentence of death is based." *Id*. at ___; 136 S Ct at 620 (citation and quotation marks omitted).

The United States Supreme Court concluded that Florida's sentencing scheme could not be reconciled with *Ring* and *Apprendi*. *Id*. at ___; 136 S Ct at 621. The Court recited its holding in *Ring* that "Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Id*. at ___; 136 S Ct at 621, citing *Ring*, 536 US at 591. This same analysis, the Court concluded, applied in *Hurst* and demonstrated the constitutional infirmity of the defendant's death sentence in that case. *Hurst*, 577 US at ___; 136 S Ct at 621-622. "Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings *necessary to impose the death penalty*. Rather, Florida requires a judge to find these facts." *Id*. at ___; 136 S Ct at 622 (emphasis added). That Florida's sentencing scheme included an advisory jury verdict—a component not present in Arizona's scheme—did not change the analysis because the advisory jury did not make specific factual findings and its recommendation was not binding on the judge. *Id*. at ___; 136 S Ct at 622. The Court concluded:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment. [*Id*. at ___; 136 S Ct at 622.]

In short, the Sixth Amendment violation in *Hurst*, as in *Ring*, was that—although the statutory maximum for the homicide offense of which the defendant was convicted authorized the death penalty—a judge could only impose the death penalty on the basis of findings beyond the jury's verdict. The death penalty was not available but for judicial fact-findings regarding certain aggravating factors that had not been submitted to a jury for determination beyond a reasonable doubt.

4. *APPRENDI* DOES NOT BAR ALL JUDICIAL FACT-FINDING

For all that was said in *Apprendi* and its progeny, we note that the Supreme Court's holding in those cases must not be read as a prohibition against all judicial fact-finding at sentencing. Indeed, the rules from *Apprendi* and its progeny do not stand for the proposition that a sentencing scheme in which judges are permitted "genuinely to exercise broad discretion . . . *within a statutory range*" is unconstitutional; rather, as articulated in *Cunningham*, "everyone agrees" that such a scheme "encounters no Sixth Amendment shoal." *Cunningham*, 549 US at 294 (citation and quotation marks omitted; alteration in original; emphasis added). See also *Alleyne*, 570 US at ___; 133 S Ct at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Therefore, a judge acting within the range of punishment authorized by statute may exercise his or her discretion—and find facts and consider factors relating to the offense and the offender—without violating the Sixth Amendment. *Id*. at ___; 136 S Ct at 2163, citing *Apprendi*, 530 US at 481. As explained in *Alleyne*, 570 US at ___; 133 S Ct at 2163:

> [W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. [1 J. Bishop, Criminal Procedure 50 (2d ed, 1872),] § 85, at 54.

> [E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. *Apprendi*, [530 US] at 519, 120 S Ct 2348 (Thomas, J., concurring). [Quotation marks omitted; first and third alteration in original.]

D. *SKINNER* AND *HYATT*

With that backdrop in mind, we arrive at the basis for this conflict: *Skinner* and the prior opinion in this case.

1. *SKINNER*

This Court first encountered the issue in *Skinner*, 312 Mich App 15. In that case, the majority, after a careful and detailed discussion of the relevant caselaw, arrived at the conclusion that a defendant is entitled to have a jury be the decision-maker at the so-called *Miller* hearing required by MCL 769.25. The majority concluded that MCL 769.25 mandated "findings" and that those findings constituted elements of the offense. *Skinner*, 312 Mich App at 42-43. The majority reasoned that MCL 769.25 established a "default" sentence of a term of years for juveniles convicted of first-degree murder because, absent a motion by the prosecution, the trial court was required to impose a term-of-years sentence. *Id*. at 43-44, citing MCL 769.25(4). This conclusion as to a "default" sentence was premised, in

part, on our Supreme Court's opinion in *Carp*, which used the same term, "default," and concluded that "MCL 769.25 *now establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age." *Skinner*, 312 Mich App at 44, quoting *Carp*, 496 Mich at 458. According to the majority in *Skinner*, MCL 769.25 conditioned a life-without-parole sentence for a juvenile offender on two things: (1) the filing of a motion by the prosecuting attorney to impose the sentence and (2) the trial court's findings on the *Miller* factors and on any other criteria relevant to its decision. *Skinner*, 312 Mich App at 45, citing and quoting MCL 769.25(6). This scheme, according to the majority, authorized an *enhanced sentence* on the basis of factual findings by the trial court and ran afoul of the rule established in *Apprendi* and its progeny. *Skinner*, 312 Mich App at 45.

> Clearly, the findings mandated by MCL 769.25(6) "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Apprendi*, 530 US at 494, and therefore act as the "functional equivalent" of elements of a greater offense that must be proved to a jury beyond a reasonable doubt, *Ring*, 536 US at 609. An enhanced punishment under MCL 769.25 is not based merely on defendant's prior convictions, on facts admitted by defendant, or on facts that are part and parcel of the elements that were submitted to the jury during the guilt phase of the proceeding. Rather, like in *Apprendi*, 530 US at 476, in this case the state threatened defendant with certain pains—i.e., a term-of-years sentence—following her jury conviction of first-degree murder and with additional pains—i.e., life without parole—following additional findings by the trial court. "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id*. The effect of MCL 769.25 plainly subjects defendant to harsher punishment on the basis of judicially

> found facts in contravention of the Sixth Amendment. [*Skinner*, 312 Mich App at 46.]

In a strong dissent, Judge SAWYER rejected the idea that MCL 769.25 required findings of fact that increased the maximum sentence authorized by statute. *Skinner*, 312 Mich App at 63-64 (SAWYER, J., dissenting). Judge SAWYER equated the requirements of MCL 769.25 to sentencing factors, rather than fact-finding that authorized the trial court to impose a greater sentence than the statutory maximum. *Id*. "[T]he juvenile lifer law does not require any particular judicial fact-finding to increase the potential sentence from a term of years to life without parole." *Id*. at 70. MCL 769.25(6), as summarized by Judge SAWYER,

> does require the trial court to conduct a hearing before it may impose a sentence of life without parole on a juvenile offender. And it further requires that the trial court "consider" the factors listed in *Miller*, as well as any other criteria the trial court deems relevant to its decision. MCL 769.25(7) then requires that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." *But nowhere does the statute require the trial court to make any particular finding of fact before it is authorized to impose a sentence of life without parole. Rather, after conducting the hearing and considering the evidence presented at the hearing as well as the evidence presented at trial, the trial court makes its decision and must state on the record the reasons for that decision*. As our Supreme Court noted in *Carp*, this process allows for the "individualized sentencing" procedures established by *Miller*. This procedure also presumably allows for more meaningful appellate review of the sentence. [*Skinner*, 312 Mich App at 73 (SAWYER, J., dissenting) (citation omitted; emphasis added).]

Likewise, Judge SAWYER concluded that *Miller* itself did not require any particular fact to be found before a

court could impose a sentence of life without parole. *Id*. at 74. Rather, it established a framework for ensuring that juveniles would receive an individualized sentence. *Id*.

2. *HYATT*

In the prior appeal in the instant matter, defendant Hyatt argued that he was entitled to have a jury determine his sentence in accordance with *Skinner*. The panel recognized that it was bound by *Skinner*, but stated, "[W]e believe that *Skinner* was wrongly decided." *Perkins*, 314 Mich App at 165. Like the panel in *Skinner*, the prior panel engaged in a lengthy and detailed analysis of MCL 769.25, *Miller*, and Sixth Amendment caselaw such as *Apprendi*, *Ring*, *Booker*, *Blakely*, *Cunningham*, and *Alleyne*. *Id*. at 165-176. After this detailed analysis, the panel agreed with Judge SAWYER's dissent in *Skinner*. That is, the prior panel believed that MCL 769.25 "does not run afoul of [Sixth Amendment jurisprudence] because Hyatt did not receive an enhanced sentence. The sentencing court did not determine facts not already determined by the jury's verdict." *Id*. at 176. Moreover, unlike in *Apprendi*, *Ring*, *Blakely*, *Cunningham*, and *Alleyne*, "nothing in MCL 769.25 premised a sentencing court's authority to impose a term of life imprisonment without parole on any specific finding that Hyatt's jury failed to consider in convicting Hyatt of first-degree felony murder. Because the prosecutor undisputedly and properly filed a motion seeking a life-without-parole sentence for Hyatt, the mandates in §§ 25(4) and (9) regarding the term of years did not apply." *Id*. at 177-178. Finally, the panel reasoned, "[T]he plain language of the statute did not require the trial court to make any findings concerning aggravating or miti-

gating factors before the court could sentence Hyatt to life without parole. Consequently, the life-without-parole sentence in this case came within the statutory maximum . . . ." *Id*. at 178.

The prior panel remanded the matter for resentencing, but stated that, "[w]ere it not for *Skinner*, we would affirm the sentencing court's decision to sentence Hyatt to life imprisonment without the possibility of parole." *Id*. at 179.

E. RESOLUTION OF THE CONFLICT

We hold that the prior panel's analysis in this case was correct. Neither *Miller* nor MCL 769.25 implicates the right to a jury trial under *Apprendi* and its progeny. Rather, by implementing *Miller*'s Eighth Amendment protections through its enactment of MCL 769.25, the Legislature simply established a procedural framework for protecting a juvenile's Eighth Amendment rights at sentencing. The sentencing procedure at issue in this case does not involve the concern that was at issue in *Apprendi*, 530 US at 490—fact-finding that increases the maximum penalty for juvenile homicide offenders. In other words, the instant case is not one in which the finding of a particular fact increases the maximum penalty. Nor does the instant case involve a statutory scheme that makes the imposition of life without parole contingent on any particular finding. Under MCL 769.25, the statutory maximum for juvenile offenders—assuming the requisite motion has been filed—is a life-without-parole sentence, and when imposing that rare sentence, the sentencing authority is not tasked with finding any particular fact before making its decision. A careful examination of both *Miller* and MCL 769.25 compels this result.

At the outset, we reject arguments that the Supreme Court's decision in *Miller* can be read to implicate the Sixth Amendment; we also reject the idea that the decision in *Miller* suggests the right to have a jury determination on the sentence of life without parole. In this respect, it is important to note the Court's concern in *Miller*: the imposition of a disproportionate sentence on juvenile offenders. The risk of a disproportionate sentence was, for purposes of the Eighth Amendment, unacceptable under a system of mandatory life-without-parole sentences for certain homicide offenses. *Miller*, 567 US at 479 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."). To alleviate this concern, the Court created a framework for protecting a juvenile's Eighth Amendment right against disproportionate punishment. Important to our present case, this framework does not make the imposition of a life-without-parole sentence contingent upon the finding of a certain fact. The Court's decision in *Miller* did not require a sentencing authority to consider an offender's youth before *aggravating* the available penalty. Rather, the Court imposed an individualized sentencing mandate for juvenile offenders convicted of homicide offenses. Individualized sentencing was required to ensure proportionality, not to aggravate the maximum penalty available under the law. Hence, a sentencing authority remains free under *Miller* to impose a life-without-parole sentence based solely on the jury's verdict. *Miller* simply holds that a framework of protections required by the Eighth Amendment must be implemented to ensure that the imposition of the maximum available penalty—life without parole—is proportionate to the particular offender and the particular of-

fense. In short, the remodeling that *Miller* performed on life-without-parole sentences for juveniles did not touch the ceiling—or floor, for that matter—of the available sentence for juvenile homicide offenders.

In support of our interpretation of *Miller*'s demands, we note the Supreme Court's discussion of *Miller* in *Montgomery*.[7] Notably, in *Montgomery*, 577 US at ___; 136 S Ct at 735, albeit not within the context of a Sixth Amendment discussion, the Supreme Court expressly recognized that its decision in *Miller* did not require a sentencing authority to make a finding of fact on a child's incorrigibility before imposing a life-without-parole sentence. As stated in *Montgomery*, "[t]hat *Miller* did not impose a formal factfinding requirement [regarding incorrigibility] does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id*. at ___; 136 S Ct at 735. In accordance with *Montgomery*'s conclusion about *Miller*'s demands, we decline to conclude that *Miller* implicates a defendant's Sixth Amendment right to a jury trial.[8]

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[7] Again, neither the panel in *Skinner* nor the prior panel in this case had the benefit of the *Montgomery* analysis.

[8] Although they are not binding on this Court, we note that two of the only cases to consider this issue in another state reached the same result regarding whether *Miller* requires a jury determination. See *State v Fletcher*, 149 So 3d 934, 943; La App 49, 303 (2d Cir, October 1, 2014); *People v Gutierrez*, unpublished opinion of the California Court of Appeal, issued June 22, 2016 (Docket No. B261989), pp 6-7. Notably, in *Fletcher*, 149 So 3d at 943, the Louisiana Court of Appeals rejected the idea that *Miller* created a "new statutory maximum" for purposes of *Apprendi*; further, *Fletcher* rejected the idea that *Miller* required proof of an additional element before a sentencing authority could impose a life-without-parole sentence. Rather, reasoned the court in *Fletcher*, *Miller* "merely mandates a hearing at which youth-related mitigating

This is not to say that the sentencing procedure envisioned by *Miller* does not involve *any* fact-finding.[9] However, the procedure described by *Miller* is missing key components for purposes of *Apprendi* and its progeny: nowhere in *Miller*'s individualized sentencing mandate is the idea that *Miller* altered the maximum punishment available for juvenile offenders or made the imposition of any punishment contingent on fact-finding. In other words, the Court did not hold that a life-without-parole sentence was unavailable *unless* the sentencing authority found certain facts. In this sense, *Miller* did not impose any aggravating factors such as those that were at issue in *Ring*, 536 US at 591-592; in that case, Arizona law provided that a jury's verdict alone was insufficient to authorize capital punishment and a death sentence required additional findings on certain aggravating factors. In contrast, *Miller* merely provided certain considerations that must be taken into account by a sentencing authority when imposing the maximum sentence—life without parole—in order to protect a juvenile's Eighth Amendment right against a disproportionate, nonindividualized sentence. *Miller*, 567 US at 477, 480-481.

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factors can be presented to the sentencer and considered in making a determination of whether the life sentence imposed upon a juvenile killer should be with or without parole eligibility." *Id*.

[9] For instance, *Miller* requires a hearing at which a court may receive evidence about, among other matters, the circumstances of the homicide, including the juvenile's role in the offense. *Miller*, 567 US at 475-476, 480. The hearing will almost inevitably produce conflicting evidence about the extent of the offender's role, with the prosecution likely seeking to maximize the juvenile defendant's involvement in the homicide and the juvenile defendant seeking to minimize that role. Faced with conflicting evidence, a sentencing judge tasked with weighing the juvenile's role in the offense will necessarily have to make a determination about which evidence to believe, i.e., make a factual finding.

Hence, *Miller* does not implicate the type of fact-finding prohibited by *Apprendi*. The process described in *Miller* was merely a means of ensuring that the maximum sentence available under the law—life without parole—was proportionate to *the particular juvenile offender* at issue. The considerations required by *Miller*'s individualized sentencing guarantee are sentencing factors, not elements that must be found before a more severe punishment is authorized. See *Apprendi*, 530 US at 482-483, 485-486. As succinctly stated in *Alleyne*, 570 US at ___; 133 S Ct at 2163, Sixth Amendment jurisprudence has "recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment."[10]

However, the conclusion that *Miller* does not require certain factual findings in order to impose a sentence of life without parole on a juvenile offender is not, by itself, dispositive of the issue raised. As the Supreme Court in *Montgomery* acknowledged, the implementation of *Miller*'s directives was a matter left largely to the states. *Montgomery*, 577 US at ___; 136 US at 735. We now turn to the legislative response at issue in this case, MCL 769.25, to determine if the right to a jury determination can be found therein.

Careful examination of MCL 769.25 reveals that our Legislature did not alter the statutory maximum sen-

[10] We briefly note Justice Breyer's concurring opinion in *Miller*, in which he concluded that in order to impose a life-without-parole sentence on a juvenile offender, there must be a finding that the offender killed or intended to kill. *Miller*, 567 US 489-490 (Breyer, J., concurring). A life-without-parole sentence should be, according to Justice Breyer, "forbid[den]" without such a finding. *Id*. at 490. If this view were the current state of the law, it might change our Sixth Amendment analysis, particularly in this case, which involved felony murder in a multiple-offender situation. However, Justice Breyer's view was not adopted by the majority in *Miller*, and we see no Sixth Amendment implications in the majority's decision in *Miller*.

tence that may be imposed solely on the basis of the jury's verdict, nor did our Legislature make imposition of the statutory maximum dependent on any particular finding of fact. The statute provides that in order to sentence a juvenile defendant to life without parole, the prosecuting attorney must, in a case involving an enumerated homicide offense, file a motion seeking that sentence within the specified period. MCL 769.25(2) and (3). If the prosecuting attorney files this motion, the trial court "shall conduct a hearing on the motion as part of the sentencing process." MCL 769.25(6). At the hearing, the trial court is to consider "the factors listed in Miller v Alabama . . . and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." MCL 769.25(6). Then, in what would appear to be an effort to aid appellate review of the sentence, the trial court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL 769.25(7).

In sum, MCL 769.25 does two important things. As an initial matter, the statute plainly states that the statutory maximum for the enumerated homicide offenses—in the event the prosecution files the requisite motion—is life without parole. Any contention that MCL 769.25 creates a "default"[11] sentence of a term of years in all instances ignores the plain language of the

[11] The suggestion that our Supreme Court declared in *Carp*, 496 Mich at 458, that MCL 769.25 created a "default" sentence of a term of years in all instances is inaccurate. Although *Carp* mentioned a default sentence, it did so in describing the procedure for sentencing a juvenile *in the absence of a motion filed by the prosecution* seeking a life-without-parole sentence. *Id*.

statute. MCL 769.25(2) plainly permits the prosecuting attorney to seek life without parole upon the filing of the requisite motion. Once this motion is filed, the statutory maximum is life without parole, and the trial court has discretion to sentence up to that statutory maximum.

This leads to our second point. MCL 769.25 does not make the imposition of this statutory maximum contingent on any particular fact. Rather, the statute mirrors the requirement of *Miller*—individualized sentencing. That is, MCL 769.25 does away with mandatory life-without-parole sentences and requires the trial court, when the maximum sentence is sought, to make the individualized sentencing determination required by *Miller*. If, consistently with *Miller*'s demands, the sentencing judge deems life without parole to be appropriate—meaning that the case before it is one of the rare cases described by *Miller*—the trial court is authorized by the jury's verdict to impose a life-without-parole sentence. Indeed, as is the case with *Miller*, our statutory scheme does not *require* any additional findings before the imposition of a life-without-parole sentence. The sentencing judge decides whether to exercise his or her discretion to impose that statutory maximum by considering the so-called *Miller* factors to satisfy *Miller*'s individualized sentencing mandate. In sum, when the prosecuting attorney files the requisite motion, the " 'statutory maximum' for *Apprendi* purposes," see *Blakely*, 542 US at 303, is life without parole. This sentence, then, is permitted "*solely on the basis of the facts reflected in the jury verdict* . . . ." *Id*. This type of sentencing scheme does not run afoul of *Apprendi* and its progeny.

In this sense, the sentencing scheme imposed by MCL 769.25 is different from the schemes at issue in

Apprendi, *Blakely*, *Booker*, and *Cunningham*—and that difference is of critical importance for purposes of the Sixth Amendment inquiry. In particular, we note that in *Apprendi*, 530 US at 470, an enhanced sentence was possible if the prosecution filed a motion seeking such a sentence and after a hearing the trial judge found that the defendant acted with a biased purpose—which was a fact not encompassed by the jury's verdict. In this case, by contrast, MCL 769.25 allows the prosecuting attorney to file a motion to sentence up to the maximum *that is allowed by the jury's verdict*. The prosecuting attorney's motion in the instant case is not meant to trigger a factual finding that will increase the maximum sentence; instead, the motion is filed to initiate the Eighth Amendment protections demanded by *Miller*.

It is argued that a sentencing judge will necessarily engage in fact-finding during the *Miller* analysis. On this point, we agree. However, as noted, it is not dispositive that a sentencing judge makes factual findings. The dispositive question is whether the statute authorizes *increased punishment*, contingent on certain factual findings. *Ring*, 536 US at 602. Indeed, "[a] statutory requirement that a judge make findings . . . does not mean that any specific finding is necessary for imposition of the sentence." *State v Fell*, 210 Ariz 554, 559; 115 P3d 594 (2005).[12] MCL 769.25 does not authorize increased punishment, much less make such an increase contingent on any facts. Instead, the fact-finding that will inevitably occur during the *Miller* analysis is the kind that "everyone agrees encounters no Sixth Amendment shoal." *Cunningham*, 549 US at

[12] Although decisions from other states are not binding, we may consider them as persuasive authority. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

294 (citation and quotation marks omitted). See also *Alleyne*, 570 US at ___; 133 S Ct at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Any fact-finding that occurs "do[es] not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely*, 542 US at 309.

For comparison purposes, we examine the sentencing of criminal defendants by federal district courts and note the type of judicial fact-finding that occurs under the sentencing factors listed in 18 USC 3553(a).[13] Any fact-finding that occurs with regard to the statutory factors is meant "to inform individual sentencing decisions and to help meet the Sentencing Commission's twin-goals of sentencing—uniformity

[13] Pursuant to 18 USC 3553(a):

> [t]he court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

and proportionality," and does not affect the maximum sentence that may be imposed. *United States v Ali*, 508 F3d 136, 146 n 15 (CA 3, 2007) (citation and quotation marks omitted). Like the federal sentencing guidelines post-*Booker*, there is no mandatory or default sentence under MCL 769.25 that must be imposed *unless* the sentencing judge finds facts that the jury never found nor were admitted by the defendant. As noted by the United States Supreme Court in *Rita v United States*, 551 US 338, 352; 127 S Ct 2456; 168 L Ed 2d 203 (2007), "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." Rather, "[t]he Sixth Amendment question" concerns "whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." *Id*.

We also reject any argument that MCL 769.25 is comparable to the sentencing scheme that was at issue in *Ring*, 536 US 584, a case cited frequently by the parties. In *Ring*, the statutory scheme provided that the maximum penalty was death or life imprisonment, but it *conditioned* imposition of the death penalty, which represented an increase in the authorized punishment, on further factual findings by the trial judge during a separate sentencing hearing. *Id*. at 592. Those additional findings concerned aggravating and mitigating circumstances. *Id*. at 592-593. In the instant case, it is true that MCL 769.25(7) uses the term "aggravating and mitigating circumstances." The key difference, once again, is that MCL 769.25 does not make the imposition of life without parole contingent upon certain findings. MCL 769.25 only requires that which *Miller* requires—individualized sentencing based on the so-called *Miller* factors. The juvenile

defendant is—based solely on the jury's verdict and the prosecuting attorney's motion—eligible for a life-without-parole sentence, the statutory maximum.

In sum, all that is mandated by MCL 769.25 is the individualized sentencing required, as stated in *Miller*, by the Eighth Amendment. The analysis involving the *Miller* factors does not aggravate punishment; instead, the analysis acts as a means of *mitigating* punishment because it acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict, a sentence which *Montgomery* cautioned is disproportionate for "the vast majority of juvenile offenders . . . ." *Montgomery*, 577 US at ___; 136 S Ct at 736. In fact, unless the defendant is the rare juvenile deserving of the harshest penalty, the *Miller* analysis, as incorporated by MCL 769.25, will have the effect of mitigating the available punishment.

The idea that *Miller*—and MCL 769.25 by its incorporation of the "*Miller* factors"—sets forth a framework of mitigation, rather than aggravation, is apparent from the text of the *Miller* decision itself. See *Miller*, 567 US at 489 ("[O]ur individualized sentencing decisions make clear that a judge or jury[14] *must have the opportunity to consider mitigating circumstances* before imposing the harshest possible penalty for juveniles.") (emphasis added). Indeed, the Supreme Court's decision in *Miller* is rife with arguments concerning why juveniles are consti-

[14] As aptly noted by the panel in *Skinner*, 312 Mich App at 33, the "passing reference to 'a judge or jury' " in *Miller* is hardly illuminating with regard to the issue at hand. The issue before the Court in *Miller* was limited to Eighth Amendment concerns, and the Court was not called on to weigh in on the matter now before us. Hence, like the panel in *Skinner*—and, for that matter, our Supreme Court in *Carp*, 496 Mich at 491 n 20—we assign no significance to the phrase "judge or jury" as it is used in *Miller*.

tutionally different from adults and why these differences *diminish the culpability* of juveniles. See, e.g., *id*. at 471 (explaining that juveniles are "constitutionally different from adults for purposes of sentencing" because, among other reasons, they have "diminished culpability"). The problem with a mandatory life-without-parole sentence, according to *Miller*, was that it failed to give the sentencing authority "the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" and that such a mandatory sentencing scheme violated the principle of proportionality by forcing the sentencing authority to ignore "age and age-related characteristics," i.e., those characteristics that diminish the culpability of the juvenile, thereby warranting a lesser sentence. *Id*. at 489. The Court in *Miller* specifically invoked the "mitigating qualities of youth" in explaining why individualized sentencing was necessary when deciding whether to impose the harshest possible penalty available for juveniles—life without parole. *Id*. at 476 (citation and quotation marks omitted). This culminated in the Court announcing the so-called *Miller* factors, all of which speak to *mitigation* and why "chronological age and its hallmark features" should be considered when sentencing a juvenile. *Id*. at 477. Put simply, *Miller* required individualized sentencing as a means of mitigating the maximum penalty authorized by the jury's verdict, rather than aggravating the penalty beyond that which was set forth by law.[15] So, too, MCL 769.25 sets a maximum punishment—in the event the

[15] To be sure, however, *Miller* made clear that mitigation was more often than not the appropriate route, emphasizing that a life-without-parole sentence would be proportionate for only the rare juvenile "whose crime reflects irreparable corruption." *Miller*, 567 US at 479-480 (citation and quotation marks omitted).

prosecution files the requisite motion—at life without parole and mandates that the sentencing judge consider the *Miller* factors in a way that mitigates, rather than enhances, the maximum available penalty.

Viewing the *Miller* factors as a means of mitigation is not to suggest, however, that life without parole remains the default sentence for juveniles convicted of first-degree murder after *Miller*. Indeed, it is doubtful whether that result could be squared with *Miller*'s conclusions about the constitutional infirmities inherent in a mandatory life-without-parole sentencing scheme for juveniles. Instead, the *Miller* factors act as a means of mitigation in the sense that they must be considered by the sentencing judge when he or she is determining whether life without parole is an appropriate sentence to impose.

Our decision today comports with those of numerous state and lower federal courts that have considered, albeit in slightly different contexts, the intersection of the Eighth Amendment's proportionality requirements and the Sixth Amendment right to a jury trial. The cases from which we draw support stemmed from the United States Supreme Court's decisions in *Atkins v Virginia*, 536 US 304, 321; 122 S Ct 2242; 153 L Ed 2d 335 (2002)—concluding that the Eighth Amendment barred the imposition of capital punishment on defendants who are intellectually disabled, and *Tison v Arizona*, 481 US 137, 158; 107 S Ct 1676; 95 L Ed 2d 127 (1987)—banning the imposition of the death penalty in felony-murder cases unless the defendant: (1) was a major participant in the offense or (2) acted with at least a reckless indifference to human life. The consensus in these cases is that when the Eighth Amendment's proportionality requirement has barred

imposition of the death penalty because of a certain factor or factors that suggested diminished culpability, the determination of whether those certain factors exist is not one that is subject to a jury determination. Stated differently, the Eighth Amendment prohibitions are considered to be mitigating factors that act as a bar against imposing the statutory maximum penalty, rather than as elements that enhance the maximum possible penalty, and the determination of whether those mitigating factors exist need not, under *Apprendi* and its progeny, be made by a jury. See, e.g., *State v Agee*, 358 Or 325, 364; 364 P3d 971 (2015) (holding that a determination on intellectual disability is a mitigating factor that can be made by a judge and does not, under *Apprendi* and *Ring*, require a jury determination); *State v Hill*, 2008 Ohio 3509, ¶ 68; 177 Ohio App 3d 171, 187; 894 NE2d 108 (Ohio App, 2008) (rejecting the idea that the Eighth Amendment's prohibition against imposing the death penalty on an intellectually disabled adult required a jury determination of intellectual disability because that determination mitigated, rather than enhanced, the available punishment); *Commonwealth v Bracey*, 604 Pa 459, 473-474; 986 A2d 128 (2009) (finding that there was no right to a jury trial on an *Atkins* claim under *Ring*); *State v Galindo*, 278 Neb 599, 655; 774 NW2d 190 (2009) (rejecting the idea that *Tison* findings were "elements" of the offense even when the death penalty was imposed); *State v Nichols*, 219 Ariz 170, 172; 195 P3d 207 (2008) (recognizing that the Sixth Amendment does not require a jury to make *Tison* findings, but a state statutory scheme could require as much if the legislature so chose); *State v Johnson*, 244 SW3d 144, 151 (Mo, 2008) (holding that a finding of intellectual disability removed the defendant from consideration for the death penalty and was therefore not the equiva-

lent of an aggravating factor that required a jury determination under *Ring*); *State v Grell*, 212 Ariz 516, 526-527; 135 P3d 696 (2006) (discussing mitigating factors from *Atkins* and *Tison* and concluding that there is no right to a jury trial on either set of factors under *Apprendi* and its progeny); *Head v Hill*, 277 Ga 255, 258; 587 SE2d 613 (2003) (opining that because intellectual disability was an "exemption" from the death penalty, it was a mitigating factor and not "the functional equivalent of an element" of the offense); *In re Johnson*, 334 F3d 403, 405 (CA 5, 2003) (stressing that a mitigating analysis of intellectual disability—required by the Eighth Amendment, per *Atkins*—was not the functional equivalent of an element of a greater offense). See also LaFave, § 26.4(i), pp 1018-1019 ("So far, lower courts have rejected arguments to equate the factors which as a matter of Eighth Amendment law are required for death eligibility with elements. The rules in *Tison* and *Atkins* have instead been treated as defenses to, not elements of, capital murder.").[16]

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[16] The United States Supreme Court has denied leave in some of these cases, see, e.g., *Galindo v Nebraska*, 559 US 1010 (2010), but has yet to expressly weigh in on this issue post-*Apprendi*. With regard to the *Atkins* line of cases, the United States Supreme Court in *Schriro v Smith*, 546 US 6, 7; 126 S Ct 7; 163 L Ed 2d 6 (2005), left to the states to determine how to implement *Atkins* and to decide whether a judge or jury should assess the mitigating factor of intellectual disability. We also note that with regard to the offender's role in the offense, the Supreme Court in *Cabana v Bullock*, 474 US 376; 106 S Ct 689; 88 L Ed 2d 704 (1986), abrogated in part on other grounds by *Pope v Illinois*, 481 US 497, 503 n 7; 107 S Ct 1918; 95 L Ed 2d 439 (1987), discussed *Enmund v Florida*, 458 US 782; 102 S Ct 3368; 73 L Ed 2d 1140 (1982), a case which served as a precursor to *Tison* and which drew similar conclusions about the Eighth Amendment's concern with the offender's role in a capital offense. Pertinent to our discussion, the Supreme Court in *Cabana* held that the offender's role in the offense did not concern guilt or innocence and did not establish an element of capital murder that had to be found by a jury. *Cabana*, 474 US at 385. Rather, determination of the offender's role was a consideration of proportionality for purposes of

These cases are instructive in the instant case. Although the Court's holding in *Miller* did not produce an outright ban on the imposition of life-without-parole sentences for juvenile homicide offenders, it nevertheless declared that in the vast majority of cases, that sentence will be disproportionate under the Eighth Amendment. Similar to the proportionality analysis of *Atkins* and *Tison*, the Supreme Court in *Miller* concluded that a certain characteristic of the offender rendered the maximum punishment authorized by statute to be disproportionate because that characteristic suggested diminished culpability on the part of the offender. And as in *Atkins* and *Tison*, the Supreme Court in *Miller* recognized that the Eighth Amendment required a certain framework of protections be considered before the maximum punishment authorized by statute could be imposed. Thus, the decision in *Miller* demonstrates that a juvenile offender's age is a mitigating factor that is to be considered in rendering a proportionate sentence for a juvenile who is convicted of first-degree murder.[17] Our Legislature enacted MCL 769.25 in a way that essentially mirrored that which is required by *Miller*. Consideration of the *Miller* factors

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the Eighth Amendment and was not a decision that required a jury determination. *Id*. Accordingly, to the extent the Supreme Court has addressed this issue, it has determined that a finding on mitigating factors does not implicate the right to a jury trial. However, before we place too much stock in *Cabana*, we must note that the case was decided prior to *Apprendi*. Accordingly, we place greater emphasis on the state court and lower federal court decisions already discussed in this opinion.

[17] Accordingly, we caution that if the prosecuting attorney moves for a life-without-parole sentence under MCL 769.25(2), the resultant *Miller* hearing must not be treated as a perfunctory exercise that will automatically authorize the imposition of a life-without-parole sentence. That approach would defy those principles that were first announced in *Miller* and that were made even clearer in *Montgomery*: life without parole is to be imposed on juvenile offenders in only the rarest of cases.

under MCL 769.25 acts to mitigate punishment, rather than acting as the functional equivalent of an element of a greater offense.

F. CONCLUSION

In sum, we find that *Miller*'s individualized sentencing mandate, as incorporated by MCL 769.25, does not run afoul of Sixth Amendment precedent. A judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25. Accordingly, we reject the result reached in *Skinner* and conclude that the prior panel in this case was correct in its analysis.

IV. APPLICATION TO THIS CASE

As for the outcome of the case before us, the prosecution asks that we do two things: (1) affirm the life-without-parole sentence imposed on defendant Hyatt and (2) articulate the appropriate standard of review on appeal for a juvenile life-without-parole sentence. In addressing these issues, we find it necessary to adhere to and incorporate *Miller*'s and *Montgomery*'s oft-repeated warnings about how rarely life-without-parole sentences for juvenile offenders will be proportionate.

A. THE TRULY RARE JUVENILE

As noted, *Miller* stopped shy of—and did not expressly consider—imposing a categorical ban on life-without-parole sentences for juveniles, but the Supreme Court repeatedly admonished sentencing authorities to impose the penalty of life without parole in only the rarest of circumstances, given the many mitigating factors of youth. In this regard, we note the

concerns raised in *Miller*—and in *Roper* and *Graham* for that matter—concerning how juveniles are different from adults in terms of their culpability and capacity for change. Notably, these cases underscored that juveniles tend to be less mature than adults, are more likely to possess an "underdeveloped sense of responsibility," and are more likely to engage in reckless behavior. *Roper*, 543 US at 569 (citation and quotation marks omitted). Largely for these reasons, states almost universally prohibit juveniles from making many decisions that will have long-term effects such as "voting, serving on juries, or marrying without parental consent." *Id*.

In addition, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id*. Children also "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 US at 471 (citations, quotation marks, and alteration omitted). And juveniles have a lesser-defined sense of character than the typical adult; a juvenile's "personality traits . . . are more transitory, less fixed." *Roper*, 543 US at 570. Juveniles, noted the Court in *Graham*, "are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Graham*, 560 US at 68 (citation and quotation marks omitted). In *Graham*, the Court explained that studies have demonstrated that "parts of the brain involved in behavior control continue to mature through late adolescence." *Id*. Hence, "youth is more than a chronological fact," and "its signature qualities are all transient." *Miller*, 567 US at 476 (citations and quotation marks omitted).

The Court explained in *Roper*, 543 US at 570, that for all these reasons, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." "[T]he distinctive attributes of youth" reasoned the Court in *Miller*, 567 US at 472, "diminish the penological justifications for imposing the harshest sentence on juvenile offenders, even when they commit terrible crimes." Therefore, when it comes to sentencing a juvenile, concern must be given to the offender's youth and its attendant characteristics. This was the impetus for *Miller*'s individualized sentencing mandate. See *id*. at 473 (emphasizing that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole"), and *id*. at 474 ("By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[mandatory sentencing schemes] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."). However, this is not to say that a juvenile should not face consequences for his or her actions; rather, in rendering punishment, consideration must be given to the fact that juvenile offenders are generally less culpable than their adult counterparts. *Graham*, 560 US at 68.

Because juveniles are different from adults and have still-evolving characters, the Supreme Court has noted how difficult it can be for a sentencer to conclude that life without parole, the harshest possible penalty for a juvenile homicide offender, is proportionate to a particular offense and offender. In *Roper*, 543 US at 569, the Court recognized that "general differences" between juveniles and adults "demonstrate that juvenile

offenders *cannot with reliability be classified among the worst offenders*." (Emphasis added.) The *Roper* Court, citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am Psychologist 1009, 1014-1016 (2003), also remarked that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 US at 573. If this determination is difficult for even trained psychologists, we would be remiss if we did not acknowledge our concerns about sentencing courts—or reviewing courts, for that matter—accurately assessing, or in essence forecasting, whether an individual who committed a crime while still a minor is and will remain irreparably corrupt for the rest of his or her life and on the basis of that assessment accurately meting out a proportionate sentence.

These concerns led the Court in *Miller* to caution that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*." *Miller*, 567 US at 479 (emphasis added). The Court returned in *Montgomery* to the idea of the infrequency of proportionate life-without-parole sentences for juvenile offenders when it declared that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison *is a disproportionate sentence for all but the rarest of children*, those whose crimes reflect irreparable corruption." *Montgomery*, 577 US at ___; 136 S Ct at 726 (citation and quotation marks omitted;

emphasis added). In fact, the majority opinion in *Montgomery* used the words "rare" or "rarest" six times in describing when a life-without-parole sentence would be appropriate after *Miller*. See *id*. at ___; 136 S Ct at 726 (declaring life without parole to be disproportionate "for all but the rarest of children") (citation and quotation marks omitted); *id*. at ___; 136 S Ct at 733 (emphasizing that although "a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified," a life-without-parole sentence will by and large be disproportionate); *id*. at ___; 136 S Ct at 734 (stating that "*Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption," explaining that *Miller* declared a life-without-parole sentence to be unconstitutional "for all but the rarest of juvenile offenders," stating that "[a]fter *Miller*, it will be the rare juvenile offender who can receive that same sentence," and noting that *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption") (citation and quotation marks omitted).

B. IMPLEMENTING *MILLER* AT SENTENCING

The cautionary language employed by the Court in *Roper*, *Graham*, *Miller*, and *Montgomery* must be honored by this Court. In light of this language and our need to review defendant Hyatt's sentence under *Miller*, we conclude that when sentencing a juvenile offender, a trial court must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue. For that reason, a

sentencing court must begin its analysis with the understanding that life without parole is, unequivocally, appropriate only in rare cases. Sentencing courts are to do more than pay mere lip service to the demands of *Miller*. A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights. As explained in *Montgomery*:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defenders because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [*Montgomery*, 577 US at ___; 136 S Ct at 734 (citations and quotation marks omitted).]

We note that nearly every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. After all, the sentence can only be imposed for the worst homicide offenses. However, the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without-parole sentence. The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is

the truly rare juvenile for whom life without parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court. And in making this determination in a way that implements the stern rebuke of *Miller* and *Montgomery*, the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate.

That this approach is required under *Miller* becomes even more apparent when one considers the warnings in *Roper*, *Graham*, and *Miller* about how difficult it is for even a trained psychologist, let alone a sentencing judge, to make a definitive determination regarding a juvenile's capacity for reform. See *Roper*, 543 US at 573 (remarking that the transient qualities of youth make determinations about a juvenile's capability for reform exceedingly difficult). In fact, the Court in *Graham*, 560 US at 77-78, felt so strongly about the difficulty of distinguishing "the few incorrigible juvenile offenders from the many that have the capacity for change" that it rejected—in the case of nonhomicide juvenile offenders—a case-specific sentencing scheme similar to the one it later adopted in *Miller*, and decided that because the determination was so difficult, it would instead impose a categorical ban in nonhomicide cases. Because MCL 769.25 permits a case-by-case determination upon the filing of the requisite motion, trial courts must operate with the understanding that, more likely than not, a life-without-parole sentence is disproportionate for the juvenile offender being sentenced. Indeed, as the Supreme Court warned in *Roper*, *Graham*, and *Miller*, given the unique and transient qualities of youth, even the most thorough, well-intentioned, and earnest sentencing courts en-

counter a significant risk of reaching the wrong conclusion about a juvenile's character being irreparably corrupt. And this risk carries with it the grave consequences of violating the Eighth Amendment and of denying an undeserving individual—who it must be remembered is nevertheless deserving of significant punishment because of the conviction—an opportunity to leave the prison he or she entered while still a child. It was not a hollow exercise for the Supreme Court in *Miller* and *Montgomery* to repeatedly emphasize how rarely a life-without-parole sentence will be proportionate. Hence, we emphasize the caution with which a sentencing court must view the imposition of life without parole for juvenile offenders.

C. STANDARD OF APPELLATE REVIEW

The same concerns noted above exist on appeal when a juvenile challenges the imposition of his or her life-without-parole sentence. That leads us to a second question, one raised by the prosecution and one that is inherently necessary in weighing in on defendant Hyatt's sentence in the instant case. That is, given the limited circumstances in which a life-without-parole sentence is proportionate and constitutional, what is the appropriate standard of appellate review for that sentence?

As noted by our Supreme Court in *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990), our Legislature, in setting forth a range of appropriate punishments for criminal offenses, has entrusted sentencing courts with the responsibility of selecting the appropriate punishment from statutorily authorized sentencing ranges. These sentencing ranges embody the "principle of proportionality" because they allow a sentencing judge to tailor the sentence to the particu-

lar offense and offender at issue. *Id*. Accordingly, the *Milbourn* Court believed "that the Legislature's purpose" in enacting such a scheme was "best served by requiring judicial sentencing discretion to be exercised according to the same principle of proportionality that has guided the Legislature in its allocation of punishment over the entire spectrum of criminal behavior." *Id*. at 635-636. See also *id*. at 651 ("The Legislature then left to the judiciary, with regard to most crimes, the task of determining the sentence to be imposed upon each offender within given bounds."). The limit on the judicial discretion to be exercised when imposing penalties is that the punishment should be proportionate to the offender and the offense. *Id*. at 651-652. Hence, appellate review of the sentence imposed is for abuse of discretion, to determine whether the sentence violates the principle of proportionality, "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 636, 654.

Turning to the instant case, we believe that the appropriate standard of review for cases in which a judge imposes a sentence of life without parole on a juvenile defendant is a common three-fold standard, the likes of which are applied in a variety of contexts. Any fact-finding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed de novo, and the court's ultimate determination regarding the sentence imposed is to be reviewed for an abuse of discretion. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (describing the standard of review for a sentencing court's findings of fact and conclusions of law); *Milbourn*, 435 Mich at 636, 654 (applying the abuse-of-discretion standard to sentencing review).

However, the abuse-of-discretion standard requires further explanation in this context. Because of the unique nature of the punishment of a life-without-parole sentence for juveniles and the mitigating qualities of youth, we are obligated to clarify what the abuse-of-discretion standard should look like in the context of life-without-parole sentences for juveniles. As will be discussed in more detail later in this opinion, we hold that the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect.

To provide meaningful appellate review under an abuse-of-discretion standard for a life-without-parole sentence imposed on a juvenile, the reviewing court must remain mindful that life without parole is the maximum punishment that may be imposed for a juvenile offender under MCL 769.25. That this is the harshest penalty available under the law raises the stakes not just for the defendant, but also for appellate review of the trial court's sentencing decision. Hence, appellate review of a life-without-parole sentence imposed on a juvenile cannot be a mere rubber-stamping of the penalty handed out by the sentencing court. In *Milbourn*, our Supreme Court repeatedly warned that the maximum penalty available under the law is to be imposed for only the most serious offenders and the most serious offenses; otherwise, it would risk failing the proportionality test. *Milbourn*, 435 Mich at 645-646. To impose the maximum possible penalty "in the face of compelling mitigating circumstances would run against this principle [of proportionality] and the legislative scheme." *Id*. at 653. Therefore, in terms of

appellate review, a reviewing court is justifiably skeptical of a sentence that represents the maximum available punishment, because such punishment is only available in limited, i.e., the most serious and extreme, circumstances. See *id*. at 654. To impose the maximum possible penalty, the case must "present a combination of circumstances placing the offender in . . . the most serious . . . class with respect to the particular crime . . . ." *Id*. at 654. Accordingly, sentencing courts should guard against routinely imposing the most severe penalty authorized by statute. *Id*. at 645. Moreover, we pay heed to *Milbourn*'s cautionary sentiment that the unjust imposition of a maximum sentence has the potential to shake "[t]he public's faith in the just and fair administration of justice . . . ." *Id*.

We use the language employed in *Milbourn* as our starting point, but point out that *Milbourn*'s sentiments ring even truer in the case of life-without-parole sentences for juveniles. Those sentences are deemed to be an "unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 577 US at ___; 136 S Ct at 734 (citation and quotation marks omitted). Applying the cautionary language of *Milbourn*—that the imposition of the harshest possible punishment is to be reserved and rendered with caution—in the context of *Miller*'s and *Montgomery*'s repeated and express warnings about how infrequently a life-without-parole sentence will be constitutionally proportionate for juveniles, we are convinced that appellate review, although done under the abuse-of-discretion standard, should consider a juvenile life-without-parole sentence as inherently suspect. While we do not suggest a presumption against the constitutionality of that sentence, we would be remiss not to note that review of that sen-

tence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate. See, generally, *Miller*, 567 US at 473; *Milbourn*, 435 Mich at 645-646. See also Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 Fla St U L Rev 853, 856 (2013) (stating that there is "reason to be skeptical" of the idea that life without parole—a particularly harsh penalty—is proportionate for a class of offenders such as juveniles who are widely recognized as having lessened culpability). Indeed, as the Court warned in *Milbourn*, 435 Mich at 653, "[w]ith regard to the principle of proportionality, it is our judgment that the imposition of the maximum possible sentence *in the face of compelling mitigating circumstances would run against this principle* . . . ." (Emphasis added.) In *Roper*, *Miller*, *Graham*, and *Montgomery*, the Supreme Court consistently described the numerous ways in which mitigating circumstances—which are compelling enough given the characteristics of youth to warrant a categorical bar on mandatory life-without-parole sentences—are often present in the case of juveniles on account of their youth. These mitigating circumstances —and the need for proper consideration of mitigating circumstances in an individualized sentencing scheme —were the driving force behind *Miller*'s prohibition on mandatory life-without-parole sentences for juveniles. And *Miller* and *Montgomery* repeatedly emphasized that a life-without-parole sentence will only be constitutionally proportionate for the truly rare juvenile.

Accordingly, to give effect to our Supreme Court's decision in *Milbourn* and the United States Supreme Court's direction in *Miller* and *Montgomery*, an appellate court must conduct a searching inquiry and view as inherently suspect any life-without-parole sentence

imposed on a juvenile offender under MCL 769.25. See *Roper*, 543 US at 570 (announcing that the differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders"). An appellate court must give meaningful review to a juvenile life-without-parole sentence and cannot merely rubber-stamp the trial court's sentencing decision.

As a tool for undertaking this appellate review, we find it appropriate to borrow from a framework employed by some federal courts. As noted, MCL 769.25 requires weighing a variety of factors in determining whether the juvenile being sentenced is the rare juvenile offender for whom life without parole is an appropriate sentence. In determining whether the sentencing court abused its discretion in weighing the factors and arriving at its conclusion, we find instructive the following analysis found in *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005), noting certain situations that constitute an abuse of discretion:[18]

> A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.

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[18] In *People v Steanhouse*, 313 Mich App 1, 43-44, 46-47; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016), this Court declined to apply *Haack*, because that case concerned sentencing factors listed in 18 USC 3553(a), and sentencing courts in Michigan are not required to look at those factors. In this case, by contrast, because a juvenile life-without-parole sentence requires consideration of the *Miller* factors, we find instructive *Haack*'s description of certain situations that constitute an abuse of discretion.

D. THE INSTANT CASE

Turning to the instant case, we find the trial court committed an error of law by failing to adhere to *Miller*'s and *Montgomery*'s directives about the rarity with which a life-without-parole sentence should be imposed. When deciding to sentence defendant Hyatt to life without parole, the trial court focused on the *Miller* factors. However, the court gave no credence to *Miller*'s repeated warnings that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender. This is inconsistent with both *Miller* and *Montgomery*.[19] Indeed, the Court's decisions in *Miller* and *Montgomery* make clear that sentencing a juvenile to life without parole is more than a simple consideration of a set of factors. In order to give any meaning to *Miller*'s discussions about proportionality and the mitigating circumstances associated with youth, a sentencing court must heed *Miller*'s discussion of how rarely a life-without-parole sentence will be proportionate. In order to warrant the imposition of a life-without-parole sentence, the juvenile must be, as *Miller* unequivocally stated, the truly rare individual who is incapable of reform.[20]

Moreover, with regard to the sentencing decision in the instant case, we are concerned that the trial court, in concluding that life without parole was warranted in this case, emphasized the opinion of the psychologist who testified at the *Miller* hearing that defendant

[19] We would be remiss if we did not note that the trial court lacked the benefit of *Montgomery* at the time of sentencing.

[20] As noted earlier, we acknowledge that, as articulated as far back as *Roper*, this determination is a difficult one to make. We also note that MCL 769.25 and *Miller* offer little in terms of guidance as to *how* to make this difficult decision. Nevertheless, the current statutory system is the one under which we are required to operate.

Hyatt's prognosis for change *in the next five years* was poor. This focus on a short, five-year period for redemption cannot be reconciled with *Miller*, which holds that a life-without-parole sentence will be proportionate for the juvenile who is irreparably corrupt and incapable of change—not one who is incapable of change within the next five years. The capacity for change within five years hardly seems of any relevance to the decision of whether an individual who committed a crime while a minor is *irreparably* corrupt and, thus, will remain corrupt and wholly incapable of rehabilitation for the remainder of his or her life expectancy, which could easily be another 60 to 80 years.

Given all that occurred at the sentencing hearing in this case, we feel compelled to remand for resentencing; the trial court must not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform. Accordingly, we reverse defendant Hyatt's sentence and remand to the trial court for resentencing. On resentencing, the court is to implement the directives of *Miller* and *Montgomery* and to be mindful that those cases caution against the imposition of a life-without-parole sentence except in the rarest of circumstances. Hence, it should operate with the understanding that, more likely than not, life without parole is a disproportionate sentence for defendant Hyatt.

V. CONCLUSION

We resolve the conflict created between the prior panel in this case and the majority in *Skinner* by concluding that a judge, not a jury, must determine whether to sentence a juvenile to life without parole under MCL 769.25. With regard to the instant case, we

vacate defendant Hyatt's sentence and remand for further proceedings consistent with this decision. We do not retain jurisdiction.

SHAPIRO, P.J., and MARKEY and STEPHENS, JJ., concurred with BECKERING, J.

BECKERING, J. (*concurring*). The task for this conflict panel is limited; we are asked to decide whether a judge or a jury is to determine whether a juvenile should be sentenced to life without parole under MCL 769.25. This question presumes that it is constitutionally permissible in Michigan to impose a life-without-parole sentence on juvenile offenders who commit the worst homicide offenses. I write a separate concurrence to voice my concern that this underlying premise is a faulty one. Although the issue was raised by defendant, it is unpreserved, scantily briefed, and better left for another day. Were we to address it, I would conclude that a sentence of life without parole for a juvenile offender constitutes cruel or unusual punishment in violation of the Michigan Constitution.[1] Given the United States Supreme Court's conclusions regarding the inherent difficulties in reliably assessing whether a still-developing juvenile is irreparably corrupt, the case-by-case individual sentencing scheme

[1] In *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), vacated sub nom *Davis v Michigan*, 577 US ___; 136 S Ct 1356 (2016), our Supreme Court concluded that a juvenile life-without-parole sentence was not cruel or unusual under the Michigan Constitution. However, in light of the fact that the opinion in *Carp* was vacated, and because I believe that *Carp*'s analysis did not address the problems associated with the imprecise and speculative nature of assessing irreparable corruption when deciding whether to impose a life-without-parole sentence on an individual who committed an offense while a minor, I voice my concerns in this concurring opinion, if only to ask our Supreme Court to consider the issue in the future.

set forth in MCL 769.25 is far too imprecise an exercise to pass muster under the Michigan Constitution. Instead, after a minimum term of years such as that set forth in MCL 769.25(9), the determination should be left to the Parole Board, which has the benefit of a more fully developed individual and a number of years in which the individual can prove himself or herself worthy of parole.

In *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Supreme Court declined to expressly address whether the Eighth Amendment required a categorical bar on life without parole for juvenile offenders. However, when one sifts through *Miller*'s various warnings—(1) how juveniles are categorically less deserving of the harshest possible punishment that can be imposed on them, (2) how the penological justifications for imposing the harshest punishment dissipate when the characteristics of juvenile offenders are considered, (3) the inherent difficulty in making determinations about a juvenile's character at the time of sentencing, and (4) how rarely such a sentence will be proportionate—one could conceivably determine that a life-without-parole sentence for a juvenile offender is, at best, constitutionally suspect. At the very least, to the extent *Miller* left open the window for juvenile life-without-parole sentences for the rare or uncommon juvenile, see *id*. at 479-480, that window should be understood as being very narrow.

Nonetheless, whether life without parole for juveniles should be categorically barred by the Eighth Amendment is not my concern in the present case. Rather, I question whether life without parole for juveniles should be categorically barred under the Michigan Constitution, which prohibits cruel *or* un-

usual punishment.[2] Const 1963, art 1, § 16. Our Courts have generally found that the prohibition contained in Const 1963, art 1, § 16 affords greater protection than the Eighth Amendment and that it requires a closer inquiry of the punishment at issue. *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011); *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

My concerns about the imprecise nature of determining whether a juvenile offender is irreparably corrupt—although, it must be remembered, that juvenile is not immune from punishment because of his youth—stem from our increasing scientific knowledge regarding the human brain, from our recognition that a juvenile is different from an adult because of his or her diminished culpability and greater capacity for reform, and from the idea that the characteristics of youth make a determination of irreparable corruption or permanent incorrigibility exceedingly difficult. As to the first point, United States Supreme Court precedent makes clear that juveniles often lack the same degree of culpability that adult offenders possess. Juveniles lack maturity and are often more prone than adults to reckless behavior and risk-taking. See *Miller*, 567 US at 471. And, as noted by the Court in *Miller*, juveniles are subject to influences—such as a home environment from which the juvenile cannot normally extricate himself or herself—in a way not typically experienced by adults. *Id*. Finally, juvenile offenders, because of the stages of cognitive development, often have a greater capacity for reform than

[2] I am not the first to opine that lifetime imprisonment of a juvenile offender violates the Michigan Constitution. See *People v Eliason*, 300 Mich App 293, 332-336; 833 NW2d 357 (2013) (GLEICHER, J., concurring in part and dissenting in part).

adult offenders. *Id*. Stated differently, juveniles inherently have a certain degree of malleability—because of their immaturity—that adults lack. As a result, it would be "misguided" morally "to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper v Simmons*, 543 US 551, 570; 125 S Ct 1183; 161 L Ed 2d 1 (2005). Accordingly, juveniles should be treated differently from adults for purposes of sentencing, particularly in regard to the imposition of the most serious punishment that can be imposed on juvenile offenders: life without parole. The punishment of life without parole for juveniles caused the United States Supreme Court to break rank from the long-standing idea that "death is different" when making comparisons between different types of punishment, and inspired the Court to liken life-without-parole sentences for juveniles to the death penalty for adult offenders. *Miller*, 567 US at 470; *Graham v Florida*, 560 US 48, 69-71; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

As to my second and greater concern, the difficult nature of making individual determinations about juvenile offenders can be gleaned from a comprehensive reading of *Roper*, *Graham*, and *Miller*. Starting in *Roper*, 543 US at 569, the Supreme Court recognized that the characteristics of youth "demonstrate that juvenile offenders *cannot with reliability be classified among the worst offenders*." (Emphasis added.) This proclamation was based, in large part, on studies related to the death penalty and juveniles, which caused the Court in *Roper* to remark that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare

juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 US at 573. As the point is made in the majority opinion in the instant case, if this determination is difficult for a trained psychologist, how much more difficult is it for a sentencing judge or an appellate court on review?

The idea that the characteristics of youth make difficult, if not impossible, accurate determinations about a juvenile's capacity for change continued in *Graham* and *Miller*. In *Graham*, 560 US at 68, the Court called attention to pertinent research, explaining that "parts of the brain involved in behavior control continue to mature through late adolescence." This continued development and the pliable nature of juveniles necessarily make it difficult to reliably classify a juvenile as being the rare juvenile who is incapable of change. *Id*. The Court in *Graham*, 560 US at 77-78, felt so strongly about the difficulty of distinguishing "the few incorrigible juvenile offenders from the many that have the capacity for change" that it rejected—in the case of nonhomicide juvenile offenders—a case-specific sentencing scheme similar to that implemented in MCL 769.25.[3] Because a determination about a juvenile's character was so difficult to make, the Court instead imposed a categorical ban on life without parole in nonhomicide cases.

The concern noted in *Roper* and *Graham* still remains: it is exceedingly difficult, given the qualities of youth, to make a reliable determination regarding whether a juvenile is truly incorrigible and incapable

[3] While it could be argued that the Supreme Court in *Miller* gave its blessing to such a scheme for juveniles who commit homicide offenses, it should be noted that the question whether there should be a categorical ban on life without parole for juvenile homicide offenders was not before the *Miller* Court, and the Court expressly declined to consider the issue. *Miller*, 567 US at 479.

of change. This concern led the Court in *Miller*, 567 US at 476, 479, to explain that proportionate life-without-parole sentences, to the extent they could even be imposed, would be "uncommon" and "rare," because "youth is more than a chronological fact," and "its signature qualities are all transient." Furthermore, the studies on which *Roper*, *Graham*, and *Miller* relied have continued validity and applicability: in reversing the sentence of a juvenile defendant sentenced to life in prison without parole, the Iowa Supreme Court discussed the argument that professionals have difficulty predicting the course of juvenile development, noting that the American Psychology Association had filed an amicus brief in *Miller*, in which it posited that " '[t]he positive predictive power of juvenile psychotherapy assessments . . . remains poor.' " *State v Sweet*, 879 NW2d 811, 828-829 (Iowa, 2016) (citation omitted).

Given the difficulty of predicting when a juvenile is truly incapable of change and thus deserving of a life-without-parole sentence, the admitted lack of reliability in a case-by-case sentencing approach, and the significance of the sentencing decision, I believe that imposing a life-without-parole sentence on a juvenile is far too speculative and that it constitutes cruel or unusual punishment under the Michigan Constitution. In this regard, I find particularly compelling *Roper*'s warning that the type of classification required by MCL 769.25 cannot be done with reliability by a trained psychologist, let alone a sentencing court. *Roper*, 543 US at 573. I also find compelling that the Supreme Court in *Graham*, 560 US at 77-78, expressly rejected a case-by-case approach, albeit in the context of nonhomicide offenses, for determining when life without parole would be appropriate for juveniles. The fact that the sentence at issue in the present case

involves a homicide offense does not mean that the determination to be made with regard to the juvenile offender's character—his immaturity, depravity, vulnerability to outside influence, culpability, or capacity for change—is markedly less difficult. Nor, for that matter, does the fact that the conviction involves a homicide offense necessarily take account of the "special difficulties encountered by counsel in juvenile representation" that were noted by *Graham*—such as the fact that juveniles generally mistrust adults (including defense counsel), have limited understanding of the criminal justice system, are generally less capable of weighing the long-term consequences of plea offers, and are likely less capable of assisting with their own defense. These difficulties further illustrate the problems inherent in a case-by-case approach such as the one at issue in this case. *Graham*, 560 US at 78-79. In short, the fact that the instant case involves a homicide offense does nothing to dispel the concerns that led the Court in *Graham* to reject the type of case-by-case sentencing approach that is currently in effect under MCL 769.25. On this point, the *Miller* Court explained that although *Graham*'s ban on life without parole applied in nonhomicide cases,

> none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree when . . . a botched robbery turns into a killing. So *Graham*'s reasoning implicates *any life-without-parole sentence* imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses. [*Miller*, 567 US at 473 (emphasis added).][4]

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[4] Again, while the Court in *Miller* was cognizant of these very concerns, it declined to expressly weigh in on the issue whether a juvenile life-without-parole sentence was cruel *and* unusual punish-

For this reason, simply arguing that the instant case is different from *Graham* because it involves a homicide offense ignores that which is most pertinent in determining whether the punishment is cruel or unusual for juveniles: that the characteristics of youth and its attendant circumstances make juveniles constitutionally different for purposes of sentencing, and it is extremely difficult to determine, with any degree of reliability, which juveniles are truly deserving of life without parole. By imposing a life-without-parole sentence, the sentencing court necessarily concludes at the outset that the individual who committed a crime when he or she was a minor will continue to be corrupt at the age of 20, 30, 40, 50, 60, 70, and, for that matter, at every age until he or she dies.

I believe that the concerns noted by the Court in *Miller*, *Graham*, and *Roper* are applicable in the case at hand. These cases essentially teach us that a sentencing judge is, to a large degree, guessing whether the juvenile is capable of reform, on the basis of information that is widely recognized as unreliable given the malleability of a juvenile's still-developing brain. This is not to fault the sentencing judge tasked with trying to decide whether to impose life without parole. I have no doubt that sentencing courts exercise the utmost care and professionalism in determining whether this particular punishment, or any punishment, is appropriate and proportionate. The constitutional concern I see is not based on a lack of diligence or professionalism by the sentencing judge, but the very nature of the inquiry that is made when he or she decides whether to impose life without parole on juve-

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ment under the United States Constitution, but it nevertheless went out of its way to emphasize how rarely this type of sentence would be constitutionally proportionate.

nile offenders. A sentencing judge tasked with determining whether to impose a life-without-parole sentence is faced with an arduous task. Simply put, as the United States Supreme Court has repeatedly warned, this task requires an inquiry that is based on poor predictors, and that inquiry cannot be answered with a sufficient degree of reliability because of a juvenile's still-developing sense of maturity and, in general, the greater capacity that juveniles have for reform. And this task, it must be remembered, carries with it the exceedingly high risk of imposing a disproportionate sentence that violates the juvenile's constitutional rights. As noted in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, 734; 193 L Ed 2d 599 (2016), "[e]ven if a court considers the child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (Citations and quotation marks omitted.)

Thus, I note my concerns that the speculative nature inherent in imposing a life-without-parole sentence on juvenile homicide offenders renders the punishment cruel or unusual under the Michigan Constitution. If the imposition of the harshest possible penalty available under the law cannot be done with any degree of reliability given the offender being a minor about whom the court must predict his or her entire future, how can the sentence not be rendered either cruel due to guesswork or unusually unfair? By their chronological status as minors, juvenile offenders spend more time in prison for a life-without-parole offense than any adult. However, because they were minors when they committed their offense, they were in a less culpable class of offenders according to our United States Supreme Court. How could such a speculative, roll-of-the-dice approach to meting out the most seri-

ous punishment on a group of offenders who are categorically less culpable not be cruel or unusual punishment? One need only examine his or her own character, judgment, maturity level, impetuosity, and susceptibility to influence at the ages of 14,[5] 15, 16, and 17 years of age and contrast these same traits as they exist at the age of 40 or older, as that marks the age range in which a juvenile offender will be after completing only the bare minimum 25 years for a minimum sentence under MCL 769.25(9). While juvenile offenders are certainly deserving of punishment for their offenses, the task of accurately pegging the rare individual who is truly irreparably corrupt is simply too imprecise and speculative to pass muster under Michigan's Constitution.

Turning to the instant case, the *Miller* hearing that took place for defendant Hyatt serves as a prime illustration of the lack of reliability involved in making a determination about a juvenile's still-forming character. The psychologist who testified in this case had a Ph.D. in educational and clinical psychology and had been a practicing psychologist for approximately 40 years. Yet when pressed on cross-examination regarding whether she thought defendant Hyatt was capable of change, she admitted: "I have no way of predicting whether he is going to be able to change his course. . . . I cannot say with certainty that he, that he's totally unredeemable." I highlight this not as an indictment of the doctor's qualifications or abilities, but to point out that the doctor admitted the same concerns noted earlier in this opinion: even a trained psychologist has essentially no way of knowing what will become of

[5] Or even younger than 14, for that matter, as Michigan law allows for juveniles younger than 14 years of age to be tried as adults. See MCL 712A.2d; MCL 712A.4.

defendant Hyatt's character—or that of any other juvenile, for that matter—in the future or whether he has the capacity to change at some point in his lifetime.

The solution to this complex problem is relatively simple: let the Parole Board do its job. The Parole Board will have the benefit of the juvenile offender's full cognitive development through adulthood, as well as years of institutional records and behavior with which to make the decision. Rather than asking a sentencing court to essentially make its best guess based on information that is admittedly not adequate for the task at hand, why not allow the Parole Board—which has the benefit of time, incarceration records, and further cognitive development by the juvenile—to make the decision? However, this is not to suggest that a juvenile should be *guaranteed* parole. Rather, the only entitlement is that the individual, who entered prison while still a child, should have the chance to show that he or she is capable of reform, and has indeed demonstrated the requisite level of reform to merit consideration for parole. As stated in *Graham*, 560 US at 75, juveniles should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." If a juvenile offender is truly the rare individual who is irreparably corrupt, that condition will surely manifest itself and be verified during the lengthy term of incarceration the individual will have served before becoming parole-eligible. Likewise, determining whether the individual, now with the benefit of further cognitive development and maturation, is capable of reform and change will be far less speculative by that point in time. Allowing the Parole Board to make this determination gives a juvenile a chance at parole after his or her character is more fully formed, rather than at a

time when that character is, by all accounts, "a work in progress." *Sweet*, 879 NW2d at 839.

I am not alone in adhering to this view. Recently, the Iowa Supreme Court, which has written rather extensively on a variety of juvenile life-without-parole issues after *Miller*, concluded that the Iowa Constitution, which mirrors the United States Constitution and bars cruel *and* unusual punishment, forbids a case-by-case approach and categorically bars imposition of life-without-parole sentences for juveniles. In this regard, the Iowa court concluded "that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial *is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation*." *Sweet*, 879 NW2d at 836-837 (emphasis added). As noted by the Iowa Supreme Court, studies on the timeline and phenomenon of juvenile brain development explain why "smart adolescents sometimes do really stupid things." *Id*. at 837, citing Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* (Mariner Books: Houghton Mifflin Harcourt, 2014), p 69.[6] And, remarked the Iowa court, the *Miller* factors are themselves "fraught with risks" of misapplication, because some factors could necessarily be viewed as weighing in favor of life without parole and against it at the same time.[7] *Sweet*, 879 NW2d at 838. All of this leads back to the original point: it is extremely problematic to require a sentencing court to make "speculative

[6] It is not until the third and final phase of brain development, which takes place "into the early twenties," when individuals " 'get better at controlling their impulses, thinking about the long-term consequences of their decisions, and resisting peer pressure.' " *Sweet*, 879 NW2d at 837, quoting *Age of Opportunity*, p 71.

[7] As an example, the court asked:

up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision." *Id*. at 839. "[T]he risk of error" in determining whether a life-without-parole sentence is proportionate "is unacceptably high" at the time of sentencing; this high risk of error caused the Iowa Supreme Court to impose a categorical ban on life-without-parole sentences for juveniles. *Id*. at 837. According to the Iowa Supreme Court, a sentencing court

> cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination. [*Id*.]

> [W]hat significance should a sentencing court attach to a juvenile offender's stable home environment? Would the fact that the adolescent offender failed to benefit from a comparatively positive home environment suggest he or she is irreparable and an unlikely candidate for rehabilitation? Or conversely, would the offender's experience with a stable home environment suggest that his or her character and personality have not been irreparably damaged and prospects for rehabilitation are therefore greater?
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> A similar quandary faces courts sentencing juvenile offenders who have experienced horrendous abuse and neglect or otherwise have been deprived of a stable home environment. Should the offenders' resulting profound character deficits and deep-seated wounds count against the prospects for rehabilitation and in favor of life-without-the-possibility-of-parole sentences under the *Miller* framework? Or should sentencing courts view the deprivation of a stable home environment as a contraindication for life without the possibility of parole because only time will tell whether maturation will come with age and treatment in a structured environment? [*Sweet*, 879 NW2d at 838.]

Furthermore, although the speculative nature of imposing life-without-parole sentences on juveniles is enough to raise serious concerns about those sentences under the Michigan Constitution, it should be noted that with regard to the practice of permitting life-without-parole sentences for juveniles, Michigan appears to be in danger of standing on the wrong side of history. In the wake of *Miller*, a growing number of states have decided to prohibit, or in some cases not seek, life-without-parole sentences for juveniles. See, e.g., Mills et al, *Juvenile Life Without Parole in Law & Practice: Chronicling the Rapid Change Underway*, 65 Am U L Rev 535, 552, 560 (2016); The Sentencing Project, *Juvenile Life Without Parole: An Overview* <http://www.sentencingproject.org/publications/juvenile-life-without-parole/> (accessed June 29, 2016) [https://perma.cc/U94J-MLBS]; Equal Justice Initiative, *Philadelphia District Attorney Declares Life-Without-Parole Sentences Inappropriate for Juveniles* <http://www.eji.org/philadelphia-da-says-life-without-parole-inappropriate-for-juveniles> (accessed June 28, 2016) [https://perma.cc/7EZF-8H4D]; Equal Justice Initiative, *Utah Joins Growing Number of States that Have Abolished Juvenile Life Without Parole Sentences* <http://eji.org/news/utah-abolishes-juvenile-life-without-parole> (accessed June 28, 2016) [https://perma.cc/SD2U-767C]; News Center 1, *South Dakota Bans Life-Without-Parole Sentences for Youth* <http://www.newscenter1.tv/story/31497823/south-dakota-bans-life-without-parole-sentences-for-youth> (accessed June 15, 2016) [https://perma.cc/YHW7-GQHK]; The Campaign for the Fair Sentencing of Youth, *States that Ban Life Without Parole for Children* <http://fairsentencingofyouth.org/reports-and-reresearch/sentenceeliminated/> (accessed July 6, 2016)

[https://perma.cc/UTC5-YPT3].[8] I note that in evaluating whether a punishment is cruel, unusual, or both, it is not only the number of states that authorize a particular penalty that is of importance; "*the consistency of the direction of change*" must be examined as well. *Atkins v Virginia*, 536 US 304, 315; 122 S Ct 2242; 153 L Ed 2d 335 (2002) (emphasis added). The number of states eliminating life-without-parole sentences in light of *Miller* leaves one fearing that Michigan, one of a handful of states responsible for the most juvenile life-without-parole sentences, see *Juvenile Life Without Parole in Law & Practice*, 65 Am U L Rev at 571-572, is on the wrong side of the recent direction of change. This is particularly so in light of the recent reluctance in states like Pennsylvania to seek juvenile life-without-parole sentences, given that Pennsylvania was, along with Michigan, one of only a few states responsible for a majority of juvenile life-without-parole sentences. See *Juvenile Life Without Parole in Law & Practice*, 65 Am U L Rev at 571-572. This recent trend illustrates that the island on which Michigan sits with regard to this particular sentencing practice is becoming increasingly lonelier.

Finally, even if a categorical ban is off the table in light of *Carp*, I would be remiss not to note, in light of the same concerns raised earlier, what I view as

[8] There is also an effort currently underway in the United States District Court for the Eastern District of Michigan to ban life-without-parole sentences for juvenile offenders. See White, *Federal Judge Stops Juvenile Lifer Sentencing Process*, The Detroit News (July 7, 2016), available at <http://www.detroitnews.com/story/news/local/michigan/2016/07/07/michigan-juvenile-resentencing/86810456/> (accessed July 8, 2016) [https://perma.cc/7L55-YH4P]. See also *Hill v Snyder*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 30, 2013 (Docket No. 10-14568), vacated and remanded on other grounds, 821 F3d 763 (CA 6, 2016).

significant holes in the Legislature's implementation of the *Miller* decision in MCL 769.25. Even if the Michigan Constitution does not compel a categorical ban on the imposition of juvenile life-without-parole sentences, the concerns inherent with sentencing juveniles to life without parole do not suddenly diminish. It is not as if the unreliable and unreasonably difficult task of determining which juvenile offenders are truly incorrigible and incapable of change vanishes by rejecting a categorical ban on life without parole for juveniles. Those concerns must be addressed, or our courts risk the arbitrary and capricious imposition of juvenile life-without-parole sentences.

The legislative response to *Miller* in MCL 769.25 does not go far enough in addressing these concerns. The Supreme Court's decision in *Miller* announced the destination that is required by the Eighth Amendment—individualized sentencing that limits the imposition of life-without-parole sentences to only those rare individuals who are irreparably corrupt—but did little to address how to arrive at that destination. The Court even recognized as much in *Montgomery*, 577 US at ___; 136 S Ct at 734-735, when it stated that *Miller* was largely a substantive rule and left to the states the responsibility for implementing procedures to comply with *Miller*. *Miller*, it could be said, set forth the *minimum* that must be done. The response in Michigan, MCL 769.25, offers little in the way of procedural requirements beyond the bare minimum that *Miller* articulated. The statute requires a hearing at which the trial court is to consider the "*Miller* factors," but otherwise is silent, save for announcing that the trial court can hold a hearing and consider evidence and that any victims must be given the right to appear or make a statement. See MCL 769.25(6) and (7). Essen-

tially, the statute requires a sentencing court to "do *Miller*" and nothing more.

In order to implement *Miller* in a way that affords meaning and substance to the decision, we must provide sentencing courts with more direction, instruction, and information to guide the sentencing process. While the ultimate determination as to what procedures should be employed is not before the Court in this conflict case, I offer a few brief suggestions. Drawing on comparisons to death penalty cases first made in *Graham* and repeated in *Miller*, the employment of a defense team that includes two attorneys, a mitigation specialist, and an investigator, as is done in death penalty cases, may go some distance toward alleviating the difficulties inherent in determining whether a juvenile is irreparably corrupt. See Drinan, *Juvenile Sentencing Post-Miller: Preventive & Corrective Measures*, 2015 Wis L Rev 203, 209-210 (2015). See also The Campaign for the Fair Sentencing of Youth, *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*, available at <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf> (accessed July 6, 2016) [https://perma.cc/UTP3-N4KN].[9] Further, provisions could be made for a sentencing court to hear testimony from a variety of expert witnesses in a way that shines further light on some of the subjects that mark the determination to be made with so much uncertainty. These include, to name a few, subjects such as juvenile brain development, immaturity, intellectual capacity, susceptibility to influences such as peer pres-

[9] These guidelines are modeled in part after the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. *Trial Defense Guidelines*, p 5 n 2.

sure and family pressure, the effect of the juvenile's background, if any, and the capacity for reform. See *Trial Defense Guidelines*, p 20. As noted by the Iowa Supreme Court in *Sweet*, 879 NW2d at 835, when it briefly considered how to attempt to accurately sentence juveniles to life-without-parole sentences in a way that could pass constitutional muster under the Eighth Amendment: "the process for making the determination of which offenders are most culpable would be resource intensive, require expert testimony, and would not be a matter left to the unguided discretion of the sentencer." The process described by MCL 769.25 is not resource-intensive, makes no mention of expert testimony, and places few restrictions, if any, on the discretion of the sentencer. Those defects, which the majority opinion goes some distance toward remedying, should, in my opinion, be addressed.

SHAPIRO, P.J., concurred with BECKERING, J.

METER, J. (*concurring in part and dissenting in part*). I concur in Parts I, II, and III of the majority opinion. I would not, however, vacate defendant Kenya Hyatt's sentence and remand this case for resentencing.

The *Milbourn*[1] concept of proportionality provides an adequate framework for review of sentences such as the one imposed in the present case. The sentencing court explicitly mentioned and adhered to the principle of proportionality. In addition, the sentencing court, as noted by the panel in *People v Perkins*, 314 Mich App 140, 179; 885 NW2d 900 (2016), explicitly took the *Miller* factors into consideration.

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[1] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

The majority opinion focuses on the following statement by a psychologist regarding defendant Hyatt's capacity for change: "[I]f I were to predict in five years, it would not be possible."[2] This statement, however, was merely one aspect of the testimony and other evidence appropriately taken into consideration by the sentencing court. In addition, while the court did not explicitly use the term "rare" as employed in *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455, 2469; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, 733; 193 L Ed 2d (2016), the record makes clear that the court applied the applicable concepts from *Miller* in deciding that a sentence of life without parole was appropriate despite defendant Hyatt's status as a juvenile.

Moreover, the pertinent circumstances—including that defendant Hyatt was the actual shooter, had a history of assaultive behavior, appeared to a counselor to have no conscience, showed no remorse or concern over the crimes, was "disconnected from societal morals and mores," had "serious maladjustment," and was 17 years old at the time of the offenses—clearly supported the sentence. See, generally, *Miller*, 567 US at 475-476. The sentencing court specifically noted that defendant Hyatt's age was not a mitigating factor in this particular case, and the court adequately set forth evidence showing that defendant Hyatt's potential for rehabilitation was low. In *Miller*, *id*. at 478, the Supreme Court stated that a mandatory sentence of life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it." Here, the circumstances did not "most suggest it."

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[2] The psychologist further stated that she simply could not predict whether defendant Hyatt would change.

I find no violation of the principle of proportionality and no need to remand this case. The sentencing procedure was constitutional and the sentence was proportionate to the circumstances surrounding the offense and the offender.

I would affirm the sentence.

M. J. KELLY and RIORDAN, JJ., concurred with METER, J.

PEOPLE v PINKNEY

Docket No. 325856. Submitted May 11, 2016, at Grand Rapids. Resubmitted after abeyance July 1, 2016. Decided July 26, 2016, at 9:00 a.m. Leave to appeal sought.

Edward Pinkney was charged in the Berrien Circuit Court with five felony counts of election forgery, MCL 168.937, and six misdemeanor counts of making a false statement in a certificate-of-recall petition, MCL 168.957. Defendant, a resident of Benton Township and a previous sponsor of recall petitions against members of the school board, was involved in recall efforts against the mayor of Benton Harbor. Defendant was present when James Cornelius filed a recall petition on October 23, 2013, and the Berrien County Election Commission approved the petition's language at a hearing. Defendant and several other individuals subsequently circulated recall petitions in hopes of obtaining the statutorily required number of signatures under MCL 168.955, which was determined to be 393. On January 8, 2014, 62 signed petitions containing 728 signatures were submitted to the Berrien County Clerk's Office, and 402 signatures were certified. Under MCL 168.961(2)(d), signatures on recall petitions only remain valid for 60 days. Before a recall election could take place, the mayor raised concerns regarding the authenticity of the dates on the petitions because it appeared as though alterations had been made in an attempt to validate otherwise untimely, invalid signatures. A forensic document examiner inspected 10 petitions for irregularities, and forensic evidence suggested that the dates on five petitions had been changed. Defendant was convicted following a jury trial in the Berrien Circuit Court, Sterling R. Schrock, J., of all five counts of election forgery, MCL 168.937, but acquitted of all six counts of making a false statement in a certificate-of-recall petition, MCL 168.957. The court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 to 120 months. Defendant appealed and unsuccessfully moved for bond pending appeal, unsuccessfully moved for reconsideration of the denial of the motion for bond, unsuccessfully applied for leave to appeal the order denying bond, *People v Pinkney*, 498 Mich 899 (2015), and unsuccessfully moved to remand the case.

The Court of Appeals *held*:

1. MCL 168.937 provides that any person found guilty of forgery under the provisions of the Michigan Election Law act, MCL 168.1 *et seq*., shall, unless otherwise provided, be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for a term not exceeding five years, or by both such fine and imprisonment in the discretion of the court. The purpose of the act is served by interpreting MCL 168.937 as creating a substantive offense, and to hold otherwise would render the statute surplusage. Accordingly, MCL 168.937 creates the substantive offense of election forgery; it does not merely serve as a penalty provision.

2. Under the vagueness doctrine, a statute may be challenged as unconstitutionally vague if it is overbroad and impinges on First Amendment freedoms, does not provide fair notice of the conduct proscribed, or is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated; however, a statute is not void for vagueness if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. Under the rule of lenity, courts should mitigate punishment when the punishment in a criminal statute is unclear; however, the rule applies only in the circumstances of an ambiguity or in the absence of any firm indication of legislative intent. MCL 168.937 does not violate the vagueness doctrine because the meaning of MCL 168.937 can be fairly ascertained by reference to the common-law definition of forgery. MCL 168.937 does not violate the rule of lenity because MCL 168.937 is unambiguous and because MCL 168.937 firmly indicates the Legislature's intent to provide for the purity of the election process and to guard against the abuse of the elective franchise.

3. In determining whether the prosecution has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecution. Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show that a defendant entertained the requisite intent. When a defendant's sufficiency argument is couched in terms of the trial court's denial of that defendant's motion for a directed verdict, only evidence presented by the prosecution up to the time the motion was made is considered. In this case, the prosecution presented sufficient evidence for the jury to find defendant guilty of violating MCL 168.937 beyond a reasonable doubt before defendant's directed-verdict motion because evidence was presented that defendant

was a leader in the recall efforts at issue, that defendant had previously sponsored recall campaigns in Benton Harbor, that defendant asked Cornelius to sponsor the petition at issue because Cornelius was a Benton Harbor resident, that defendant obtained and circulated recall petitions and advocated on behalf of the recall campaign at city commission meetings and throughout the community, that defendant was familiar with the 60-day rule regarding the signatures' validity, and that defendant was indisputably in control of the petitions when he attempted to file them on his own and when Cornelius filed them in his presence on January 8, 2014. Defendant's possession of the forged recall petitions, coupled with his demonstrated animosity against the mayor, his knowledge of the 60-day rule, and his motive to alter the dates, while circumstantial, constituted sufficient evidence to support the jury's guilty verdicts when viewed in a light most favorable to the prosecution.

4. The trial court may issue an instruction to the jury if a rational view of the evidence supports the instruction. To convict a defendant of aiding and abetting a crime, the prosecution must establish that the crime charged was committed by the defendant or some third person, the defendant performed acts or gave encouragement that assisted the commission of the crime, and the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. While it is not necessary that the prosecution prove the identity of the principal, it is necessary that the prosecution prove the guilt of the principal. An aiding-and-abetting instruction may be given despite the fact that the evidence could lend itself to a defendant's guilt as the principal or the aider-and-abettor. The trial court did not err by instructing the jury that defendant could be convicted under an aiding-and-abetting theory because the prosecution presented substantial evidence in support of its theory that defendant had motive to alter the recall petitions in an attempt to bring otherwise invalid signatures within the requirements of the 60-day rule. Relatedly, because the evidence supported an aiding-and-abetting jury instruction, trial counsel's failure to advance a meritless argument or raise a futile objection did not constitute ineffective assistance of counsel.

5. Under MRE 404(b)(1), there are three requirements for the admissibility of other-acts evidence: (1) the other-acts evidence must be offered for a proper purpose, i.e., for a purpose other than to show character and action in conformity therewith, (2) the other-acts evidence must be relevant to an issue of fact that is of

consequence at trial, and (3) the danger of unfair prejudice must not substantially outweigh the probative value of the other-acts evidence. In this case, each of the three requirements was satisfied. First, the prosecution offered the other-acts evidence for the proper purpose of establishing defendant's motive. Second, the other-acts evidence had the tendency to make the existence of a fact of consequence more or less probable because it directly addressed defendant's motive in altering or aiding and encouraging the alteration of the dates on the recall petitions, which was used to prove the identity of the perpetrator. Third, the other-acts evidence was highly probative because it showed that defendant had a motive to alter the dates on the recall petitions, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Additionally, the admission of other-acts evidence did not violate defendant's constitutional right to due process or defendant's First Amendment rights to free association and speech.

Affirmed.

ELECTIONS — OFFENSES AND PENALTIES — FORGERY — SUBSTANTIVE OFFENSE.

MCL 168.937 provides that any person found guilty of forgery under the provisions of the Michigan Election Law act, MCL 168.1 *et seq*., shall, unless otherwise provided, be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for a term not exceeding five years, or by both such fine and imprisonment in the discretion of the court; MCL 168.937 creates the substantive offense of election forgery; MCL 168.937 does not merely serve as a penalty provision.

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

Timothy M. Holloway for defendant.

Amici Curiae:

Mark P. Fancher, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union of Michigan.

Kathy H. Murphy for the Detroit/Michigan Chapter of the National Lawyers Guild.

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

O'BRIEN, P.J. Defendant, Edward Pinkney, was convicted by a jury of five counts of election forgery, MCL 168.937, but acquitted of six counts of making a false statement in a certificate-of-recall petition, MCL 168.957. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 to 120 months. He appeals as of right his December 15, 2014 judgment of sentence. We affirm.

I. BACKGROUND

Defendant's convictions arise out of the unsuccessful recall efforts against the mayor of Benton Harbor, James Hightower. Hightower was elected mayor in 2011. Approximately two years after his election, several members of the Benton Harbor City Commission proposed a city income tax. According to Hightower, the primary target of the proposed tax was Whirlpool Corporation. Hightower opposed the proposed tax, but, because enough members of the city commission supported it, the tax was placed on the ballot for the November 2013 election. It did not pass.

On October 23, 2013, James Cornelius filed a petition seeking the recall of Hightower as the mayor of Benton Harbor. According to the petition, Hightower was to be recalled "for voting no to not allow the city income tax to be placed on the 11.5.13 ballot." Carolyn Toliver, the elections administrator for the Berrien County Clerk's Office, testified that the recall petition was accepted, and "a clarity factual hearing" on the petition was scheduled for November 6, 2013. At that hearing, the Berrien County Election Commission approved the recall petition's language.

Defendant and Cornelius had met several years earlier at a Black Autonomy Network Community Organization (BANCO) meeting, and defendant was with Cornelius when he filed the recall petition. While Cornelius testified that he did not write the language that appeared on the recall petition, he could not recall who had written it. According to Cornelius, he sponsored the petition because he was a resident of Benton Harbor. Defendant, on the other hand, was a resident of Benton Township. After the recall petition's language was approved, Cornelius, defendant, and several other individuals circulated recall petitions in hopes of obtaining the statutorily required amount of signatures, which was determined to be 393. See MCL 168.955.

On January 8, 2014, defendant returned to the Berrien County Clerk's Office with a stack of signed recall petitions, but Toliver was unable to accept the recall petitions from anyone but the sponsor, i.e., Cornelius. Consequently, defendant contacted Cornelius, who came to the clerk's office and submitted the signed recall petitions to Toliver that same day. In total, there were 62 signed petitions containing 728 signatures submitted on January 8. While more than 300 of the submitted signatures were disqualified for various reasons, 402 signatures were certified by Toliver. Therefore, the recall petitions were accepted, and a recall election was scheduled for May 6, 2014.

However, the recall election was never held. After Toliver called for the recall election, Hightower raised concerns with her regarding the authenticity of the dates on the recall petitions that were submitted. Detective-Sergeant David Zizkovsky with the Berrien County Sheriff's Department took possession of the 62 recall petitions and studied them for irregularities.

Specifically, Zizkovsky identified several dates next to corresponding signatures that appeared to have been altered. Consequently, he took the 62 petitions to the Michigan State Police Crime Laboratory, and he and Detective-Sergeant Mark Goff, a forensic document examiner with the laboratory, who was admitted "as an expert regarding opinions in the area of forensic document examination" at trial, decided to examine 10 recall petitions in detail.

Of the 10 recall petitions that were examined, 5 are of significance, and they are numbered in the record as Petitions 1, 6, 18, 19, and 38. Each of these petitions was circulated and signed by defendant. Goff testified that each petition was examined using photomicroscopy, which he described as "tak[ing] pictures through microscopes," and a "Video Spectral Comparator," which he described as "a flashlight with a group of colored lenses and then some more filters that filter out that light." Using this equipment, Goff was able to look for differences in ink color and variations in the type of pen used. Goff also used an electrostatic detection device, which he testified "detects impression in paper." As it relates to Petition 1, Goff expressed concerns over the authenticity of the dates on lines 2 through 6. Specifically, it appeared as though the dates were originally written as November 8, 2013, but subsequently changed to November 9, 2013. This determination was based on a change in ink color—i.e., from a black ink with a reddish hue to a dark black ink—and a difference in the burr striations. As it relates to Petition 6, Goff expressed concerns over the authenticity of the dates on lines 1 and 2. Specifically, it appeared as though the dates were originally written as November 7, 2013, but subsequently changed to November 9, 2013. Again, this was determined based on a change in ink color, i.e., from one red ink to a

different red ink. As it relates to Petition 18, Goff expressed concerns over the authenticity of the dates on lines 5 and 6. Specifically, it appeared as though the dates were originally written as November 8, 2013, but subsequently changed to November 18, 2013. According to Goff, the "1" in "18" was written with a different ink than the remaining numbers in "11-18-2013." As it relates to Petition 19, Goff expressed concerns over the authenticity of the dates on lines 5 through 10. Specifically, it appeared as though the dates were originally written as November 8, 2013, but subsequently changed to November 18, 2013, in the same fashion as those on Petition 18. Finally, as it relates to Petition 38, Goff expressed concerns over the authenticity of the dates on lines 1 through 12. Specifically, it appeared as though the dates were originally written as November 8, 2013, for lines 1 through 4, but subsequently changed to November 18, 2013, and as though the dates were originally written as November 8, 2013, for lines 5 through 12, but subsequently changed to November 28, 2013. Again, the "1" in "18" and the "2" in "28" were written with a different ink than the remaining numbers in the dates. Goff also testified that he was able to find impressions from lines 6 through 10 on Petition 19—i.e., five of the six lines that were altered—on Petition 38, which he described as an indication that Petition 38 was underneath Petition 19 when the alterations at issue were made. Additionally, Zizkovsky testified that between March 29, 2013, and April 13, 2014, he watched a news story that included still photographs of the recall petitions, including Petition 38. In the still photographs of Petition 38, Zizkovsky noticed that the dates were written as November 8, 2013; however, the dates on Petition 38 were written as November 18, 2013, when they were examined.

As it turns out, these alterations to the dates proved crucial. The signatures on these recall petitions remained valid for only 60 days. See MCL 168.961(2)(d). That is, if the signers signed the recall petitions more than 60 days before they were filed, their signatures would be deemed invalid. The parties agree that the 60-day period commenced in this case on November 9, 2013. Therefore, it appeared that the alterations were made in an attempt to validate otherwise invalid, untimely signatures. Numerous individuals who signed the recall petitions were called to testify, but they largely testified that they did not recall whether they were responsible or whether someone else was responsible for the alterations to the dates.

The record reflects that defendant was familiar with the recall-petition procedures, including the applicable time limitations such as the 60-day rule. According to Toliver, defendant had sponsored recall petitions for three members of the Benton Harbor School Board in September 2013, had received multiple information packets outlining the applicable time limitations such as the 60-day rule, and had the applicable time limitations such as the 60-day rule explained to him when he received the information packet on each occasion. The prosecution also presented the testimony of Sharon Tyler, the Berrien County Clerk, who oversees Toliver. According to Tyler, between August and October 2014, defendant submitted 12 recall petitions against her in connection with what she described as the "recall petition drive" against Hightower.

Defendant was eventually charged with five counts of election forgery, MCL 168.937, and six counts of making a false statement in a certificate-of-recall petition, MCL 168.957. At trial, the prosecution presented evidence largely consistent with the testimony

described earlier. After his motion for a directed verdict was denied, defendant presented the testimony of Marquette Coates, Tamara Jude, and Quacy Roberts. Coates, Jude, and Roberts each testified that a woman by the name of Venita Campbell altered the dates on the recall petitions in their presence. Each explained that they did not disclose this information to law enforcement before trial because they "didn't trust the police," "don't mess with the police," were "afraid of" the police, or had other bad experiences with law enforcement.

Defendant also testified on his own behalf. He admitted that he circulated 33 of the 62 petitions that were submitted; that he was familiar with the recall-petition procedures, including the 60-day time period; that he was the founder and president of the BANCO chapter in Benton Harbor; that he has a radio show that involves various political issues; that he was a leader in objecting to the Harbor Shores Development and in speaking out against Whirlpool; that he regularly speaks at public meetings and other engagements; and that he was not liked by some people. He denied, however, that he altered the dates on the recall petitions in any way, that he had any motive to alter the dates on the petitions, and that he was the leader in the effort to recall Hightower.

Instead, defendant claimed that Venita Campbell was the driving force behind the recall movement. While he admitted that she did not sign or circulate any petitions, he claimed that she was, indeed, the recall campaign's leader. "Her job," defendant testified, "was to check and make sure [that the individuals who signed a petition] were registered voters, and also to check the double signatures." At the end of each week, defendant explained, he would provide the completed

petitions to Campbell. On January 3, 2014, according to defendant, Campbell brought the petitions that he had circulated to defendant's home for defendant to sign. Campbell then apparently kept all the petitions until January 7, 2014, when she turned them over to Roberts, who turned them over to defendant the following day. Without examining the petitions, defendant took them to the clerk's office for filing, and, once Cornelius was present, the petitions were filed.

In response, the prosecution called two rebuttal witnesses: Toliver and Zizkovsky. Toliver testified that she was unable to find anyone by the name of "Venita Campbell" in the "Secretary of State records" that matched defendant's description of her, which included that she was in her late twenties. Zizkovsky similarly testified that the name "Venita Campbell" had not been mentioned throughout the entirety of his investigation in this matter. He also conducted searches using "TLO," "a company that law enforcement uses and it is controlled by TransUnion, who is one of the people that monitor credit," "White Pages," and "Been Verified" but was unable to find anyone matching defendant's description of Campbell, according to his testimony. It is worth noting that "Venita Campbell, Benton Harbor, Michigan, 49022" was included on defendant's witness list.

After an eight-day jury trial, defendant was convicted and sentenced. This appeal followed. On appeal, defendant unsuccessfully moved for bond pending appeal, *People v Pinkney*, unpublished order of the Court of Appeals, entered August 4, 2015 (Docket No. 325856), unsuccessfully moved for reconsideration of that order, *People v Pinkney*, unpublished order of the Court of Appeals, entered September 8, 2015 (Docket No. 325856), unsuccessfully applied for leave to appeal

this Court's order denying bond, *People v Pinkney*, 498 Mich 899 (2015), and unsuccessfully moved to remand this matter for a hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), *People v Pinkney*, unpublished order of the Court of Appeals, entered October 23, 2015 (Docket No. 325856). Additionally, while this matter was pending on appeal, this Court granted the American Civil Liberties Union of Michigan's motion to file an amicus brief, *People v Pinkney*, unpublished order of the Court of Appeals, entered December 10, 2015 (Docket No. 325856), the Detroit/Michigan Chapter of the National Lawyers Guild's motion to file an amicus brief, *People v Pinkney*, unpublished order of the Court of Appeals, entered January 4, 2016 (Docket No. 325856), and the American Civil Liberties Union of Michigan's motion to participate in oral argument, *People v Pinkney*, unpublished order of the Court of Appeals, entered April 13, 2016 (Docket No. 325856).

II. ANALYSIS

On appeal, defendant argues that his convictions must be reversed for four reasons. First, defendant argues that his convictions must be reversed because MCL 168.937 does not create the substantive offense of election forgery. Second, he argues that his convictions must be reversed because the prosecution presented insufficient evidence to support his convictions. Third, defendant argues that his convictions must be reversed because the trial court erroneously instructed the jury that it could convict him under an aiding-and-abetting theory. Finally, defendant argues that his convictions must be reversed because other-acts evidence was admitted against him in violation of MRE 404(b), his constitutional right to free speech, and his constitu-

tional right to due process. Because we disagree in each respect, we affirm defendant's convictions and sentence.

A. MCL 168.937

Defendant argues on appeal that his convictions must be reversed because MCL 168.937 does not create the substantive offense of election forgery. We disagree.

Defendant was convicted of election forgery under MCL 168.937, which provides as follows:

> Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

Whether MCL 168.937 creates the substantive offense of election forgery is an issue that has yet to be resolved by this Court in a published opinion or by our Supreme Court. It has, however, been resolved by a panel of this Court in an unpublished opinion. In *People v Hall*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2014 (Docket No. 321045) (*Hall I*), p 6, a panel of this Court, when faced with determining "whether MCL 168.937 can be fairly read as proscribing the broad offense of forgery that pertains to the falsifying a document governed by the Michigan election law, or whether it is merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law," held "that MCL 168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery." While this Court's *Hall I* decision was reversed on other grounds as discussed later in this opinion, *People v Hall*, 499 Mich 446; 884 NW2d 561 (2016) (*Hall II*),

we nevertheless find the reasoning as it relates to this specific issue persuasive, see *People v Kloosterman*, 296 Mich App 636, 641 n 2; 823 NW2d 134 (2012) (stating that "[u]npublished opinions are not binding authority, but they may be persuasive"), citing MCR 7.215(C)(1); *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004), and therefore conclude that MCL 168.937 does, in fact, create the substantive offense of election forgery.

We review issues of statutory construction de novo. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). "The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature." *Id*. (citation and quotation marks omitted). "In doing so, we focus on the plain language of the statute and, if the statute is unambiguous, must conclude that the Legislature intended the meaning clearly expressed[.]" *People v Lyon*, 310 Mich App 515, 517; 872 NW2d 245 (2015) (citations and quotation marks omitted; alteration in original). That is, if the language of a statute is unambiguous, judicial construction is not required or permitted. *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014). Ultimately, "[c]ourts must construe a statute in a manner that gives full effect to all its provisions." *Dowdy*, 489 Mich at 379.

A variety of statutory-construction rules support the conclusion reached in *Hall I*. As the *Hall I* panel correctly recognized, the purpose of the Michigan Election Law act, MCL 168.1 *et seq*., is to regulate primaries and elections, provide for the "purity" of the election process, and guard against abuse. *Hall I*, unpub op at 6, citing 1954 PA 116. That purpose is served by interpreting MCL 168.937 as a provision creating the substantive offense of election forgery, not as merely a penalty provision, because it ensures

fairness and purity in the election process by expressly and specifically prohibiting all election forgery. *Id*. at 7, citing *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006). In fact, under defendant's interpretation of MCL 168.937, only "[a]n inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description," MCL 168.932(c), or "[a] person who is not involved in the counting of ballots as provided by law and who has possession of an absent voter ballot mailed or delivered to another person," MCL 168.932(e), could be guilty of election forgery. There is simply nothing—express, implied, or otherwise—in the Michigan Election Law to support the idea that the Legislature intended such a peculiar result. *People v Stephan*, 241 Mich App 482, 503; 616 NW2d 188 (2000) (explaining that this Court will not read anything into a statute that is "not plainly expressed" by the Legislature). Furthermore, interpreting MCL 168.937 in that manner, that is, as only a penalty provision, would create an absurd result by permitting individuals who do not meet the definitions set forth in MCL 168.932 to commit common-law forgery in the election process without recourse under the Michigan Election Law. *People v Lewis*, 302 Mich App 338, 341-342; 839 NW2d 37 (2013), quoting *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (" 'Statutes must be construed to prevent absurd results.' "). Additionally, as the *Hall I* panel also correctly recognized, interpreting MCL 168.937 as merely a penalty provision would render that statutory provision mere surplusage. *Hall I*, unpub op at 7. That is, because MCL 168.935 sets forth the penalties for a felony conviction under the provisions of the Michigan Election Law, interpreting MCL 168.937 as also setting

forth the penalties for a felony, albeit a specific one, adds nothing to the statutory scheme at issue. *Id*. "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *Id*. (citation and quotation marks omitted). Stated differently, "[c]ourts *must* construe a statute in a manner that gives full effect to *all* its provisions." *Dowdy*, 489 Mich at 379 (emphasis added). If we were to accept defendant's argument and interpret MCL 168.937 as merely a penalty provision, MCL 168.937 would have no effect in light of MCL 168.935. We are forbidden from doing so.

Relatedly, defendant also argues that his convictions must be reversed because even if MCL 168.937 does create the substantive offense of election forgery, MCL 168.937 violates the vagueness doctrine and the rule of lenity. We disagree.

Constitutional issues, including the constitutionality of a statute, are reviewed de novo. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). "A statute is presumed constitutional, and the party challenging the statute has the burden of proving its invalidity." *Id*. (citations omitted). Under the vagueness doctrine, a statute may be challenged as unconstitutionally vague if it (1) "is overbroad and impinges on First Amendment freedoms," (2) "does not provide fair notice of the conduct proscribed," or (3) "is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated." *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). However, a statute is not void for vagueness if "its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*. at 652. Under the rule of lenity,

"courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Johnson*, 302 Mich App 450, 462; 838 NW2d 889 (2013) (citation and quotation marks omitted). However, the rule "applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983).

Applying those rules to the instant matter, we conclude that MCL 168.937 does not violate the vagueness doctrine or the rule of lenity. Stated simply, the meaning of MCL 168.937 can be fairly ascertained by reference to the common law. *Noble*, 238 Mich App at 652. "The common-law definition of 'forgery' is 'a false making . . . of any written instrument with intent to defraud.' " *People v Nasir*, 255 Mich App 38, 42 n 2; 662 NW2d 29 (2003) (citation and quotation marks omitted). Thus, it is not unconstitutionally vague. Additionally, MCL 168.937 is unambiguous for similar reasons, and one can easily discern a firm indication of the Legislature's intent. As stated earlier, "[t]he Michigan election law . . . was enacted for the stated purpose of, among other things, regulating primaries and elections; providing for the 'purity' of the election process; and guarding against 'the abuse of the elective franchise.' " *Hall I*, unpub op at 6, quoting 1954 PA 116. Therefore, MCL 168.937 does not violate the rule of lenity either.

This conclusion is also supported by our Supreme Court's recent decision in *Hall II*, 499 Mich 446. In that case, the issue before our Supreme Court was "whether defendant may be bound over to circuit court on felony charges for committing forgery under MCL 168.937, or whether the prosecution was limited to proceeding with misdemeanor charges under MCL 168.544c(8)(a)

for signing the petitions 'with a name other than his . . . own.' " *Id*. at 448-449. While our Supreme Court did not specifically address whether MCL 168.937 created the substantive offense of election forgery, *id*. at 456 (stating that "defendant concedes that this statute creates the substantive offense of forgery"), it did specifically address whether MCL 168.937 provided sufficient notice to survive a due-process challenge, *id*. at 460-463. The Supreme Court concluded that MCL 168.937 did provide sufficient notice, explaining that "prosecution under MCL 168.937 did not violate 'fundamental elements of fairness' given the Court of Appeals' holding that MCL 168.937 is a substantive offense and given that the plain text of that statute informed him he could be subject to felony charges if he committed election law forgery . . . ." *Id*. at 463 (citation omitted). Therefore, while our Supreme Court's decision in *Hall II* does not specifically address the issue of whether MCL 168.937 creates a substantive offense, it certainly does not compel a conclusion other than the one that we have reached in this case.

B. SUFFICIENCY OF THE EVIDENCE

Defendant also argues on appeal that his convictions must be reversed because the prosecution presented insufficient evidence to support his convictions. Specifically, he claims that the jury could not have concluded that he altered the dates on the recall petitions with the requisite intent beyond a reasonable doubt. We disagree.

This Court reviews a defendant's challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "In determining whether the prosecutor has presented suffi-

cient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor." *People v Bosca*, 310 Mich App 1, 16; 871 NW2d 307 (2015) (citation and quotation marks omitted). "The standard of review is deferential and this Court 'is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.' " *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In this case, because the Michigan Election Law does not define the substantive offense of election forgery, we turn to the common-law definition of forgery, *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002), which is, as stated earlier, "a false making . . . of any written instrument with intent to defraud," *Nasir*, 255 Mich App at 42 n 2 (citation and quotation marks omitted). "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010); see also *People v Chelmicki*, 305 Mich App 58, 66; 850 NW2d 612 (2014). Indeed, circumstantial evidence alone may be sufficient to prove all elements of an offense. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). Relatedly, "[a]lthough motive is not an essential element of the crime, evidence of motive in a prosecution . . . is always relevant." *Id*. When a defendant's "sufficiency argument is couched in terms of the trial court's having denied his motion for a directed verdict," "we only consider the evidence presented by the prosecution up to the time the motion was made." *Powell*, 278 Mich App at 320 n 1, citing *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

Applying those rules to this case, we conclude that the prosecution presented sufficient evidence for the jury to find defendant guilty of violating MCL 168.937 beyond a reasonable doubt prior to defendant's directed-verdict motion. The evidence presented at trial portrayed defendant as the leader in the recall efforts at issue. Defendant, who had previously sponsored several recall campaigns in Benton Harbor, asked Cornelius to sponsor this specific recall petition because he was a Benton Harbor resident; successfully obtained the recall petitions from Toliver; circulated 33 of the 62 recall petitions that were submitted; advocated on behalf of the recall campaign at city commission meetings, BANCO meetings, and generally throughout the community; attempted to file the 62 recall petitions at issue; and demonstrated animosity toward Hightower in various ways during the period at issue. Having filed several recall petitions in the past, defendant was admittedly familiar with the 60-day rule regarding the signatures' validity, and he was undisputedly in control of the petitions when he attempted to file them on his own as well as when Cornelius filed them in his presence. The testimony that was presented indicated that the only dates altered on these recall petitions were those that fell beyond the 60-day period, November 7 and 8. Those dates were altered to instead reflect November 9, 18, or 28, all dates that fell within the 60-day period. This evidence, while circumstantial, constituted sufficient evidence to support the jury's guilty verdicts when viewed in a light most favorable to the prosecution.

Defendant's primary argument on appeal relies on his claim that he was merely found in possession of the altered recall petitions, but he was not actually responsible for the alterations themselves. However, a review of the record reflects that defendant's convictions were

supported by substantially more than his mere possession of the recall petitions. As discussed earlier, the evidence presented portrayed defendant, who was familiar with the recall-petition process, as having motive to alter the recall petitions to bring them within the 60-day period. While possession of the forged recall petitions alone may have been insufficient to support a conviction under MCL 168.937, this possession of the forged recall petitions, coupled with his demonstrated animosity against Hightower, his knowledge of the 60-day rule, and his motive to alter the dates to bring them within the 60-day period, constituted sufficient evidence, when viewed in a light most favorable to the prosecution, *Bosca*, 310 Mich App at 16, for a rational trier of fact to find defendant guilty of violating MCL 168.937 beyond a reasonable doubt.

C. AIDING AND ABETTING

Defendant additionally argues on appeal that his convictions must be reversed because the trial court erroneously instructed the jury that it could convict him under an aiding-and-abetting theory. We disagree.

In order to preserve for appellate review a challenge to a trial court's decision to give or not give a specific jury instruction, a party must object to or request that jury instruction before the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Defendant did not object to the aiding-and-abetting instruction that he now challenges on appeal. Therefore, this issue is unpreserved and reviewed for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was

plain, i.e., clear or obvious, 3) and the plain error affected substantial rights," "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him," *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014) (citation and quotation marks omitted), and the jury instructions "must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence," *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003). In short, "[t]he trial court may issue an instruction to the jury if a rational view of the evidence supports the instruction." *Armstrong*, 305 Mich App at 240. "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124.

> The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that "(1) the crime charged was committed by the defendant or some third person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *Carines*, 460 Mich at 768 (alteration by the *Moore* Court).]

While it is not necessary that the prosecution prove the identity of the principal, it is necessary that the prosecution prove the guilt of the principal. *People v Wilson*, 196 Mich App 604, 611; 493 NW2d 471 (1992);

People v Vaughn, 186 Mich App 376, 381-382; 465 NW2d 365 (1990). Ultimately, so long as there is evidence that "tend[s] to establish that more than one person committed the crime," the issue of aiding and abetting may be put before the trier of fact. *Vaughn*, 186 Mich App at 382.

Applying those rules to this case, we conclude that the trial court did not err by instructing the jury that defendant could be convicted under an aiding-and-abetting theory. As discussed earlier, the prosecution presented substantial evidence in support of its theory that defendant had motive to alter the recall petitions in an attempt to bring otherwise invalid signatures within the requirements of the 60-day rule. The way that the dates on the recall petitions were altered, i.e., changing dates beyond the 60-day period to within the 60-day period, certainly supports an inference that the individuals who made those changes had knowledge of the 60-day period or were told to make the changes according to the same. Assuming that Coates's, Jude's, and Roberts's testimony was true and that Campbell did, in fact, alter the dates on the recall petitions, a rational jury could have reasonably concluded that she did so with the intent to defraud. That same jury could also have reasonably concluded that she did so with the aid and encouragement of defendant, who was, again, portrayed as the leader of the recall campaign, who was admittedly familiar with the 60-day rule, and who collected the recall petitions from Campbell. And, because a rational view of the evidence supports finding defendant guilty under an aiding-and-abetting theory, we discern no error with respect to the trial court's decision to issue an aiding-and-abetting instruction. *Armstrong*, 305 Mich App at 239; *McKinney*, 258 Mich App at 162-163.

Relatedly, we also reject defendant's brief argument that reversal is required because his trial counsel was ineffective for failing to object to the aiding-and-abetting jury instruction. To prevail on an ineffective-assistance claim, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation and quotation marks omitted). In this case, defendant has failed to overcome this presumption of effective assistance. For the reasons set forth, the evidence supported an aiding-and-abetting jury instruction, and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In light of our conclusion that there was sufficient evidence to find defendant guilty of violating MCL 168.937 beyond a reasonable doubt, we deem it unnecessary to address in detail whether there was sufficient evidence for a rational jury to find defendant guilty of violating MCL 168.937 beyond a reasonable doubt under an aiding-and-abetting theory *as well*. The same rationale applies in support of defendant being convicted as either the principal or the aider-and-abettor, and beyond-a-reasonable-doubt proof is not required to support the trial court's decision to give an aiding-and-abetting instruction to the jury. Stated differently, there exist scenarios, including the one at bar, in which an aiding-and-abetting instruction may be given de-

spite the fact that the evidence could lend itself to a defendant's guilt as the principal *or* the aider-and-abettor.

D. OTHER-ACTS EVIDENCE

Finally, defendant argues that his convictions must be reversed because other-acts evidence was admitted against him in violation of MRE 404(b), his constitutional right to free speech, and his constitutional right to due process. We disagree.

A trial court's decision to admit evidence, including other-acts evidence, is reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216; *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. The questions of law involved in the admission of evidence, however, are reviewed de novo. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). Constitutional issues are likewise reviewed de novo. *Sadows*, 283 Mich App at 67.

MRE 404 governs the admission of other-acts evidence. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). While "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," "[i]t may . . . 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 . . . ." MRE 404(b)(1). There are three requirements for other-acts evidence to be admissible under MRE 404(b)(1): (1) the other-acts evidence must be offered for a proper purpose, i.e., for

a purpose other than to show character and action in conformity therewith, (2) the other-acts evidence must be relevant to an issue of fact that is of consequence at trial, and (3) the danger of unfair prejudice must not substantially outweigh the probative value of the other-acts evidence. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). MRE 404(b) is a rule of inclusion, not exclusion. *People v Jackson*, 498 Mich 246, 259; 869 NW2d 253 (2015).

In this case, each of the three requirements was satisfied. First, the prosecution offered the other-acts evidence at issue in this case—testimony regarding defendant's efforts in a recall campaign against Tyler and testimony regarding defendant's public comments criticizing Hightower, Hightower's "alliance" with Whirlpool, and various other actions—for a proper purpose, i.e., for the purpose of establishing defendant's motive. And, as discussed earlier, "[a]lthough motive is not an essential element of the crime, evidence of motive in a prosecution . . . is always relevant." *Unger*, 278 Mich App at 223. Second, evidence is relevant if it has the tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence, MRE 401, and the testimony had the tendency to make the existence of a fact of consequence more or less probable because it directly addressed defendant's motive in altering or aiding and encouraging the alteration of the dates on the recall petitions, which was used to prove the identity of the perpetrator. Third, the probative value of the other-acts evidence at issue was not substantially outweighed by the danger of unfair prejudice. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *McGhee*, 268 Mich App at 613-614. "Evidence is unfairly prejudicial when there exists a danger that marginally

probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The evidence at issue here was highly probative. It showed that defendant had a motive to alter the dates on the recall petitions, thus providing evidence of the identification of the perpetrator. While defendant claims that the probative value of this evidence was marginal when compared to the fact "that his political views are not popular with some people in the community," the record simply reflects otherwise. Furthermore, the jury was properly instructed several times that it could only consider the other-acts evidence for motive purposes. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant makes no effort to overcome these presumptions.

Defendant does not necessarily challenge, at least with respect to MRE 404(b), the admission of that testimony. Rather, his argument on appeal focuses on the allegedly improper admission of his own cross-examination testimony regarding his political activism unrelated to the recall campaign against Hightower. Specifically, the allegedly improper testimony that he takes issue with includes his testimony about his radio show, his recall efforts in the local community, his speaking engagements across the country, and his search for justice and equality in general. He claims that this testimony was substantively inadmissible, MRE 404(b)(1), and procedurally inadmissible, MRE 404(b)(2). But, it is difficult to discern from the record how this testimony creates a "character-to-conduct" inference. *Jackson*, 498 Mich at 262; see also *People v Mardlin*, 487 Mich 609, 616 n 10; 790 NW2d 607 (2010) (explaining that "MRE 404(b) is not even implicated if the prosecution seeks to introduce logically relevant

evidence of other acts performed by the defendant if the evidence does not generate an intermediate inference as to his character"). Furthermore, defendant's argument does not address the fact that jurors are presumed to follow their instructions, and jury instructions are presumed to cure most errors. *Abraham*, 256 Mich App at 279. The trial court specifically and repeatedly instructed the jury that it was not to consider his "stature in the community" or "his activities in relation to the community" in a negative light. Defendant makes no effort to articulate how these and other related instructions were insufficient.

Relatedly, defendant also challenges the trial court's decision to admit the other-acts evidence under the First Amendment, claiming that his constitutional rights to free association and speech were infringed on by the admission of this testimony. While the First Amendment certainly protects citizens' rights to free speech, including speech involving the criticism of public officials and policies, it "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v Mitchell*, 508 US 476, 489; 113 S Ct 2194; 124 L Ed 2d 436 (1993). Therefore, even if we assume that defendant's conduct at issue is entitled to First Amendment protection, it is nevertheless admissible so long as it was relevant, not unfairly prejudicial, and otherwise admissible. And, as stated several times, this testimony was highly relevant and minimally prejudicial, and defendant has not challenged its admission on any other grounds. Consequently, the admission of other-acts evidence did not violate defendant's First Amendment rights to free association and speech.

For similar reasons, we reject defendant's due-process challenge as well. He claims that due process

compels reversal in this case because the other-acts evidence at issue was used to show his propensity to commit election forgery. See, e.g., *McKinney v Rees*, 993 F2d 1378 (CA 9, 1993). In order for the admission of other-acts evidence to violate one's constitutional right to due process, "the introduction of this type of evidence [must be] so extremely unfair that its admission violates 'fundamental conceptions of justice.' " *Dowling v United States*, 493 US 342, 352; 110 S Ct 668; 107 L Ed 2d 708 (1990). At issue in this case is what defendant describes as the admission of evidence "not directly related to the recall of Hightower," but the admission of that evidence alone simply does not violate the fundamental conceptions of justice discussed in *Dowling*. Indeed, "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v Mitchell*, 329 F3d 496, 512 (CA 6, 2003). As discussed in great detail earlier, the evidence presented by the prosecution portrayed defendant as the leader in the recall campaign against Hightower, and the other-acts evidence at issue provided evidence of his motive in altering or aiding and encouraging the alteration of the dates on the recall petitions. Consequently, the admission of other-acts evidence did not violate defendant's constitutional right to due process either.

III. CONCLUSION

In sum, we conclude that MCL 168.937 does create the substantive offense of election forgery, that the prosecution presented sufficient evidence to support defendant's convictions, that the jury was correctly instructed, and that the trial court did not erroneously

admit other-acts evidence. We therefore affirm defendant's convictions and sentence.

Affirmed.

K. F. KELLY and FORT HOOD, JJ., concurred with O'BRIEN, P.J.

BANK OF AMERICA, NA v FIDELITY NATIONAL TITLE INSURANCE COMPANY

Docket Nos. 311798, 312426, 313797, and 316538. Submitted June 14, 2016, at Detroit. Decided June 21, 2016. Approved for publication July 26, 2016, at 9:05 a.m. Leave to appeal sought.

Bank of America (BOA) brought actions for breach of contract against Fidelity National Title Insurance Company (FNTIC), and others, in the Genesee and Oakland Circuit Courts on the basis of closing protection letters (CPLs) issued by FNTIC that promised to indemnify BOA for any actual losses arising from fraud or dishonesty in handling BOA's funds or documents on the part of the closing agent, who was also the title agent of FNTIC. FNTIC filed counterclaims against BOA. In the Oakland Circuit Court case, the closing agent was Fidelity Title Company (FTC). In the Genesee Circuit Court case, the closing agent was Wolverine Title Agency, Inc. (WTA). In both cases, BOA provided evidence of inflated appraisals, property-flip transactions, double-escrow transactions, counterfeit checks, and documents that should have served as red flags to the closing agents about the validity of the transactions. In each underlying action, the court, Denise Karen Langford-Morris, J., and Geoffrey L. Neithercut, J., respectively, granted summary disposition to FNTIC on BOA's breach of contract claims. In Docket Nos. 311798 and 316538, BOA appealed those respective determinations. In Docket Nos. 312426 and 313797, BOA appealed the Oakland Circuit Court's order striking the case evaluation award and its award of costs and attorney fees to FNTIC in the same underlying action that led to the appeal in Docket No. 311798. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. In Docket No. 311798, there was evidence establishing a genuine issue of material fact concerning whether BOA suffered an actual loss arising out of fraud or dishonesty in the handling of BOA's funds or documents in connection with the closings. There was evidence that FTC or its agents were aware of misrepresentations in documents submitted to BOA and that BOA's funds

were dishonestly or fraudulently distributed. The evidence indicated that the loans at issue were sham transactions that used straw borrowers and artificially inflated property values to induce BOA to lend significant sums of money and that FTC or its agents were aware of the misrepresentations and the fraudulent nature of the transactions at the time of closing. The Oakland Circuit Court erred by granting FNTIC's motion for summary disposition on BOA's breach of contract claim under the CPLs.

2. In Docket No. 311798, FNTIC's counterclaims and affirmative defenses based on BOA's allegedly deficient underwriting failed as a matter of law. Rescission of a contract based on fraudulent inducement required FNTIC to show six things: that BOA made a material representation, that the representation was false, that when BOA made the representation BOA knew it was false or made it recklessly without knowledge of its truth and as a positive assertion, that BOA made the representation with the intention that FNTIC would rely on it, that FNTIC acted in reliance on it, and that FNTIC suffered damage. FNTIC was unable to satisfy the materiality requirements because BOA's underwriting practices were not material to the terms of the CPLs. FNTIC's reliance on the implied covenant of good faith and fair dealing was similarly misplaced. Not only did Michigan not recognize a cause of action for breach of the implied covenant of good faith and fair dealing, but the failure to refer to underwriting guidelines in a title policy did not constitute a gap to be filled by the implied duty of good faith and fair dealing when the policy was clear and specific regarding the parties' rights and obligations. There was no basis to rescind the CPLs on the ground of mutual mistake of the parties because there was no evidence to conclude that BOA shared FNTIC's alleged belief that BOA had agreed to use different or more stringent underwriting standards. Summary disposition was also required for the portions of FNTIC's declaratory judgment counterclaim that alleged the same underlying theory as the rescission counterclaim, including fraudulent misrepresentation, contractual mistake, failure to satisfy the duty of good faith and fair dealing, and contributory or comparative negligence. BOA was also entitled to summary disposition on the portion of FNTIC's declaratory judgment counterclaim asserting failure to provide prompt notice of its damages claim. The parties agreed BOA became aware of the fraudulent scheme in 2006 but disagreed about when BOA provided notice. FNTIC conceded BOA sent written notice of potential claims to FNTIC in February 2008 but asserted that the notice provided insufficient detail. However, FNTIC's own April and June 2008 letters to BOA reflected that BOA's February 2008 claim letter

provided notice of both the property and the borrower at issue for each loan, that BOA was alleging that FTC failed to comply with BOA's written instructions, and that FNTIC acted fraudulently or dishonestly in handling BOA's funds. FNTIC failed to articulate why this was insufficient to provide the notice required by the CPLs. FNTIC also failed to demonstrate a genuine issue of material fact about whether it was prejudiced by BOA's delay in providing notice. The vague reference to fading memories and loss of documents failed to demonstrate with a sufficient level of specificity what in fact was lost by the missing evidence, how that prejudiced FNTIC's position, and why information available from other sources was inadequate. The Oakland Circuit Court erred by denying BOA's motion for summary disposition concerning FNTIC's counterclaims and affirmative defenses that were based on BOA's allegedly deficient underwriting.

3. In Docket No. 316538, genuine issues of material fact precluded summary disposition for either party on BOA's CPL claims. The language of the CPLs issued by FNTIC's predecessor, Lawyers Title Insurance Corporation, was identical in all relevant respects to the language of the CPLs issued by FNTIC in the Oakland Circuit Court case. There was evidence demonstrating a genuine issue of material fact concerning whether the closing agent, WTA, was aware of and participated in the fraudulent scheme and whether BOA sustained an actual loss arising out of WTA's fraud or dishonesty in handling BOA's funds or documents. The evidence was not sufficient for summary disposition in favor of BOA because it was comprised of witness testimony, for which a jury had to determine the credibility. The Genesee Circuit Court erred by granting FNTIC's motion for summary disposition on BOA's breach of contract claim under the CPLs.

4. In Docket No. 316538, FNTIC's alternative grounds for summary disposition on BOA's CPL claim also failed. FNTIC first argued that BOA suffered no actual loss because it sold the loans "without recourse" to third-party investors on the secondary mortgage market. FNTIC argued that BOA voluntarily repurchased the loans and, therefore, the loss was because of BOA's own voluntary action, not actions protected by the CPLs. BOA responded that it was contractually obligated under the mortgage loan purchase agreements to repurchase a defective loan when it discovered a breach of the representations and warranties in the mortgage loan purchase agreement that affected the value of the loan. The repurchase reports issued by BOA set forth BOA's internal findings that the loans were fraudulent and that the

loans should be repurchased. FNTIC identified no evidence and presented no argument disputing that BOA repurchased the loans after learning of the fraud associated with the loans. Furthermore, FNTIC's argument that BOA suffered no actual loss because it voluntarily repurchased the loans failed to appreciate that the "arises out of" language in the CPL did not require proximate cause in the strict legal sense, but that almost any causal connection that was more than incidental or fortuitous was sufficient. Other cases had held that an entity could sustain actual losses for the purpose of a CPL claim if the entity repurchased loans it had previously sold. FNTIC failed to establish that BOA's sale and subsequent repurchase of the loans required a conclusion as a matter of law that BOA suffered no actual losses that arose out of WTA's fraud or dishonesty. FNTIC also argued that BOA lacked standing to make claims under the CPLs because BOA sold its interest in the CPLs to investors. FNTIC failed to explain why BOA would not have standing to pursue the claim on behalf of the investors as the servicer of the claim even if it had not repurchased the loans. But BOA did repurchase the loans, and FNTIC failed to cite authority that the interest in a CPL is not reacquired when a loan is repurchased. FNTIC also claimed prejudice because of BOA's failure to bring prompt notice, but that issue was not properly presented because of FNTIC's failure to file a cross-appeal. The Genesee Circuit Court had dismissed FNTIC's counterclaims, including prejudice based on failure to provide prompt notice, so FNTIC's argument was effectively seeking reversal of part of the court's dismissal, i.e., obtaining a more favorable decision than was rendered by the lower tribunal. Even if the argument had been properly presented on appeal, it would have been without merit for the same reasons discussed in relation to Docket No. 311798. FNTIC also argued that BOA impaired FNTIC's rights of subrogation by failing to confirm the value of the properties and the borrower's ability to repay the loans and by approving the loans without independently verifying the accuracy of the inflated appraisals. FNTIC failed to cite any pertinent authority in support of its argument and failed to present an argument that BOA knowingly and voluntarily impaired the subrogation rights as required to reduce FNTIC's liability under the language of the CPLs. FNTIC's cursory appellate presentation resulted in abandonment of the issue.

5. In both Docket No. 311798 and Docket No. 316538, the trial courts erred by concluding that the full credit bid rule barred BOA's breach of CPL claims. The Michigan Supreme Court already ruled that the full credit bid rule is inapplicable to a

mortgagee's claims against nonborrower third parties. Indeed, breach of CPL claims against a title insurer related to a closing agent's fraud or dishonesty were among the claims to which the Michigan Supreme Court expressly held the full credit bid rule was inapplicable.

6. In Docket Nos. 312426 and 313797, because the trial court erred by granting summary disposition to FNTIC, it followed that the trial court's decision to strike the case evaluation award had to be vacated. Likewise, the award of costs and attorney fees sanctions premised on the grant of summary disposition also had to be vacated.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. CONTRACTS — BREACH — DEFENSES — CONTRIBUTORY NEGLIGENCE NOT A DEFENSE.

In litigation to enforce a closing protection letter (CPL), a title insurer cannot avoid its indemnification obligations under a CPL by arguing that the lender was negligent in underwriting the loan because such negligence is irrelevant when the CPL does not mention underwriting practices and contributory negligence is not a valid defense in a breach of contract case.

2. CONTRACTS — GAPS — IMPLIED DUTIES — DUTIES OF GOOD FAITH AND FAIR DEALING.

The failure to refer to underwriting guidelines in a title policy does not constitute a gap to be filled by the implied duty of good faith and fair dealing when the policy is clear and specific regarding the parties' rights and obligations.

3. INSURANCE — NOTICE OF CLAIM — PROMPTNESS — PREJUDICE — BURDEN OF PROOF.

The insurer bears the burden of proving prejudice arising from a lack of prompt notice, but prejudice will be found if the insurer demonstrates that a delay in providing notice materially impaired the insurer's ability to contest its liability to an insured.

4. INSURANCE — NOTICE OF CLAIM — PROMPTNESS — PREJUDICE — QUESTION OF FACT.

In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, the question of prejudice is generally left up to the trier of fact, unless the facts are so clear that only one conclusion is reasonably possible from the facts; then it becomes a question of law.

5. INSURANCE — NOTICE OF CLAIM — PROMPTNESS — PREJUDICE — FACTORS.

In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, courts will consider whether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues in order to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (5) to contest its liability to its insured.

6. INSURANCE — NOTICE OF CLAIM — PROMPTNESS — PREJUDICE — EVIDENCE.

In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, an insurer must do more than simply claim that evidence was lost, physically altered, or has otherwise become unavailable and that witnesses have died, disappeared, or their memories have faded; an insurer must establish what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inadequate.

RJ Landau Partners PLLC (by *Richard J. Landau* and *Christopher A. Merritt*) for Bank of America.

Curley & Berkal, PC (by *John E. Curley*), and *Hahn, Loeser & Parks LLP* (by *Robert J. Fogarty*) for Fidelity National Title Insurance Company.

Before: METER, P.J., and SHAPIRO and O'BRIEN, JJ.

O'BRIEN, J. In Docket No. 311798, plaintiff, Bank of America, NA (BOA), appeals as of right a final order granting BOA's motion to dismiss its remaining claims following an earlier order granting summary disposition in favor of defendant Fidelity National Title Insurance Company (FNTIC) with respect to BOA's breach of contract claims against FNTIC. In Docket No. 312426, BOA appeals as of right an order granting FNTIC's motion for costs and awarding FNTIC costs in the amount of $19,580.04. In Docket No. 313797, BOA appeals as of right an order granting FNTIC's motion

for attorney fees in the amount of $164,539. In Docket No. 316538,[1] plaintiff, BOA, appeals as of right a final order dismissing BOA's claims against defendant Chicago Title Insurance Company (CTIC), formerly known as Ticor Title Insurance of Florida, and dismissing CTIC's counterclaims against BOA following an earlier order granting summary disposition in favor of defendant FNTIC, formerly known as Lawyers Title Insurance Corporation (LTIC), with respect to BOA's breach of contract claims against FNTIC. The appeals were consolidated to advance the efficient administration of the appellate process. *Bank of America, NA v Fidelity Nat'l Title Ins Co*, unpublished order of the Court of Appeals, entered August 6, 2015 (Docket Nos. 311798, 312426, 313797, and 316538).

In Docket No. 311798, we reverse the order granting summary disposition to FNTIC regarding BOA's breach of contract claims, reverse the order denying BOA's motion for summary disposition concerning FNTIC's counterclaims and affirmative defenses, and remand for further proceedings consistent with this opinion. In Docket Nos. 312426 and 313797, we vacate the order striking the case evaluation award and the orders awarding costs and attorney fees to FNTIC. In Docket No. 316538, we reverse the order granting summary disposition to FNTIC regarding BOA's breach of contract claims, affirm the order denying BOA's motion for summary disposition concerning its breach of contract claims, affirm the order granting summary disposition to BOA regarding FNTIC's counterclaims and affirmative defenses, and remand for further proceedings consistent with this opinion.

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[1] The appeal in Docket No. 316538 arises from a different lower court file than the appeals in Docket Nos. 311798, 312426, and 313797.

These cases arise from allegations of mortgage fraud perpetrated by various individuals and entities against BOA, the mortgage lender that commenced both of the lower court actions that led to the present appeals. Pertinent to these appeals, BOA filed breach of contract claims against FNTIC, the title insurer that had issued closing protection letters (CPLs) that promised to indemnify BOA for any actual losses arising from fraud or dishonesty in handling BOA's funds or documents on the part of the closing agent, who was also the title agent of FNTIC, in each action. In each underlying action, the trial court granted summary disposition to FNTIC on BOA's breach of contract claims, and BOA challenges those respective determinations on appeal in Docket Nos. 311798 and 316538. In Docket Nos. 312426 and 313797, BOA challenges the trial court's order striking the case evaluation award and the trial court's award of costs and attorney fees to FNTIC in the same underlying action that led to the appeal in Docket No. 311798.

I. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. A reviewing court must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify a recovery.
>
> A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to

> state a valid defense to the claim asserted against it. A motion under MCR 2.116(C)(9) is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true. When a party's defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery, the motion is properly granted. [*Id*. at 315-316 (citations and quotation marks omitted).]

"In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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).

The interpretation of a contract presents a question of law that is reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

> In interpreting a contract, this Court's obligation is to determine the intent of the parties. This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. If the contractual language is unambiguous, courts must interpret and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. [*In re*

> *Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007) (citations and quotation marks omitted).]

II. FNTIC'S LIABILITY UNDER THE CLOSING PROTECTION LETTERS

To prevail on a breach of contract claim, a party "must establish by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016) (*FATCO*).

> A CPL is a contract between the title company and the lender whereby the title insurance company agrees to indemnify the lender for any losses caused by the failure of the title agent to follow the lender's closing instructions. A CPL is necessary because, while a title agent is the agent of the title insurance company for purposes of selling the title insurance policy (and binding the company to the insurance contract), that agency relationship does not extend to the title agent's conduct at the closing. As a result, a lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services must separately contract with the title insurer for such additional protection by entering into an insured closing letter or closing protection letter. [*Id*. at 104 (citations, brackets, and quotation marks omitted).]

See also *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 80; 761 NW2d 832 (2008) ("A closing protection letter is typically issued by a title insurance underwriter '[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds.' ") (citation omitted; alteration in original), overruled in part on other grounds by *FATCO*, 499 Mich 74.

The CPLs issued for the closings at issue in Docket No. 311798 provided, in relevant part, that FNTIC would reimburse BOA "for actual loss incurred by [BOA] in connection with such closings . . . when such loss arises out of: . . . (2) Fraud or dishonesty of [the closing agent, Fidelity Title Company (FTC)] in handling [BOA's] funds or documents in connection with such closings." This contractual language plainly makes FNTIC liable if BOA suffered actual losses arising out of FTC's fraud or dishonesty in handing BOA's funds or documents in connection with the closings.

> The common meaning of "dishonesty" is the opposite of "honesty;" it is "a disposition to lie, cheat, or steal" or a "dishonest act; fraud." . . . [T]he plain meaning of "fraud" includes both actual fraud—an intentional perversion of the truth—and constructive fraud—an act of deception or a misrepresentation without an evil intent. Fraud may also be committed by suppressing facts—silent fraud—where circumstances establish a legal duty to make full disclosure. Such a duty of full disclosure may arise when a party has expressed to another some particularized concern or made a direct inquiry. [*FATCO*, 499 Mich at 106-107 (citations and quotation marks omitted).]

A lender is not required to present evidence of concealed disbursements, shortages, or unpaid prior lien holders in order to recover for a closing agent's fraud or dishonesty if no such restrictions are contained in the CPL. *Id*. at 107.

In the case appealed in Docket No. 311798, there is evidence establishing a genuine issue of material fact concerning whether BOA suffered an actual loss arising out of the fraud or dishonesty of FTC in handling BOA's funds or documents in connection with the closings. There is evidence that FTC or its agents were aware of misrepresentations in documents submitted

to BOA and that BOA's funds were dishonestly or fraudulently distributed. The evidence indicates that the loans at issue were sham transactions that used straw borrowers and artificially inflated property values to induce BOA to lend significant sums of money and that FTC or its agents were aware of the misrepresentations and the fraudulent nature of the transactions at the time of closing.

In particular, with respect to BOA's loan to Jacqueline Buie (the Buie loan or transaction), Buie agreed to purchase 5228 Deer Run Circle, Orchard Lake, Michigan, from Robert Harden for $3.4 million. But Harden purchased that property from Mike Awdish and Raidah Awdish for a significantly smaller sum, $2.1 million, on August 16, 2005, a mere 10 days before the Buie closing. The warranty deeds for both of these closings were notarized by Jeanenne Foster Keely (Foster), who was FTC's employee, and they were received for recording at the register of deeds on the same date. Under FNTIC's own guidelines, those facts suggest that the Buie transaction was a so-called "property flip" transaction, i.e., "a conveyance of real estate from A to B followed very shortly thereafter, or almost simultaneously, with another conveyance at a much higher sale price from B to a third party, C." The $1.3 million increase in the sales price over 10 days and the lack of evidence of financing for the earlier transfer indicated that FNTIC's approval was required for the Buie transaction. Also, FTC prepared title commitments for the Buie loan that listed Harden as the owner of 5228 Deer Run Circle *before* August 16, 2005, i.e., when he did not yet own the property. A request to show an intermediary party such as Harden as the title owner is designated by FNTIC as a "red flag" to alert the closing agent to a possible flip transaction.

Further, the United States Department of Housing and Urban Development settlement statement (HUD-1 settlement statement) prepared by FTC and signed by Foster stated that Buie made a down payment of $651,348.95 at closing. As purported documentation of Buie's down payment, the FTC closing file contained a copy of a purported Charter One cashier's check for $735,000 made out to FTC. A subpoena of Charter One records established that this check was a counterfeit alteration of a check made out to State Farm in the amount of $137.33. According to FTC's ledger and check copies, Harden provided the $651,348.95 down payment listed on the HUD-1 settlement statement as having come from Buie. As part of the Buie closing, FTC issued three checks to Harden in the respective amounts of $651,348.95, $517,584.01, and $2,115,667.04, and Harden then endorsed the check for $651,348.95 back to FTC with the phrase "Buyer Funds" written on the front of the check. The $2,115,667.04 check was endorsed back to FTC with the phrase "Funds to Purchase" written on the front of the check. FTC's owner, Harry Ellman, testified that Harden used the funds from BOA to pay off the prior sellers, the Awdishes.

In short, these facts support inferences that the HUD-1 settlement statement prepared by FTC was falsified with knowledge that the supposed down payment check drawn on Charter One was counterfeit and that Harden purchased the property in a so-called "double escrow" transaction whereby Harden purchased the property from the Awdishes with the funds supplied by BOA to finance Buie's purchase from Harden. FNTIC's own guidelines indicate that such transactions, in which the first transaction is funded by proceeds from the second transaction, are improper unless the first buyer comes to the first transaction

with the funds necessary to close that transaction before the second transaction commences. Ellman admitted that this requirement was not complied with in the Buie transaction.

FTC's ledger also showed a $10,000 disbursement to Sanford M. Hoskow as a consulting fee in the Buie transaction even though Hoskow was not identified on the HUD-1 settlement statement. Ellman admitted that he was aware that Hoskow had been disbarred as an attorney and that he had been warned by Oakland Circuit Court Judge Norman Lippitt in late 2004 or early 2005 that Hoskow had a "nefarious background" and to be "leery or careful" with respect to Hoskow. Ellman also knew that Hoskow was a convicted felon who had served jail time "for something to do with checks." Ellman nevertheless continued to do business with Hoskow after learning of his background, including 97 transactions in which Hoskow received disbursements, some of which were flip transactions.

With regard to BOA's loan to Jon Holmes (the Holmes loan or transaction), Holmes agreed to buy 2785 Cranbrook Ridge Court, Rochester, Michigan, for $5.4 million. BOA agreed to provide a $3.78 million loan for the transaction. The HUD-1 settlement statement signed by Foster indicated that Holmes made a $1,787,824.91 down payment at closing. FTC's closing file contained a copy of a purported cashier's check for $1.8 million made out to FTC as apparent documentation of Holmes's down payment. A subpoena of the bank from which the check was to be drawn indicated that the check was a counterfeit alteration of a $10.00 check. In fact, the receipts and disbursements ledger for the Holmes transaction indicated that the funds for Holmes's purported down payment actually came from one of FTC's own accounts. In addition, FTC's ledger

showed a $10,000 disbursement to Hoskow, and Hoskow was not identified on the HUD-1 settlement statement. Ellman admitted that FTC failed to list other payees on the HUD-1 settlement statement, and this practice was frowned on by 2005 because mortgage fraud was becoming more prevalent.

Ellman testified that it was FTC's practice to deposit a borrower's down payment check into an escrow account and to confirm that the check cleared, and he admitted that this was not done in this case, which was improper. Ellman also acknowledged that all of the funds disbursed in this case were BOA's funds given that no down payments were actually made. Ellman conceded that some employee of FTC must have known that the checks were counterfeit given that the checks were never actually deposited.

This evidence supports a conclusion that FTC fraudulently or dishonestly handled BOA's funds or documents. In the Buie transaction, FTC participated in arranging a flip transaction of the property with BOA's funds used to finance the second sale. That second sale was based on an inflated value of the property, and FTC prepared the warranty deeds for both sales in this flip transaction. FTC also prepared title commitments that listed Harden as the owner before he owned the property, and FTC prepared a HUD-1 settlement statement inaccurately showing a down payment made by Buie. FTC did not attempt to deposit a counterfeit check submitted as a purported down payment for Buie, which was contrary to FTC's normal practice, suggesting knowledge by one or more FTC employees of the fraudulent scheme. FTC made payments to Harden, apparently using BOA's funds meant to finance the second sale, to help Harden pay the sales price for the first sale, in contravention of

FNTIC's own guidelines. There was also a disbursement to Hoskow, a convicted felon who was not identified on the HUD-1 settlement statement. Taken together, these facts support an inference that FTC was aware of, and participated in, the fraudulent scheme, as well as that FTC thereby fraudulently or dishonestly handled BOA's funds or documents in the Buie transaction.

In the Holmes transaction, there was again a counterfeit check in FTC's file as documentation of the purported down payment of the borrower, and FTC never deposited that check as would have been its normal practice, suggesting awareness by one or more FTC employees that the check was counterfeit. The funds for Holmes's supposed down payment actually came from one of FTC's own accounts. There was again a disbursement to Hoskow, who was not identified on the HUD-1 settlement statement, and Ellman admitted that other payees were not identified on the HUD-1 settlement statement. These facts suggest that FTC participated in the scheme and fraudulently or dishonestly handled BOA's funds or documents.

FNTIC likens the facts of this case to those of *New Freedom*, but the evidence in this case suggests that FTC both had knowledge of, and participated in, the fraudulent scheme as described earlier. In *New Freedom*, 281 Mich App at 83, this Court found no evidence that the closing agent committed any fraud or dishonesty in handling the lender's funds or documents because there was no evidence the closing agent was aware at closing that the borrower did not intend to occupy the property and because discrepancies in the HUD-1 settlement statement did not matter given that the document did not belong to the lender. And with respect to another transaction in *New Freedom*, this

Court found no evidence of fraud or dishonesty in handling the lender's funds or documents because there was no evidence that the closing agent was aware of the borrower's false assertion on the loan application that he intended to occupy the property. *Id*. at 84. By contrast, there was extensive evidence here that one or more FTC employees had knowledge of, and participated in, the fraudulent scheme for the reasons discussed earlier at considerable length. *New Freedom* is therefore distinguishable. Given the evidence that these were sham transactions from the outset and that one or more FTC employees participated in the fraudulent schemes, a trier of fact could reasonably conclude that FTC dishonestly or fraudulently handled BOA's funds or documents. See *Walsh Securities, Inc v Cristo Prop Mgt, Ltd*, 858 F Supp 2d 402, 419 (D NJ, 2012), recon gtd on other grounds in an unpublished opinion of the United States District Court for the District of New Jersey, issued August 10, 2012 (Docket No. 97-3496) (finding CPL coverage existed when there was a fraudulent scheme involving a straw buyer and an inflated appraised value of the property resulting in a mortgage loan for an amount far greater than the true value of the property, with full knowledge and participation by the closing attorneys in the fraudulent scheme); *First American Title Ins Co v Vision Mtg Corp, Inc*, 298 NJ Super 138, 144; 689 A2d 154 (1997) (*Vision Mtg*) (the closing agent's fraud eliminated the possibility of recouping a foreclosure loss through a deficiency proceeding against the mortgagor, given that the case involved "a sham transaction from the outset" and there was no bona fide mortgagor, thus triggering CPL liability).[2]

[2] Although this Court is not bound by decisions of federal courts or courts of other states, we may consider them persuasive. *Mettler*

A genuine issue of material fact also exists concerning whether BOA's losses arose out of FTC's fraud or dishonesty. As discussed earlier, the CPLs require FNTIC to reimburse BOA if BOA's loss "arises out of" FTC's fraud or dishonesty in handling BOA's funds or documents. In general, the phrase "arises out of" does not mean proximate cause in the strict legal sense; rather, almost any causal connection will suffice if it is more than merely incidental or fortuitous. See *People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006); *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032, 1033-1035 (2009) (KELLY, C.J., concurring); *Schultz v Blue Cross Blue Shield*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2010 (Docket Nos. 288128, 288224, 288225, and 288423), p 23, citing *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314; 282 NW2d 301 (1979); *Lawyers Title Ins Corp v New Freedom Mtg Corp*, 285 Ga App 22, 30; 645 SE2d 536 (2007) ("[W]here a contract provides that a loss must 'arise out of' a specified act, it 'does not mean proximate cause in the strict legal sense' but instead encompasses 'almost any causal connection or relationship.' "). In this case, a trier of fact could find that a causal connection exists between FTC's fraud or dishonesty and BOA's losses. It is reasonable to infer that if FTC had disclosed the true nature of the transactions, then BOA would not have funded the transactions. Even FTC's owner, Ellman, and its employee, Foster, claimed that they would not have closed the transactions if they had known of the counterfeit checks or the fraudulent nature of the transactions. And this causal connection is not negated by any deficiency in BOA's underwriting process. See *JP Mor-*

Walloon, LLC v Melrose Twp, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008); *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

gan Chase Bank, NA v First American Title Ins Co, 795 F Supp 2d 624, 632-633 (ED Mich, 2011) (stating that a lender's allegedly negligent underwriting is irrelevant in a breach of contract action under a CPL), aff'd 750 F3d 573 (CA 6, 2014); *Lawyers Title Ins Corp*, 285 Ga App at 29-30 (concluding that indemnification was required under a CPL even if the lender's own negligence may have partially caused its loss).

Accordingly, for the foregoing reasons, the trial court erred by granting FNTIC's motion for summary disposition on BOA's breach of contract claim under the CPLs in Docket No. 311798. Genuine issues of material fact exist concerning BOA's breach of contract claim. Therefore, a trial is required.

Next, the trial court in Docket No. 311798 erred by denying BOA's motion for summary disposition concerning FNTIC's counterclaims and affirmative defenses that were based on BOA's allegedly deficient underwriting. In its counterclaims, FNTIC alleged that BOA failed to employ objectively reasonable underwriting standards and that BOA failed to inform FNTIC that the Holmes and Buie loans did not meet objectively reasonable underwriting standards. FNTIC sought to rescind the CPLs on the grounds that BOA or its agents made fraudulent misrepresentations or omissions or, alternatively, on the basis of contractual mistake related to BOA's purported failure to use objectively reasonable underwriting standards. FNTIC also sought a declaratory judgment that FNTIC was not liable to BOA under the CPLs because of BOA's failure to follow objectively reasonable underwriting standards, as well as because BOA failed to give prompt notice of its claims and thereby prejudiced FNTIC. Further, in its affirmative defenses to BOA's complaint, FNTIC asserted that BOA's claims were

barred by BOA's contributory or comparative negligence. The affirmative defenses also sought rescission on the same grounds as the counterclaim and asserted that BOA failed to satisfy the duty of good faith and fair dealing given the failure to use objectively reasonable underwriting standards.

FNTIC's counterclaims and affirmative defenses based on BOA's allegedly deficient underwriting fail as a matter of law. "Rescission of a contract is an equitable remedy to be exercised in the sound discretion of the trial court." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 587; 458 NW2d 659 (1990). In order to rescind a contract on the basis of fraudulent inducement, a party must show that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006) (citations and quotation marks omitted).]

FNTIC is unable to satisfy the materiality requirement because BOA's underwriting practices are not material to the terms of the CPLs. See *Fifth Third Mtg Co v Chicago Title Ins Co*, 758 F Supp 2d 476, 487-488 (SD Ohio, 2010) (*Fifth Third I*); *JP Morgan Chase*, 795 F Supp 2d at 632-633.

In *Fifth Third I*, 758 F Supp 2d at 486, the federal district court noted that the terms of the title policy at issue in that case did not mention underwriting practices or requirements. Therefore, the plaintiff-lender's underwriting guidelines were irrelevant under the

terms of the policy. *Id*. Nonetheless, the defendant-title insurer filed a rescission counterclaim alleging that the plaintiff defrauded the defendant by implicitly representing that the plaintiff followed reasonable underwriting standards. *Id*. at 487. The federal district court reasoned that the title policy did not mention underwriting or require the plaintiff to provide documentation of its underwriting standards. *Id*. The court found that if the underwriting standards were material to the defendant's decision to issue the policy, then the policy would have expressly provided that the underwriting would be subject to the defendant's approval. *Id*. at 488. The court therefore granted summary judgment to the plaintiff with respect to the defendant's counterclaim for rescission. *Id*. In *Fifth Third Mtg Co v Chicago Title Ins Co*, 692 F3d 507, 511, 513 (CA 6, 2012) (*Fifth Third II*), the federal appellate court affirmed the decision in *Fifth Third I*, concluding that the title policy said nothing about the plaintiff's underwriting obligations and noting that the alleged misrepresentation in failing to disclose underwriting practices was not written into the policy itself. See also *JP Morgan Chase*, 795 F Supp 2d at 632-633 (concluding that the title insurer could not avoid its indemnification obligations under a CPL by arguing that the lender was negligent in underwriting the loan because such negligence was irrelevant and contributory negligence was not a valid defense in a breach of contract case). In the present case, the CPLs do not mention BOA's underwriting practices. Therefore, BOA's underwriting was not material to the terms of the CPLs. FNTIC consequently cannot establish the materiality element required for rescission on the basis of fraudulent inducement.

FNTIC's reliance on the implied covenant of good faith and fair dealing is similarly misplaced. "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) (citation and quotation marks omitted). "However, 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). Moreover, the failure to refer to underwriting guidelines in a title policy does not constitute a gap to be filled by the implied duty of good faith and fair dealing when the policy is clear and specific regarding the parties' rights and obligations. *Fifth Third I*, 758 F Supp 2d at 490. FNTIC fails to identify any lack of clarity or specificity in the CPLs that warrants resort to the implied covenant in this case. See also *Van Arnem Co v Mfr Hanover Leasing Corp*, 776 F Supp 1220, 1223 (ED Mich, 1991) ("The implied covenant of good faith under Michigan law, as well as under the law of other jurisdictions having persuasive effect, neither overrides nor replaces any express contractual term.").

A contract may also be rescinded on the basis of a mutual mistake of the parties. *Shell Oil Co v Estate of Kert*, 161 Mich App 409, 421; 411 NW2d 770 (1987). A mutual mistake is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). "A court need not grant rescission in every case in which the mutual mistake relates to a basic assumption and materially affects the agreed performance of the parties." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). In the present case, there is

no evidence that the parties shared and relied on a mutual mistake concerning BOA's underwriting standards or that this mistake affected the substance of the transaction. Even accepting FNTIC's claim that it assumed BOA had agreed to use different or more stringent underwriting standards, there is no evidence from which to conclude that BOA shared this belief or that it affected the substance of the parties' transaction. Hence, there is no basis to rescind the CPLs on the ground of a mutual mistake of the parties. Accordingly, BOA is entitled to summary disposition with respect to FNTIC's counterclaim for rescission.

Summary disposition for BOA is also required for the portion of FNTIC's declaratory judgment counterclaim that alleges the same underlying theory as the rescission counterclaim, i.e., that BOA failed to employ objectively reasonable underwriting standards. Summary disposition shall also be granted to BOA on FNTIC's fifth affirmative defense asserting that FNTIC is entitled to rescind the CPLs because of fraudulent misrepresentations or contractual mistake, FNTIC's eleventh affirmative defense asserting that BOA failed to satisfy the duty of good faith and fair dealing when it approved loans that did not meet objectively reasonable underwriting standards, and FNTIC's twelfth affirmative defense asserting that BOA's claims are barred by contributory or comparative negligence. See *JP Morgan Chase*, 795 F Supp 2d at 633 (noting in the context of CPL claims that "contributory negligence is not a valid defense in a breach of contract case"), citing *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich App 505, 509; 381 NW2d 757 (1985).

BOA is also entitled to summary disposition with respect to the portion of FNTIC's declaratory judgment counterclaim asserting that BOA failed to provide

prompt notice of its damages claims to FNTIC as required by the CPLs and that FNTIC was thereby prejudiced. Paragraph E of the "conditions and exclusions" section of the CPLs provides as follows: "Claims shall be made promptly to [FNTIC] . . . . When the failure to give prompt notice shall prejudice [FNTIC], then liability of [FNTIC] hereunder shall be reduced to the extent of such prejudice."

> Provisions in liability insurance contracts requiring the insured to give the insurer immediate or prompt notice of accident or suit are common, if not universal. The purpose of such provisions is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. [*Wendel v Swanberg*, 384 Mich 468, 477; 185 NW2d 348 (1971).]

It is the insurer's burden to demonstrate prejudice arising from the lack of prompt notice. *Id*. at 478. "[P]rejudice will be found if the insurer demonstrates that a delay in providing notice materially impaired the insurer's ability to contest its liability to an insured." *Triple Investment Group, LLC v Hartford Steam Boiler Inspection & Ins Co*, 71 F Supp 3d 733, 740 (ED Mich, 2014). The insurer is not required to prove that it would have avoided liability but for the delay. *Id*.

> An insurer must do more than simply claim that evidence was lost, physically altered, or has otherwise become unavailable and that witnesses have died, disappeared, or their memories have faded. Instead, an insurer must establish what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inadequate.
>
> The question of prejudice is generally to be left to the trier of fact. However, where the facts are so clear that one conclusion only is reasonably possible, the question is one of law.

> In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, courts consider whether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (5) to contest its liability to its insured. [*Id*. (citations and quotation marks omitted).]

In this case, the parties agree that BOA became aware of the fraudulent scheme at some point in 2006. The parties disagree about when BOA provided notice of its claim to FNTIC. BOA argues that it provided notice of its CPL claims to FNTIC in February 2008. FNTIC argues, however, that it did not receive notice until BOA commenced this action on October 20, 2010. FNTIC acknowledges that BOA provided written notice of potential claims to FNTIC in February 2008 but asserts that BOA never provided further details regarding its potential claims in response to FNTIC's April 15, 2008 (for the Buie loan) and June 12, 2008 (for the Holmes loan) written requests for more complete descriptions of the basis of BOA's claims. However, FNTIC's own letters from April and June 2008 reflect that BOA's February 2008 claim letters provided notice of both the property and the borrower at issue for each loan, that BOA was alleging that FTC failed to comply with BOA's written instructions, and that FNTIC committed fraud or dishonesty in handling BOA's funds. FNTIC fails to articulate why this was insufficient to provide the notice required by the CPLs. We conclude that BOA's February 2008 claim letters provided the requisite notice of BOA's claims to FNTIC such that FNTIC could commence its investigation.

FNTIC has failed to demonstrate a genuine issue of material fact about whether it was prejudiced by BOA's delay in providing notice. In his deposition, FNTIC's corporate representative, David Golub, referred vaguely to the fading of memories and the loss of documents and asserted a lack of knowledge about whether the brokers who produced the loans were contractually obligated to repurchase the loans. FNTIC suggests this loss of documents and fading of memories may have impaired FNTIC's right of subrogation under the CPLs. FNTIC also notes the deposition testimony of BOA's corporate representative, Vicky Olson, indicating that BOA's original loan files and the files of its mortgage brokers had been lost. FNTIC's assertions fail to demonstrate with a sufficient level of specificity "what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inadequate." *Triple Investment Group, LLC*, 71 F Supp 3d at 740 (citation and quotation marks omitted). In addition, the purported failure of BOA's senior underwriter, Shirley Robert, to remember at deposition certain aspects of BOA's underwriting training or procedures does not establish prejudice given the irrelevancy of BOA's underwriting practices, as explained earlier. Accordingly, BOA is entitled to summary disposition on this aspect of FNTIC's declaratory judgment counterclaim.

In Docket No. 316538, BOA argues that the trial court erred by denying BOA's motion for summary disposition on its CPL claims against FNTIC. FNTIC, on the other hand, contends that BOA's CPL claims fail as a matter of law, thereby entitling FNTIC to summary disposition in its favor on this basis even if, as discussed later, this Court reverses the trial court's determination regarding the applicability of the full

credit bid rule on the basis of which the trial court granted summary disposition to FNTIC. We conclude that genuine issues of material fact exist precluding summary disposition for either party on BOA's CPL claims. The language of the CPLs issued by FNTIC's predecessor, LTIC, in Docket No. 316538 is identical in all relevant respects to the language of the CPLs issued by FNTIC in Docket No. 311798. There is evidence demonstrating a genuine issue of material fact concerning whether the closing agent in Docket No. 316538, Wolverine Title Agency, Inc. (WTA), was aware of and participated in the fraudulent scheme and whether BOA sustained an actual loss arising out of WTA's fraud or dishonesty in handling BOA's funds or documents.

With respect to BOA's loan to Giles Marks (the Marks loan or transaction), WTA closed Marks's purchase from Michigan Land Development (MLD) of 9430 Highland Court, Davison, Michigan, in January 2006 for a purported sales price of $1.15 million with BOA loaning $920,000 to fund the purchase. This property was purported to be Marks's intended residence. The HUD-1 settlement statement indicated that Marks made a down payment of $235,086.59. The loan went into default because the loan payment due on December 1, 2006, was not made. Warranty deeds reflect that this transaction was a same-day property flip. MLD purchased the property from Michael Jarvinen and Lamis Jarvinen on January 11, 2006, for $548,000. On the same date, MLD sold the property to Marks for $1.15 million. Foster, a WTA employee, notarized both warranty deeds in the flip transaction. WTA prepared a title commitment dated August 8, 2005, signed by WTA's owner, Amira Butler, showing MLD as the owner of the property even though the Jarvinens owned the property on that date and MLD

did not obtain title to this property until January 11, 2006, the date of the Marks closing. Butler invoked the Fifth Amendment privilege against compelled self-incrimination when questioned at deposition about WTA's knowledge of the same-day property flip.

In an affidavit, Marks explained that he was approached by loan officer James Lamar about buying this property as an investment opportunity. Marks did not intend to occupy the property and was told that he would not be responsible for making loan payments. Marks did not make the down payment shown on the HUD-1 settlement statement. At his deposition, Marks confirmed that he had provided the facts stated in his affidavit. Butler again invoked the Fifth Amendment when questioned about these matters. The facts concerning this fraudulent scheme are also set forth in a felony information against Thomas Keller, the principal of MLD, and a guilty plea agreement filed in the United States District Court for the Eastern District of Michigan, in which Keller pleaded guilty to one count of financial institution fraud, 18 USC 1344. The plea agreement set forth the following factual basis for the plea:

> [MLD] purported to be a real estate investment company doing business in the State of Michigan. Defendant Thomas Keller operated MLD and used it to facilitate the purchase and sale of properties with fraudulently inflated appraised values and false buyer asset and income information.
>
> From in or about December 2005 through January 2006, Defendant Thomas Keller devised a scheme to defraud Bank of America, a financial institution in the Eastern District of Michigan. On January 11, 2006, Keller used MLD to purchase 9430 Highland Court in Davison, Michigan for $548,000. On that same day, using a false and inflated appraisal for the property, Keller sold 9430

> Highland Court to a straw buyer for $1,150,000. In addition to the inflated appraisal Keller help[ed] arrange for the straw buyer's asset and income information to be grossly inflated on the loan application. The lending institution was Bank of America which relied on the material and false appraisal and asset and income information in approving and disbursing the loan. The resulting illegally gained proceeds were split between Keller and others involved in the fraud.
>
> Although Keller is pleading guilty to one instance of financial institution fraud, he admits that he was involved in other instances of fraudulent conduct which have been used as relevant conduct in calculating his sentencing guidelines and for which he will be responsible for paying restitution. The parties agree that the fraud loss will be more than $1 million and less than $2.5 million.

WTA's disbursement summary indicated that Butler's company, Centurion Land Management (CLM), was paid $236,586.59 as part of the Marks closing. This disbursement was not shown on the HUD-1 settlement statement. Butler invoked the Fifth Amendment in response to deposition questions about this payment to CLM. An appraisal later obtained by BOA indicated that the true value of the property on the date of the origination appraisal was $370,000. BOA sold the property for $189,000 in April 2010 in an effort to mitigate its losses.

As for BOA's loan to Nicklas Williams (the Williams loan or transaction), on January 13, 2006, WTA closed Williams's purchase of 3231 Rivershyre Parkway, Davison, Michigan, from MLD for the supposed sales price of $1.2 million, with BOA loaning $960,000 to fund the purchase. The HUD-1 settlement statement indicated that Williams made a down payment of $244,776.71. Williams signed a document indicating that he intended to occupy the property. This transaction was supported by an appraisal that valued the

property at $1.2 million. The Williams loan went into default because the November 1, 2006 loan payment was not made.

Public records reflect that the Williams transaction was a same-day property flip as well. Warranty deeds show that MLD purchased the property from Brad Townsend and Kyra Townsend for $469,000 on January 13, 2006; on the same date, MLD sold the property to Williams for $1.2 million. WTA assisted in the preparation of both warranty deeds, with Foster notarizing both deeds. WTA prepared a title commitment for this property, signed by Butler and dated December 12, 2005, showing MLD as the owner of the property, even though the Townsends owned the property on that date, and MLD did not obtain title to the property until January 13, 2006. Butler invoked the Fifth Amendment when questioned about this matter. WTA's disbursement summary indicates that Butler's company, CLM, was paid $281,276.71 as part of the Williams transaction, but this payment was not shown on the HUD-1 settlement statement. The disbursement summary also reflects other payments by WTA that are not shown on the HUD-1 settlement statement, including a payment of $20,000 to WTA denoted as "3 MOS PAYMENTS." Williams owed $19,646.70 to BOA for the first three months of loan payments. Again, Butler invoked the Fifth Amendment when questioned about these payments.

In his deposition, Williams admitted that the information about his income and assets on the loan application was overstated, that he only saw the property one time and never entered it, that he viewed the transaction as an investment, that he was paid $20,000 to make loan payments, and that he did not have the money needed to make the down payment.

Butler invoked the Fifth Amendment when questioned about these facts. BOA ultimately obtained another appraisal indicating that the property was worth $385,000 on the date of the origination appraisal. After foreclosure, BOA sold the property for $190,000 in an effort to mitigate its losses.

This evidence presents a material factual dispute concerning whether WTA fraudulently or dishonestly handled BOA's funds or documents. The Marks transaction was a same-day property flip with an inflated appraisal, a significantly higher sum for the second sale, and misrepresentations on the HUD-1 settlement statement indicating that Marks made a substantial down payment. WTA assisted in preparing the warranty deeds for both sides of the flip transaction, with Foster notarizing both deeds. WTA prepared a title commitment incorrectly showing MLD as the owner of the property when the Jarvinens still owned it. Another participant in the scheme has pleaded guilty to financial institution fraud in relation to this loan. WTA disbursed $236,586.59 to Butler's company as part of the Marks transaction, a disbursement that was not shown on the HUD-1 settlement statement.

Likewise, the Williams transaction was a same-day property flip with an inflated appraised value for the property and overstated information concerning Williams's income and assets on the loan application. Williams did not intend to live on the property as his primary residence. WTA prepared the warranty deeds for both sides of the flip transaction, with Foster notarizing both deeds, and WTA prepared a title commitment that incorrectly listed MLD as the owner of the property when it was still owned by the Townsends. WTA made disbursements that were not shown on the HUD-1 settlement statement, including a disburse-

ment of $281,276.71 to Butler's company and a disbursement to WTA of $20,000 to pay the first three months of Williams's loan payments.

Although the other evidence described earlier suffices to support BOA's claims, we note that, in a civil action, Butler's invocation of the Fifth Amendment privilege against compulsory self-incrimination gives rise to a legitimate inference that Butler was engaged in criminal activity. *Baxter v Palmigiano*, 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976); *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995); *Davis v Mut Life Ins Co of New York*, 6 F3d 367, 384 (CA 6, 1993). BOA is therefore entitled to an adverse inference that WTA was complicit in the fraudulent scheme given Butler's assertion of the Fifth Amendment.

Taken together, the evidence supports an inference that WTA was aware of and participated in the fraudulent scheme for both the Marks and the Williams transactions, and that WTA thereby fraudulently or dishonestly handled BOA's funds or documents in those transactions. *New Freedom* is distinguishable because the evidence here suggests that WTA had knowledge of and participated in the fraudulent schemes in the ways described earlier in this opinion. Given the evidence that these were sham transactions from the outset and that WTA personnel participated in the fraudulent schemes, a trier of fact could reasonably conclude that WTA dishonestly or fraudulently handled BOA's funds or documents. See *Walsh Securities, Inc*, 858 F Supp 2d at 419; *Vision Mtg Corp, Inc*, 298 NJ Super at 144. And a material factual dispute exists regarding whether BOA's losses arose out of WTA's fraud or dishonesty, i.e., whether there is a causal connection between WTA's fraud or dishonesty

and BOA's losses. See *Johnson*, 474 Mich at 100-101; *Scott*, 483 Mich at 1033-1035 (KELLY, C.J., concurring); *Lawyers Title Ins Corp*, 285 Ga App at 30. It is reasonable to infer that if WTA had disclosed the true nature of the transactions, then BOA would not have funded the transactions. As discussed, such a causal connection is not negated by any deficiency in BOA's underwriting process. See *JP Morgan Chase*, 795 F Supp 2d at 632-633; *Lawyers Title Ins Corp*, 285 Ga App at 29-30.

Accordingly, for the foregoing reasons, the trial court erred by granting FNTIC's motion for summary disposition on BOA's breach of contract claim under the CPLs in Docket No. 316538. Genuine issues of material fact exist concerning BOA's breach of contract claim. Therefore, a trial is required.

Although BOA presented sufficient evidence to avoid summary disposition in favor of FNTIC on BOA's CPL claims, we are not convinced by BOA's argument in Docket No. 316538 that BOA is entitled to summary disposition in its favor on its CPL claims. It is for the trier of fact to assess credibility; a jury may choose to credit or discredit any testimony. *Taylor v Mobley*, 279 Mich App 309, 314; 760 NW2d 234 (2008), citing *Kelly v Builders Square, Inc*, 465 Mich 29, 38-39; 632 NW2d 912 (2001). That is, a jury is free to disbelieve and to discredit the testimony offered in support of a plaintiff's case. *Taylor*, 279 Mich App at 314. A trial court may not weigh evidence when ruling on a summary disposition motion, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005), or make credibility determinations, *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007). As discussed, much of the evidence that supports BOA's claims is composed of witness testimony. It

is for the trier of fact to decide whether to credit this testimony. Also, causation is generally a question for the trier of fact, although it may be decided by the court as a matter of law if no issue of material fact exists. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). BOA fails to demonstrate that there are no material issues of fact concerning whether CPL coverage is triggered in this case. It is for the trier of fact to assess the evidence at trial and to determine whether BOA's losses arose out of WTA's fraud or dishonesty in handling BOA's funds or documents; the issue is not amenable to resolution as a matter of law. Accordingly, BOA is not entitled to summary disposition on its CPL claims.

In Docket No. 316538, FNTIC suggests other alternative grounds on which to grant summary disposition to FNTIC. Because, as discussed later, the trial court's grant of summary disposition to FNTIC on the basis of the full credit bid rule must be reversed, and because FNTIC raised in the trial court the alternative grounds that it now asserts on appeal, we will address those alternative grounds for granting summary disposition to FNTIC. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (a litigant who raised an issue in the trial court should not be punished for the trial court's failure to address the issue).

FNTIC's first alternative ground for granting summary disposition in its favor is that BOA suffered no actual loss because it sold the loans "without recourse" to third-party investors on the secondary mortgage market. FNTIC notes that BOA relinquished "all of its 'right, title, and interest' " in the mortgage loans. FNTIC argues that the mortgage loan purchase agreements (MLPAs) did not require BOA to repurchase the

loans because of a title agent's fraud; therefore, FNTIC reasons, any loss BOA suffered did not arise out of an act protected by the CPLs. FNTIC suggests that BOA voluntarily repurchased the loans from the third-party investors and that any loss was thus because of BOA's own voluntary actions. FNTIC contends that BOA cannot recover payments that BOA voluntarily made in a breach of contract action.

In responding to this argument in the trial court, BOA explained that it repurchased the loans from the third-party investors after discovering that the loans were fraudulent because BOA was contractually obligated to do so. Under the MLPAs, BOA sold the loans to Banc of America Funding Corporation (BAFC). As part of the MLPAs, BOA made representations and warranties, including that there was "no default, breach, violation or event of acceleration existing under the [mortgages or mortgage notes]." BOA further explained that it was required to cure the breach or repurchase a defective mortgage loan when it discovered a breach of the representations and warranties in the MLPAs that had a material adverse effect on the value of the loan. BAFC then sold "without recourse" all of BAFC's right, title, and interest in the loans that it purchased from BOA, including BAFC's rights under the MLPAs, to trustees for the benefit of certificate holders of mortgage-backed securities. The pooling and servicing agreements (PSAs) governing the sales of the loans by BAFC to the trustees contain language effectively providing that the representations and warranties in the MLPAs survived delivery of the mortgage files to the trustees, thereby carrying over BOA's obligation to repurchase defective mortgage loans after the loans were sold to the trustees under the PSAs.

In May 2007, BOA referred the loans at issue for further review after learning of potential fraud. Less than 30 days after this internal review was initiated, BOA repurchased the loans at issue. Judy Lowman, who was, at the time of these transactions, a BOA vice-president transaction manager working with mortgage-backed securities, testified that BOA did not have a choice about whether to repurchase the loans; she indicated that the repurchase was because of a breach of the representations in light of the fraud in connection with the origination of the loans and that BOA was contractually obligated to repurchase the loans. BOA prepared repurchase reports for each of the loans, which also indicate that BOA repurchased the loans because of the fraudulent nature of the loans. The repurchase reports set forth BOA's internal findings that the loans were fraudulent and indicate that Lowman agreed that the loans should be repurchased. After Lowman authorized the repurchases, a BOA employee calculated the amounts owed to the investors, and the amounts were disbursed to the investors.

FNTIC identifies no evidence and presents no argument disputing that BOA repurchased the loans at issue after learning of the fraud associated with those loans. FNTIC instead contends that BOA voluntarily repurchased the loans and, therefore, cannot recover in this breach of contract action for payments that it voluntarily made. But the evidence summarized earlier provides support for BOA's contention that it repurchased the defective loans because of what BOA understood to be its contractual obligation to do so. Moreover, in arguing that BOA suffered no actual loss because it voluntarily repurchased the loans, FNTIC again fails to appreciate that the "arises out of" language in the CPLs does not require proximate cause in the strict legal sense and that, rather, almost any

causal connection that is more than incidental or fortuitous is sufficient. *Johnson*, 474 Mich at 100-101; *Scott*, 483 Mich at 1033-1035 (KELLY, C.J., concurring); *Lawyers Title Ins Corp*, 285 Ga App at 30. As discussed earlier, evidence exists of a causal connection between WTA's fraud or dishonesty and BOA's losses. The fact that BOA sold the loans and then later repurchased the loans after concluding that it was contractually obligated to do so does not require a conclusion as a matter of law that the requisite causal connection has been negated or rendered incidental or fortuitous. See generally *Holton*, 255 Mich App at 326 (stating that causation is typically a question for the trier of fact). FNTIC cites no authority establishing that the existence of other possible causes precludes a conclusion that a lender's losses arose out of a closing agent's fraud or dishonesty under a CPL claim. Moreover, it has been recognized that an entity may sustain actual losses for the purpose of CPL claims if it repurchased loans that it had previously sold. See *Walsh Securities, Inc*, 858 F Supp 2d at 419 (noting, in the context of CPL claims, that the plaintiff, a mortgage loan wholesaler, "would only have sustained actual losses if it repurchased the twenty-one aforementioned mortgage loans"). Accordingly, FNTIC has failed to establish that BOA's sale and subsequent repurchase of the loans requires a conclusion as a matter of law that BOA suffered no actual losses that arose out of WTA's fraud or dishonesty.

As a related alternative ground for granting summary disposition in its favor, FNTIC argues that BOA lacks standing to make claims under the CPLs because BOA sold its interest in the CPLs to investors, and no evidence exists that BOA ever repurchased its interest in the CPLs. We disagree. "[A] litigant has standing whenever there is a legal cause of action." *Lansing Sch*

Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 372; 792 NW2d 686 (2010). FNTIC fails to explain why, even if BOA had not repurchased the loans, BOA would lack standing to pursue the CPL claims on behalf of the third-party investors in its capacity as a servicer of the loans. FNTIC identifies no language in the CPLs that required BOA to retain its loans in order to bring claims under the CPLs. Also, BOA repurchased the loans. FNTIC asserts that BOA's repurchase of the loans did not return to BOA the interest in the CPLs, but FNTIC fails to cite authority establishing that the interest in a CPL is not reacquired when a loan is repurchased.

> A party may not leave it to this Court to search for authority to sustain or reject its position. 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 issues cursory treatment with little or no citation of supporting authority. Argument must be supported by citation to appropriate authority or policy. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. [*Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (citations and quotation marks omitted).]

Missing from FNTIC's cursory argument is any articulation of why BOA's repurchase of the loans excluded any rights under the CPLs that had been transferred when BOA sold the loans. There is no evidence that the trustees retained any rights associated with the loans after BOA repurchased the loans, such as the ability to pursue CPL claims against FNTIC after BOA repurchased the loans. No document has been presented explicitly saying that the interest in the CPLs was transferred back to BOA, but this does not preclude a conclusion that, in these circumstances,

BOA reacquired any rights under the CPLs when it repurchased the loans. Cf. *Burkhardt v Bailey*, 260 Mich App 636, 658; 680 NW2d 453 (2004) (stating that if "a legal instrument fails to create an assignment but the circumstances clearly establish the assignor's intent to presently transfer an interest, an equitable assignment may arise").

Next, FNTIC asserts an alternative ground for denying BOA's request for summary disposition in Docket No. 316538: FNTIC was prejudiced by BOA's failure to provide prompt notice of its claims as required by the CPLs. This issue is not properly before this Court because FNTIC did not file a cross-appeal and is requesting greater relief than it received in the trial court. The trial court dismissed FNTIC's counterclaims, which included FNTIC's declaratory judgment counterclaim asserting, in relevant part, that FNTIC was prejudiced by BOA's failure to provide prompt notice of its CPL claims. Although an appellee need not file a cross-appeal in order to assert an alternative ground for affirmance, "an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal." *ABATE v Public Serv Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991). In this argument, FNTIC is effectively seeking to reverse in part the trial court's dismissal of FNTIC's declaratory judgment counterclaim, which would thereby result in a decision more favorable to FNTIC than was rendered by the trial court. Therefore, because FNTIC did not file a cross-appeal, FNTIC may not properly seek a partial reversal of the order dismissing its counterclaims by making the argument at issue.

But, even if this argument were properly before this Court, we would conclude that FNTIC's argument is

devoid of merit. Condition and Exclusion (F) of the CPLs in Docket No. 316538 contains the following notice provision: "Claims shall be made promptly to [FNTIC's predecessor, LTIC] . . . . When the failure to give prompt notice shall prejudice [LTIC], the liability of [LTIC] hereunder shall be reduced to the extent of such prejudice." As discussed earlier, it is FNTIC's burden to demonstrate prejudice arising from the lack of prompt notice. *Wendel*, 384 Mich at 478.

> An insurer must do more than simply claim that evidence was lost, physically altered, or has otherwise become unavailable and that witnesses have died, disappeared, or their memories have faded. Instead, an insurer must establish what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inadequate. [*Triple Investment Group, LLC*, 71 F Supp 3d at 740.]

FNTIC argues that BOA waited more than four years after learning of the alleged fraud to notify FNTIC of the CPL claims. In suggesting that it was prejudiced, FNTIC refers to BOA's destruction of its original loan files, the borrowers' destruction of their copies of documents, the cessation of operations by WTA and by BOA's broker, the disappearance of WTA's original files for these transactions, and the deaths of one LTIC employee and one WTA employee. FNTIC has failed to demonstrate a genuine issue of material fact that it was prejudiced by BOA's delay in providing notice. FNTIC asserts in a conclusory fashion that the loss of evidence and deaths of witnesses have prejudiced FNTIC's ability to investigate liability and damages and impaired its ability to evaluate or settle BOA's claims. FNTIC's assertions fail to demonstrate with a sufficient level of specificity "what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inad-

equate." *Id*. Accordingly, BOA was properly granted summary disposition on the aspect of FNTIC's counterclaim asserting prejudice arising from the alleged failure to give prompt notice.

FNTIC also argues that BOA impaired FNTIC's right of subrogation by failing to confirm the value of the properties and the borrowers' ability to repay the loans and by approving the loans without independently verifying the accuracy of the inflated appraisals. Condition and Exclusion (B) of the CPLs provided that FNTIC's predecessor, LTIC, was subrogated to all rights and remedies that BOA would have had and provided for the reduction of LTIC's liability to the extent that BOA knowingly and voluntarily impaired the value of the subrogation right. FNTIC fails to cite any pertinent authority in support of its argument on this issue and also fails to present an argument that BOA *knowingly and voluntarily* impaired the subrogation right as required to reduce FNTIC's liability under the language of the CPLs. FNTIC's cursory appellate presentation results in abandonment of this issue. *Peterson Novelties, Inc*, 259 Mich App at 14. In any event, FNTIC's argument is devoid of merit. There is no evidence that BOA *knowingly and voluntarily* impaired the value of FNTIC's subrogation right. BOA's purported failure to confirm the value of the properties or the borrowers' ability to repay the loans constituted at most mere negligence. FNTIC's suggestion that the value of its subrogation right was impaired because BOA made full credit bids for the properties, thereby precluding FNTIC from pursuing deficiency judgments against the borrowers, is unsupported. FNTIC identifies no evidence that the borrowers possessed assets from which any deficiency judgments could be collected. It is therefore groundless for FNTIC to assert

that BOA's full credit bids impaired the value of FNTIC's subrogation right.

III. FULL CREDIT BID RULE

Next, BOA argues in Docket Nos. 311798 and 316538 that the trial court in each case erred by concluding that the full credit bid rule barred one or both of BOA's breach of CPL claims. We agree.

Before addressing the substance of this issue, we note that in Docket No. 316538, the trial court had initially rejected FNTIC's argument that the full credit bid rule applied, but later revisited that determination and agreed with FNTIC's argument. BOA contends that the trial court lacked authority to do this because the trial court had already denied both FNTIC's motion for summary disposition on this issue and FNTIC's motion for reconsideration of that decision. But we agree with FNTIC that the trial court had authority to revisit its earlier determination concerning the applicability of the full credit bid rule. MCR 2.604(A) provides that "an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties." "As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). A party is permitted to file more than one motion for summary disposition. MCR 2.116(E)(3); *Dep't of Social Servs v Baayoun*, 204 Mich App 170, 176-177; 514 NW2d 522 (1994). The denial of

a motion for summary disposition does not preclude such a motion on the same ground from being granted later in the same case. See *Goodrich v Moore*, 8 Mich App 725, 728; 155 NW2d 247 (1967). In this case, although the trial court exhibited a lack of awareness that it had previously denied FNTIC's motion for reconsideration of the order denying FNTIC's first motion for summary disposition, the trial court nonetheless had authority to revisit its previous determination regarding the applicability of the full credit bid rule. A final judgment had not yet been entered, and FNTIC had filed another motion for summary disposition again raising the issue of the full credit bid rule as permitted by court rule. Consequently, the trial court possessed authority to revisit the issue.

Nevertheless, we agree with BOA that the trial courts in Docket Nos. 311798 and 316538 erred by concluding that the full credit bid rule barred some of BOA's breach of CPL claims. Our Supreme Court recently provided guidance in this area of the law. In *FATCO*, 499 Mich at 88-89, our Supreme Court explained the full credit bid rule as follows:

> A mortgagee who bids on the property at a foreclosure sale is not required to bid the full amount of the debt. If a mortgagee bids a lower amount, it may then pursue a deficiency judgment against the debtor, subject to the limitations set forth in the anti-deficiency statute [MCL 600.3280]. However, a mortgagee can make a full credit bid—i.e., a credit bid in an amount equal to the unpaid principal and interest of the mortgage debt, together with costs, fees, and other expenses of the foreclosure. If a mortgagee's full credit bid is successful, i.e., results in the acquisition of the property, the lender pays the full outstanding balance of the debt and costs of the foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note.

> Under the full credit bid rule, a lender who takes title following a full credit bid is precluded for purposes of collecting its debt from later claiming that the property is actually worth less than the bid. This is because the mortgagee who enters such a bid is deemed to have irrevocably warranted that the value of the security foreclosed upon was equal to the outstanding indebtedness and not impaired. Thus, the full credit bid rule makes a properly conducted nonjudicial foreclosure sale the dispositive device through which to resolve the question of value. And, in its most direct application, the rule bars a mortgagee who takes title at a nonjudicial foreclosure sale following a full credit bid from pursuing a deficiency judgment against the mortgagor. [Citations and quotation marks omitted.]

In *FATCO*, our Supreme Court held "that the *New Freedom* panel erred to the extent it held that the full credit bid rule bars contract claims against nonborrower third parties, such as defendants in this case. Therefore, the Court of Appeals in the instant case erred by concluding that plaintiff's full credit bids barred its contract claims against the nonborrower third-party defendants." *Id*. at 80. Our Supreme Court in *FATCO* further explained:

> [T]he full credit bid rule is related to the anti-deficiency statute, and its purpose is merely to resolve the question of the value of the property for purposes of determining whether the mortgage debt was satisfied. It is not concerned with the relationship between the lender and third parties and was simply not intended to cut off all remedies a mortgagee might have against nonborrower third parties.
>
> * * *
>
> In sum, although the full credit bid rule is not a creature of statute, we are cognizant of its relationship to the foreclosure by advertisement and anti-deficiency statutes. Those statutes are carefully designed to govern the

> relationship between, and establish the rights and liabilities of, the mortgagee and mortgagor—not nonborrower third parties. . . . [W]e conclude that there is no justification for extending the protections of the rule to alter the contractual rights and liabilities between a mortgagee and nonborrower third parties. Therefore, we hold that the full credit bid rule does not bar contract claims by a mortgagee against nonborrower third parties, and we overrule *New Freedom* to the extent that it conflicts with our decision today. [*Id*. at 96, 98-99.]

In Docket No. 311798, the trial court partially premised its grant of summary disposition to FNTIC on the fact that BOA made a full credit bid in the Buie transaction, and in Docket No. 316538, the trial court likewise granted summary disposition to FNTIC on the ground that BOA made full credit bids in the Marks and Williams transactions. In other words, the trial court in each lower court action applied the full credit bid rule to bar one or both of BOA's CPL claims. As the quotations from *FATCO* reflect, however, our Supreme Court has now clarified that the full credit bid rule is inapplicable to a mortgagee's claims against nonborrower third parties. Indeed, the claims at issue in the present cases, i.e., breach of CPL claims against a title insurer related to a closing agent's fraud or dishonesty, were among the types of claims at issue in *FATCO* and with respect to which our Supreme Court held that the full credit bid rule was inapplicable. See *FATCO*, 499 Mich at 98-99. Therefore, the trial courts in the present cases erred by holding that some of BOA's breach of CPL claims against FNTIC were barred by the full credit bid rule.

IV. CASE EVALUATION, ATTORNEY FEES, AND COSTS

In light of our resolution of the earlier issues, we need not address the substance of the remaining issues

raised by BOA on appeal, which are raised in Docket Nos. 312426 and 313797, and which arise from the same lower court file as Docket No. 311798. Specifically, BOA argues that the trial court erred by striking the case evaluation award. The trial court's decision to strike the case evaluation award was premised on the fact that it had granted summary disposition to FNTIC with respect to BOA's claims against FNTIC and its view that it was, therefore, inappropriate for the case evaluation to have been held on the dismissed claims. Because we have concluded that the trial court erred by granting summary disposition to FNTIC, it follows that the trial court's decision to strike the case evaluation award premised on what we have concluded was an erroneous grant of summary disposition to FNTIC must be vacated. Accordingly, it is unnecessary for us to address whether the decision to strike the case evaluation award would otherwise have been appropriate if the grant of summary disposition had been proper.

Likewise, we need not address the substance of BOA's arguments challenging the award of attorney fees to FNTIC. The offer-of-judgment sanctions at issue here were imposed on the ground that the order granting summary disposition to FNTIC was more favorable to FNTIC, the offeror, than the average offer, thereby entitling FNTIC to recover its costs and attorney fees under MCR 2.405(D). But because, as discussed earlier, we are reversing the order granting summary disposition to FNTIC, the award of sanctions premised on that grant of summary disposition must be vacated, thereby making it unnecessary to address the specific issues concerning sanctions raised by BOA. Cf. *McManamon v Redford Charter Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006) (" '[I]t is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against

the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O).' "), quoting *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). In other words, because we are reversing the order granting summary disposition to FNTIC, this action has not yet proceeded to verdict, and the sanctions award must therefore be vacated.

V. CONCLUSION

In sum, in Docket No. 311798, we reverse the order granting summary disposition to FNTIC regarding BOA's breach of contract claim, reverse the order denying BOA's motion for summary disposition concerning FNTIC's counterclaims and affirmative defenses, and remand this matter for further proceedings consistent with this opinion. In Docket Nos. 312426 and 313797, we vacate the order striking the case evaluation award and the orders awarding costs and attorney fees to FNTIC. In Docket No. 316538, we reverse the order granting summary disposition to FNTIC regarding BOA's breach of contract claim, affirm the order denying BOA's motion for summary disposition concerning its breach of contract claim, affirm the order granting summary disposition to BOA regarding FNTIC's counterclaims and affirmative defenses, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. BOA, as the prevailing party, may tax costs in accordance with MCR 7.219.

METER, P.J., and SHAPIRO, J., concurred with O'BRIEN, J.

MAJOR v VILLAGE OF NEWBERRY

Docket No. 322368. Submitted October 6, 2015, at Marquette. Decided August 2, 2016, at 9:00 a.m.

Debra Major brought an action in the Luce Circuit Court against the village of Newberry for employment discrimination based on age and sex. Plaintiff worked as a meter reader for defendant's department of public works from 2002 to 2008, and in 2008, she applied for a position as an apprentice lineman in defendant's department of water and light. Defendant's village council denied plaintiff the position. Plaintiff filed a union grievance in July 2008, and in December 2008, plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that she was denied the position of apprentice lineman because she was female. A conciliation agreement resolved the EEOC charge; plaintiff agreed not to sue defendant, and plaintiff was given the position of apprentice lineman in December 2010. In February 2011, plaintiff requested a return to her position as a meter reader. According to plaintiff, her supervisor had purposely made her sixty days on the job miserable and it would be impossible to attain the 7,000 hours of work required to become a journeyman lineman. In July 2011, plaintiff filed a second charge with the EEOC alleging sex discrimination. She also claimed she was retaliated against for filing the first EEOC charge. In August 2012, the EEOC issued plaintiff a letter explaining that its investigation failed to support her claim of discrimination. Plaintiff later filed a charge with the Michigan Department of Civil Rights (MDCR), which was dismissed in September 2012 with instructions that she could request reconsideration by the MDCR or that she could appeal the dismissal within 30 days of the date she was served with an appealable order. In April 2013, plaintiff filed a complaint in the circuit court, alleging sex discrimination, age discrimination, and retaliation under Michigan's Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*. Defendant moved for summary disposition. The court, William W. Carmody, J., granted defendant's motion—in part under MCR 2.166(C)(7) because plaintiff's action was time-barred. According to the court, plaintiff was bound by the periods of limitations for filing suit found in the EEOC and the CRA, not the three-year

period of limitations for torts set forth in MCL 600.5805(10). The court also granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (10) because plaintiff's arguments were either unsupported by the evidence or were conclusory in nature. Plaintiff appealed.

The Court of Appeals *held*:

1. The three-year statutory period of limitations applies when a person has suffered injury to his or her person as a result of discrimination in the workplace. MCL 600.5805(10) indicates that the period of limitations for filing a claim for personal injury based on an allegation of discrimination is three years, not the limitations periods found in the EEOC and the CRA following dismissal of a claim. In this case, plaintiff filed her claim in the circuit court within the three-year period of limitations, and the trial court erred by dismissing her complaint under MCR 2.116(C)(7).

2. A claim of age discrimination can be proved by direct or indirect evidence. Direct evidence is evidence that if believed requires finding that unlawful discrimination was at least a motivating factor in the employer's adverse employment action. Indirect evidence of age discrimination requires a plaintiff to establish a prima facie case by showing that: (1) plaintiff is a member of a protected class, (2) plaintiff suffered an adverse employment action, (3) plaintiff was qualified for the position, and (4) plaintiff was replaced by a younger individual. Discrimination on the basis of sex requires similar evidence with the exception that instead of replacement by a younger individual, a female plaintiff must prove that she was treated differently than similarly situated males. Once the prima facie case is established, the burden shifts to the defendant to provide a nondiscriminatory reason for the adverse employment action. After the defendant satisfies that requirement, the burden is again on the plaintiff to prove that the reason given by the defendant was pretextual. With both indirect and direct evidence, a plaintiff must show a causal link between the alleged discrimination and the adverse employment action. In this case, plaintiff presented direct evidence with regard to her claim of age discrimination, including a statement made by plaintiff's direct supervisor about plaintiff's age and his questions about her ability to perform job tasks. With regard to her claim of sex discrimination, plaintiff presented direct evidence to establish a prima facie case, including the significant difference in training hours provided to plaintiff and the similarly situated male lineman. In addition, plaintiff presented direct evidence of sex discrimination with regard to defendant's failure to provide her with the same equipment as

that provided to male employees in the same position and her assignment to administrative tasks that male employees were not required to perform. However, the trial court correctly granted summary disposition in favor of defendant with regard to plaintiff's sex discrimination claims that depended on indirect evidence of disparate treatment and a hostile work environment, because plaintiff failed to establish a prima facie case with regard to those claims.

3. The CRA prohibits retaliation or discrimination because an individual opposed a violation of the CRA or because the person made a charge under the CRA. In this case, the trial court correctly granted summary disposition to defendant on plaintiff's retaliation claim because plaintiff failed to establish a prima facie case of retaliation.

Affirmed in part and reversed in part.

RIORDAN, J., concurring in part and dissenting in part, would have affirmed the trial court's grant of summary disposition to defendant on plaintiff's age-discrimination claim. A single isolated comment does not constitute direct evidence of age discrimination; there was no pattern of biased, age-related comments. Because plaintiff did not present direct evidence of age discrimination, she was obligated to establish a prima facie case in support of her claim. Her burden was to show that there was a contestable issue of material fact about whether a materially adverse employment action caused her to leave her job as an apprentice lineman and return to her former job as a meter reader. Plaintiff failed to satisfy her burden, and the trial court properly granted summary disposition in defendant's favor. In all other respects, Judge RIORDAN joined the majority.

Hanshaw Burink, PLC (by *Sandra Hanshaw Burink*), for plaintiff.

Strom & Strom, PC (by *Paul L. Strom*), for defendant.

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

STEPHENS, J. Plaintiff appeals as of right the circuit court's order granting summary disposition to defendant under MCR 2.116(C)(7), (8), and (10). We affirm in part and reverse in part.

I. BACKGROUND

Plaintiff, Debra Major, was an employee of defendant, village of Newberry. Relevant to this case, defendant operated two departments—the department of public works and the department of water and light. Plaintiff began working for defendant on May 15, 2002. From 2002 to 2008, plaintiff held the position of meter reader in defendant's department of public works; in 2010 and 2011, she held the position of apprentice lineman in the department of water and light. Plaintiff applied for the position of apprentice lineman[1] in 2008, but defendant's village council voted to not offer plaintiff the position. Plaintiff filed a union grievance on July 3, 2008. Later in December 2008, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that plaintiff was denied the apprentice lineman position for no other reason than because she was female. The EEOC charge was resolved in an October 2010 conciliation agreement in which plaintiff agreed not to sue defendant with respect to the allegations in the discrimination charge, and plaintiff received the position of apprentice lineman.

Plaintiff was awarded the position of apprentice lineman on December 21, 2010. Two months later, on February 22, 2011, in accordance with her rights under the union contract, plaintiff wrote Beverly Holmes, defendant's village manager, and requested to return to her previous position of meter reader. Plaintiff cited two reasons for her decision. Plaintiff claimed that Matthew Perry (the lineman supervisor) had "done

[1] The position of lineman involves installation and maintenance of overhead electrical lines, construction and repair of overhead wires, repair of street lights, setting and removal of telephone poles, and trimming trees with chainsaws.

everything in his power to make" her 60-day period on the job "miserable" and that she did not see how she could attain the required 7,000 hours of work required to become a journeyman lineman.

Dissatisfied with her tenure as a lineman, plaintiff filed a second charge with the EEOC in July 2011, alleging that she was discriminated against because of her sex and that she was subjected to retaliation after filing her 2008 charge of discrimination. On August 3, 2012, plaintiff was notified by the EEOC that "[t]he facts, evidence, and information obtained throughout the course of the investigation fails to establish that you were discriminated against on the basis which you alleged in the charge." The EEOC letter informed plaintiff that "UPON RECEIPT OF THE DISMISSAL AND NOTICE OF RIGHTS, IT IS IMPERATIVE THAT YOU FILE SUIT IN THE UNITED STATES DISTRICT COURT WITHIN NINETY (90) DAYS OF RECEIPT. FAILURE TO DO SO WILL RESULT IN YOUR LOSS OF RIGHT TO PROCEED IN COURT."

Plaintiff filed a charge with Michigan's Department of Civil Rights (MDCR) that was dismissed on September 19, 2012. The MDCR Notice of Disposition and Order of Dismissal provided that plaintiff could either request reconsideration of the refusal to issue a charge within 30 days after the date the notice was mailed, or appeal the notice of dismissal to "the circuit court of the State of Michigan having jurisdiction within 30 days of the date of service of an appealable order."

On October 17, 2012, plaintiff received notice from the United States Department of Justice, Civil Rights Division, informing her that because "180 days ha[d] elapsed since the date the [EEOC] assumed jurisdiction over the charge, and no suit based thereon [was] filed by this Department," plaintiff still had the right to

institute a civil action against defendant under Title VII of the federal Civil Rights Act of 1964 within 90 days of plaintiff's receipt of the notice.

Plaintiff filed a complaint in the circuit court against defendant on April 24, 2013, alleging gender discrimination, age discrimination, and retaliation under Michigan's Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*. As a basis for her gender discrimination claim, plaintiff alleged that she and other female employees were subjected to disparate treatment and were required to perform ministerial tasks when male employees were not. Plaintiff further alleged that she was not promoted to the position of apprentice lineman because she was not provided with the same training as was the male apprentice, Jake Lewis. Plaintiff also alleged that she worked in a hostile work environment because she was harassed with unwelcome comments and incidents of conduct that were offensive and targeted toward her gender. As a basis for her age discrimination claim, plaintiff alleged that defendant (1) failed to promote her to the position of apprentice lineman because of her age of 54 at the time she applied in 2008, (2) provided the necessary training to a younger employee, again Jake Lewis, and (3) changed the requirements for the position after it was posted. As a basis for her retaliation claim, plaintiff alleged that defendant retaliated against her after she filed a claim with the EEOC against defendant in December 2008.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Plaintiff filed a brief in response supported by the affidavits of Terrence Webb (defendant's previous president and accounts payable clerk), Cheryl Withrow (trustee of defendant's council and council representative to

defendant's department of water and light board), and William McNamara (former supervisor for defendant).

After a hearing, the trial court issued its decision on June 5, 2014. The court granted defendant's motion for summary disposition in part under MCR 2.116(C)(7), concluding that plaintiff's complaint was time-barred. The court reasoned that plaintiff failed to file her claim within the EEOC-stated 90-day period after her complaint was investigated by the MDCR, and that the statutory three-year period of limitations related to injuries to persons or property, MCL 600.5805(10), was inapplicable.

The trial court also granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (10), concluding that

> [t]he arguments presented by the Plaintiff . . . are either unsupported by the facts or are conclusory in nature. The Plaintiff was awarded the Apprentice Lineman's position, and within 60 days tendered her letter seeking to return to her former position per her contract for those reasons noted above. The record provided to the Court reveals the extent [defendant] went to investigat[e] Plaintiff's claims, both by [defendant] and an independent review, [and the claims] were found to be without merit. . . . [T]his Court is unable to find either a valid and supportable claim that may be established by the Plaintiff, or a genuine issue on which the Plaintiff can support her position.

Plaintiff now seeks relief from this Court.

II. STATUTE OF LIMITATIONS

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition under MCR 2.116(C)(7) based on a finding that she filed her complaint outside the period of limitations. We agree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations." *Id*. To determine whether summary disposition was proper under MCR 2.116(C)(7), "this Court consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id*. at 647-648 (quotation marks and citation omitted; alteration in original). Issues of statutory interpretation, like the interpretation of the CRA, are questions of law that this Court also reviews de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

B. ANALYSIS

At issue in this case is which limitations period applies to plaintiff's claims. Plaintiff argues that her case is governed by the three-year period of limitations applicable to actions to recover damages for injury to a person, MCL 600.5805(10). The trial court applied the limitations periods set forth by the EEOC and the MDCR for appealing their respective dismissals of her claims. We hold that the trial court erred.

Contrary to the trial court's conclusion, the appropriate period of limitations is three years. MCL 600.5805(10) provides, "Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property." The CRA, in part, prohibits an

employer from discriminating against an employee or an individual in an apprenticeship or training program on the basis of sex or age with respect to a term, condition, or privilege of employment. MCL 37.2202(1)(a); MCL 37.2205. The CRA also prohibits retaliation or discrimination because the person made a charge, filed a complaint, or opposed a violation of the act. MCL 37.2701. A person alleging a violation of the act may bring a civil action for damages "in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his [or her] principal place of business." MCL 37.2801(1) and (2). The CRA "shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of the state." MCL 37.2803.

When interpreting a statute,

> [t]he 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, the words of a statute provide the most reliable evidence of its intent . . . . [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (quotation marks, citation, and alteration omitted).]

"[S]tatutes must be read as a whole and in context[.]" *Cichewicz v Salesin*, 306 Mich App 14, 25; 854 NW2d 901 (2014). "[A]lthough only an aid to interpretation, [this Court has noted] that the maxim *expressio unius*

est exclusio alterius (the expression of one thing suggests the exclusion of all others) means that the express mention of one thing in a statutory provision implies the exclusion of similar things." *Id*. at 33 (quotation marks and citation omitted; first alteration in original).

In *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 270; 696 NW2d 646 (2005), the plaintiff filed an action in July 1995 under the CRA, claiming that she was denied a promotion and treated poorly due to her national origin and that she was retaliated against for opposing sexual harassment. She further claimed that her employer's actions were in retaliation for her filing of a union grievance in June 1987 in which she claimed "discrimination based on her national origin and color." *Id*. at 268-269. The defendant's retaliatory conduct took place over an eleven-year period and included acts that occurred after she filed the CRA action in July 1995. *Id*. at 286 n 13. In applying the three-year period of limitations to the plaintiff's claim, our Supreme Court noted that "it is appropriate . . . in discrimination cases [to] turn to federal precedent for guidance in reaching [a] decision." *Id*. at 278 (quotation marks and citation omitted; first alteration in original). However, "[w]hile federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law." *Id*. at 283. The Court rejected application of the continuing violations doctrine to actions filed under the CRA; the continuing violations doctrine allows complainants filing federal Title VII claims to recover damages for discriminatory acts beyond those that occurred within the 180-day period from which the claim must be filed with the EEOC. *Id*. at 282-283. The Court concluded that "a person must file a claim under

the [CRA] within three years of the date his or her cause of action accrues, as required by [MCL 600.5805(10)]." *Id*. at 284.

While the *Garg* decision did not consider whether the specified filing limits stated in right-to-sue letters or dismissal-of-claim letters issued by either the EEOC or MDCR trump the period of limitations in MCL 600.5805(10), our Supreme Court was clear that the three-year period of limitations in MCL 600.5805(10) applies to persons filing a claim under the CRA, which was the claim filed by plaintiff on April 24, 2013, in the instant case in the Luce Circuit Court. Further, while the CRA does not specify the period in which an action must be filed if the MDCR dismisses a person's charge without a hearing, it does specify that if the MDCR holds a hearing and determines that the employer did or did not engage in a discriminatory practice prohibited by the CRA, it shall state its findings of fact and conclusions of law and issue a final order dismissing the complaint. MCL 37.2604; MCL 37.2605(1). If the MDCR issues a final order following a hearing, the complainant and the respondent have a right to appeal the decision in the appropriate circuit court within 30 days of the final order of the MDCR. MCL 37.2606(1). By explicitly limiting the time in which an appeal may be filed in the circuit court following a hearing and the final order and decision of the MDCR, the statutory scheme implies that such limitations are not applicable to a dismissal issued after plaintiff withdrew her complaint or requested a right-to-sue letter from the EEOC. *Cichewicz*, 306 Mich App at 33. Moreover, "[i]t is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002). Allowing the MDCR, in this situation, to alter the three-year period of limitations for filing a discrimina-

tion claim under the CRA would read language into the plain text of the statute that does not exist. Specifically, it would impose a claim-filing requirement on an individual who exercises his or her right to file a charge with the MDCR even though a full hearing and decision on the merits did not occur. Therefore, the trial court erred by granting defendant summary disposition under MCR 2.116(C)(7).

Defendant erroneously claims that plaintiff filed her claim in the wrong court—that on the basis of the EEOC letter sent to her on August 2, 2012, which found no merit in her charge, she was required to file her claim in the United States District Court within 90 days of receiving the notice. However, the charge of discrimination filed with the EEOC alleged discrimination "in violation of Title VII of the Civil Rights Act of 1964, as amended [42 USC 2000e *et seq*.]." The claim filed in the trial court in this case alleges a violation of the CRA, which provides that a person alleging a violation of the act may bring a civil action for damages in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his or her principal place of business. MCL 37.2801(1) and (2). We are unaware of any authority that allows the EEOC's dismissal of a Title VII claim to control where plaintiff may file her CRA claim, and defendant does not cite any supporting authority for this assertion.

Finally, defendant's 2008 accrual-date argument is also misplaced. Although plaintiff mentions defendant's failure to promote her to the apprentice lineman position in her complaint, the allegation was made because defendant provided Lewis with the necessary hours to accomplish the position but failed to provide

her with the same opportunity. Further, plaintiff states in her appeal brief that the alleged discrimination and retaliation complaint arose out of events that occurred after the date she was appointed to the apprentice lineman position, or December 22, 2010. Because plaintiff filed the instant action on April 24, 2013, her complaint was timely in that she filed it within the prescribed three-year period of limitations from the date of its accrual. MCL 600.5805(10).

III. MICHIGAN'S ELLIOTT-LARSEN CIVIL RIGHTS ACT

Plaintiff next argues that the trial court erred by summarily dismissing her claims against defendant of age and sex discrimination under the CRA. The CRA provides in part that an employer may not discriminate against an individual with respect to his or her age or sex. MCL 37.2202(1)(a). As to plaintiff's individual claims of age and sex discrimination, we agree in part and disagree in part.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008).[2] In addition,

[2] The trial court granted summary disposition of plaintiff's discrimination claims under both MCR 2.116(C)(8) (failure to state a claim) and (10) (no genuine issue of material fact). In deciding the motion, however, the trial court considered documentary evidence outside the pleadings, and it is therefore assumed that the motion was decided only under MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012) (concluding that if a party moved for summary disposition under multiple subrules and the trial court ruled on the motion without specifying the subrule under which it decided an issue, and the court considered documentary evidence beyond the pleadings, this Court reviews the decision as if it were based on MCR 2.116(C)(10)).

> [a] motion brought under MCR 2.116(C)(10) tests the factual support for a claim. The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the documentary evidence presented to the trial court in the light most favorable to the nonmoving party. A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. [*American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 716-717; 795 NW2d 172 (2010) (quotation marks and citations omitted).]

B. ANALYSIS

"Proof of discriminatory treatment in violation of the CRA may be established by direct evidence or by indirect or circumstantial evidence." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). "In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Id*. "Direct evidence," in the context of a CRA claim, is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quotation marks and citation omitted).

In a case where direct evidence is lacking, a plaintiff must establish a prima facie case of age discrimination by proving that "(1) she was a member of the protected class, (2) she suffered an adverse employment action,

(3) she was qualified for the position, and (4) she was replaced by a younger person." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998) (opinion by WEAVER, J.).

When there is no direct evidence of sex discrimination, a plaintiff must establish a prima facie case by proving that "she was a member of a class entitled to protection under the statute and that, for the same or similar conduct, she was treated differently than a man. The crux of a sex discrimination case is that similarly situated persons have been treated differently because of their sex." *Marsh v Dep't of Civil Serv (After Remand)*, 173 Mich App 72, 79; 433 NW2d 820 (1988).

If a plaintiff establishes a prima facie case of discrimination based on either age or sex, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action taken. *Hazle*, 464 Mich at 464. "There is no exhaustive list of what constitutes adverse employment actions. And what might constitute an adverse employment action in one employment context might not be actionable in another employment context." *Chen v Wayne State Univ*, 284 Mich App 172, 201; 771 NW2d 820 (2009) (citations omitted). " ' "[T]ermination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation" ' " have all been recognized as adverse employment actions. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999), quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 886 (CA 6, 1996), quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993).

To prevail on the claim, a plaintiff must then present evidence that the explanation provided by his or her employer constituted a pretext for discrimination. *Hazle*, 464 Mich at 465-466.

> A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. [*Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).]

In cases of both direct and indirect evidence, "a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision." *Sniecinski*, 469 Mich at 134-135.

1. DIRECT EVIDENCE OF AGE AND SEX DISCRIMINATION

Plaintiff presented direct evidence of age discrimination. The evidence plaintiff presented for her discrimination claim was that her direct supervisor, foreman Perry, said: "You know . . . you're in your 50s now. And by the time you go through the school, if you go through the school, you'll be in your mid 50s. Do you think you'll be able to climb a pole then?" Plaintiff argues that Perry's specified comment constitutes direct evidence of ageism and that summary disposition should not have been granted. We agree. Perry did not deny that he referred to plaintiff's age in relation to her ability to climb. Perry testified at his deposition that he said: "I believe [in] that conversation I might have said how are you going to climb when you're 60 figuring that she might be 60 at that time. Just as a ballpark figure. And, you know, said, 'Hopefully I'm not climbing when I'm 60.' "

Perry admitted that he thought age was a relevant consideration due to the physicality of the job. Perry also admitted that plaintiff was qualified for the apprentice lineman position. Perry further testified that he "was suggesting if she [plaintiff] didn't start learning to climb she [wa]sn't going to be able to." Plaintiff claims that she did not receive the training or hours she needed to advance in the apprentice lineman program because of her age, and she submitted evidence that she was given fewer hours of training than the male apprentice, Lewis. Plaintiff submitted Holmes's deposition testimony that a meeting with Perry, Lewis, and plaintiff was held before her entry into the apprenticeship in which Perry was informed that plaintiff was to receive the same amount of training hours as Lewis. Perry's deposition testimony included an admission that he did not begin to give plaintiff training hours until "two months or so" after she was given the apprentice lineman position. In sum, plaintiff presented sufficient direct evidence to preserve the material question of fact as to whether age was at least a motivating factor in Perry's failure to offer plaintiff the required training.

Relevant to the same argument, we cannot conclude that Perry's comment to plaintiff was a stray remark under *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001). In determining whether a comment is a stray remark, this Court considers:

> (1) whether the alleged discriminatory remarks were made by the person who made the adverse employment decision or by an agent of the employer that was uninvolved in the challenged decision, (2) whether the alleged discriminatory remarks were isolated or part of a pattern of biased comments, (3) whether the alleged discriminatory remarks were made in close temporal proximity to

> the challenged employment decision, and (4) whether the alleged discriminatory remarks were ambiguous or clearly reflective of discriminatory bias. [*Dep't of Civil Rights ex rel Burnside v Fashion Bug of Detroit*, 473 Mich 863, 867; 702 NW2d 154 (2005).]

The remark in this case was made by plaintiff's direct supervisor who was responsible for providing plaintiff with training hours. The remark, although said only once, was not isolated given that Perry admitted that age was a relevant consideration in plaintiff's ability to climb. The remark was made while plaintiff was in training in the apprentice lineman program. Lastly, Perry's remark was not ambiguous. He made a direct correlation between plaintiff's age and whether she could perform the required training.

Plaintiff also presented direct evidence that she was denied training and equipment and that she was assigned additional tasks because of her sex. "The proper recourse for conduct or communication that is gender-based, but not sexual in nature, is a sex-discrimination claim . . . ." *Haynie v Dep't of State Police*, 468 Mich 302, 304 n 2; 664 NW2d 129 (2003).

Plaintiff is correct that Lewis received more hours of electrical training than she did for the period she worked as an apprentice lineman; specifically, she received 199.8 hours while Lewis received 407 hours during the same period. Plaintiff and Lewis were similarly situated. They were both apprentice linemen in the apprentice lineman program working toward the position of journeyman lineman, even though Lewis entered the program before plaintiff and had completed certain portions of the program before plaintiff's entry into the program. The program was made up of a series of steps; each step was completed by obtaining a certain number of electrical-training hours. It is true

that Lewis had already completed climbing school when plaintiff entered the program and had more hours than plaintiff; however, Holmes's deposition testimony was that while plaintiff and Lewis might not be able to do the same type of tasks, "they could have equal hours in electric [toward certification]." As mentioned earlier, Holmes held a meeting with Perry and others in December 2010 to direct that plaintiff receive equal hours. Holmes admitted, however, that she did not follow up to determine whether plaintiff was receiving equal hours.

The record supports a finding that the difference in hours was due to plaintiff's protected status as a female. Plaintiff submitted affidavits to support this claim. Specifically, Webb stated that plaintiff "did not receive the same training for other duties as the male employees were," that "[c]urrent male employees disallowed [plaintiff] from operating the skid-steer, front-end loader and other machinery," and that he believed she was treated in that manner "because of her gender." Withrow stated that she had "personal knowledge that [plaintiff] was not provided with the same training as other male employees." McNamara stated that he "ha[d] personal knowledge that [plaintiff] wanted to be trained to run the generator and that Mr. Perry refused to train her." Adverse employment actions include diminished material responsibilities. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003). Collectively, the affidavits provide evidence that plaintiff requested and male employees of defendant denied her training on specific machinery and that her direct supervisor Perry supported the refusal to train her.

Plaintiff also presented direct evidence that she was not provided with the proper equipment to perform her

job although male employees were provided with the proper equipment. Plaintiff presented Webb's affidavit in support. Webb averred that plaintiff was not given the proper equipment to perform her job and that in the winter of 2012 to 2013, plaintiff did not receive "certain cold weather equipment" she requested until Webb twice requested that plaintiff's supervisor at the time, Eric Buckler, order it. Webb further averred that "male employees were not required to jump through the same hoops as [plaintiff] was." This is competent evidence that plaintiff was treated differently from her male counterparts as it relates to, at least, cold weather gear. This Court has previously recognized that restricting a plaintiff's ability to do his or her job properly is an adverse employment action. See *Chen*, 284 Mich App at 202.

Additionally, plaintiff presented direct evidence that she was assigned to perform administrative tasks that male employees were not required to perform. Plaintiff submitted Holmes's affidavit that acknowledged that plaintiff was asked on multiple occasions to fill in for administrative staff at the department of water and light. In further support of her claim, plaintiff provided Withrow's affidavit stating that in February 2012, Withrow recommended to Holmes that a man who was recently hired as a meter reader be trained for clerk duties, like plaintiff had in the past, but Holmes said, "He's a man." Withrow further stated that Holmes hired two part-time women to perform the clerk duties "rather than train the man . . . in the position." Holmes vehemently denied telling Withrow that the new male meter reader would not be trained for clerk duties because "he's a man."

Contrary to the trial court's ruling, the affidavits plaintiff presented are not conclusory. The evidence

presented in them is admissible and sufficient to survive summary disposition. Plaintiff has presented evidence that job-related duties and training were determined on the basis of gender. While naming the specific employees would have been preferable and more persuasive, it is not required. Plaintiff also presented evidence that she was not given proper equipment, again based on her gender. Viewing the evidence in the light most favorable to plaintiff, we conclude there is a genuine issue of fact about whether plaintiff was discriminated against on the basis of her sex. This evidence, "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462 (quotation marks and citation omitted).

2. INDIRECT EVIDENCE OF SEX DISCRIMINATION

Plaintiff makes three claims of sex discrimination for which there is no direct evidence and for which she fails to establish a prima facie case.

"Michigan courts have recognized two basic theories for establishing a prima facie case of gender discrimination: showing intentional discrimination or proving disparate treatment." *Lytle*, 458 Mich at 181 n 31. Plaintiff's three claims are that (1) she was treated differently in regard to working conditions, (2) she was treated differently in regard to overtime, and (3) she was intentionally harassed on the basis of her gender, which created a hostile working environment.

In support of her first claim, plaintiff alleged that defendant placed her in unsafe working conditions because of her sex. Her direct evidence of sex discrimination is attributable to Webb, who was not the supervisor or decision-maker for either of these actions. Again, when there is no direct evidence of sex discrimi-

nation, a plaintiff must establish a prima facie case by showing that "she was a member of a class entitled to protection under the statute and that, for the same or similar conduct, she was treated differently than a man." *Marsh*, 173 Mich App at 79.

Plaintiff, as a woman, was clearly a member of a protected class. As to plaintiff's unsafe working conditions claim, both parties agree that Perry ordered plaintiff to go up in a bucket with him at the Family Dollar Store where he was to disconnect a temporary service, but plaintiff refused to do so. Plaintiff testified that it was unsafe; Holmes testified that it was not. On another occasion, both parties agree that plaintiff was given a chainsaw, but she declined to practice using the chainsaw outside of the class. Again, plaintiff cited safety concerns, asserting that the class did not include hands-on training. Plaintiff stated that the failure to include such hands-on training made it unsafe for her to practice, but the defense witnesses disagreed. This factual dispute, however, does not defeat her claim. It is the fact that plaintiff failed to provide evidence of disparate treatment that is fatal to this claim. Plaintiff did not present evidence that the other apprentice lineman or journeyman linemen, all of whom were males, were not required to perform the same tasks.

Plaintiff's second claim is that defendant's failure to provide her with the same amount of overtime as was provided to male employees is evidence of sex discrimination. In support of this assertion, plaintiff presented evidence showing that from January 2012 to March 2014 she received only 32 hours of overtime, while five other male employees received considerably more hours. Again, plaintiff's supervisor for these claims was not Webb. Plaintiff also claimed that Buckler, who was her supervisor, refused to call her for overtime.

Plaintiff offered a chart that demonstrated that several named male employees received more overtime than she did. To the contrary, Buckler testified that only qualified employees were called in for overtime when needed in a particular department. For example, one employee named on the chart, Richard Haley, a mechanic and a generator operator, had a total 1,016 overtime hours; Buckler explained that plaintiff was not qualified to perform the jobs that Haley did. Therefore, plaintiff and Haley were not similarly situated. We cannot guess or contrive arguments related to the other male employees plaintiff listed in the overtime chart. In toto, plaintiff's two claims for sex discrimination based on disparate treatment fail, and the trial court was correct to have granted summary disposition to defendant on those issues.

Plaintiff's third claim is that she was harassed in the workplace because of her sex and that the harassment created a hostile work environment. Plaintiff did not establish a prima facie case of hostile work environment based on sex discrimination, and the trial court did not legally err by granting summary disposition in favor of defendant on this claim.

Harassment based on any of the enumerated classifications in MCL 37.2202(1)(a) is an actionable offense. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998). To establish a prima facie case of hostile work environment based upon sex discrimination,[3] a plaintiff must prove:

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[3] Plaintiff's hostile work environment claim is based on alleged discrimination based on sex, not on allegations of sexual harassment. In this case, we assume that a hostile environment claim may be maintained on the basis of conduct involving plaintiff's gender. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368 & n 6; 547 NW2d 314 (1996) (recognizing that "federal courts have held that harassing behavior based on ethnicity and age is violative of Title VII," 42 USC 2000e *et*

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Id*. at 629.]

"[W]hether a hostile work environment was created by the unwelcome conduct [is] determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996) (quotation marks and citation omitted). Conclusory allegations devoid of detail are not sufficient "[to] permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed." *Id*. at 371-372.

Plaintiff is clearly a member of a protected class because discrimination on the basis of sex is prohibited. MCL 37.2202(1)(a). Plaintiff set forth three examples of alleged sex discrimination. She claimed that she was subjected to communication, conduct, or unwelcome conduct on the basis of her protected status as a female and that this conduct created a hostile work environment. We reject each, concluding that they are insufficient to establish that the actions occurred because she is female.

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seq., and "assum[ing] without deciding . . . that a hostile environment claim may be maintained on conduct involving a plaintiff's gender, age, or national origin").

First, plaintiff alleged that defendant's and its employees' references to her as a "nuisance employee" is evidence of a hostile environment based on sex discrimination. Plaintiff's support for this claim is Webb's affidavit, in which Webb stated that plaintiff's unequal treatment claims were "brushed aside" by Holmes and by Bill Glimes, superintendent of the department of water and light, and that those individuals referred to plaintiff as a "nuisance employee." There is no record evidence that the asserted "nuisance employee" comment was based on plaintiff's status as a female, and a reasonable person could not reach that conclusion on the evidence submitted.

Second, plaintiff argued that defendant's reference to her as a "bitch" constituted sex discrimination and is evidence of a hostile work environment. This claim is based on hearsay. Plaintiff claimed that Ryan McNamara, a generator operator/mechanic, told her when she was a meter reader that he heard "them" call her a bitch when she left her office area. While rude, a single remark made by unknown persons is not only inadmissible, it is also not of the severity to support a reasonable person's conclusion that the remark created a hostile work environment.

Third, plaintiff testified that employees ignored her when she entered a room. She offered no remarks or admissible or circumstantial evidence on which a connection between her sex and the other employees' behavior can be connected. Assuming the behavior did indeed happen, such behavior, while unkind and rude, does not rise to the level of a hostile work environment.

Because plaintiff is unable to prove that she was subjected to unwelcome communication or conduct based on her sex or that the alleged unwelcome conduct or communication was intended to, or in fact did,

create a hostile work environment, it is unnecessary for the Court to analyze the last element, respondeat superior.

IV. RETALIATION

Plaintiff last argues that defendant and defendant's employees retaliated against her because she filed a charge with the EEOC, in which she alleged that she was discriminated against when she did not receive the apprentice lineman position, and that the trial court therefore erred by granting defendant's motion for summary disposition under MCR 2.116(C)(10). We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Jimkoski*, 282 Mich App at 4. Summary disposition under MCR 2.116(C)(10) is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

B. ANALYSIS

The CRA prohibits persons from retaliating or discriminating "against a person because the person has opposed a violation of [the CRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the CRA]." MCL 37.2701(a). "To establish a prima facie case of retaliation, a plaintiff must show: '(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the

plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.' " *Garg*, 472 Mich at 273 (quotation marks and citation omitted).

Applying the test, plaintiff clearly engaged in a protected activity in 2008 when she filed a charge of discrimination with the EEOC and in 2010 and 2011 when she complained to Holmes. In addition, because defendant was involved with the investigation and entered into a conciliation agreement with plaintiff in October 2010 regarding the apprentice lineman position, defendant knew of that protected activity. Plaintiff claims that the hostile work environment included (1) hostility from her supervisors, (2) being called a nuisance employee, and (3) being denied a clerk position with the water and light department, which constituted an employment action adverse to her. However, plaintiff's allegations are not sufficient to permit the conclusion that there was conduct or communication of a type or severity to support a reasonable person's conclusion that a hostile work environment existed. *Quinto*, 451 Mich at 371-372.

With regard to the final employment action—that plaintiff was denied the clerk position at the department of water and light because Holmes added a testing requirement to retaliate for plaintiff's complaints—the record is devoid of any evidence that her failure to be awarded the position was the result of retaliation or discrimination. The clerk position was posted in July 2013, two years after plaintiff's complaints to Holmes. Holmes testified that the skills necessary for the position were verified by a basic clerical test and that such testing had been required for the position in the past. Plaintiff and another female union employee (Lori Stokes) applied for the

position. Although the other employee did not have as much seniority as plaintiff, plaintiff refused to take the test and was not hired for the position. The mere failure to obtain a position does not elevate defendant's act to the level of a materially adverse employment action. *Peña*, 255 Mich App at 312. In addition, "there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling." *Id*. at 311 (quotation marks and citations omitted; alteration in original).

Finally, because plaintiff failed to show that any of the three employment actions just discussed were adverse to her, it is unnecessary to determine whether there was a causal connection between the protected activity and the asserted adverse employment action.

V. CONCLUSION

We reverse the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7) with regard to the statute of limitations and under MCR 2.116(C)(10) with regard to plaintiff's age discrimination claim and sex discrimination claims related to training, equipment, and assigned tasks. We affirm the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10) on plaintiff's claims of disparate treatment, hostile work environment, and retaliation. We remand for proceedings consistent with this opinion.

MARKEY, P.J., concurred with STEPHENS, J.

RIORDAN, J. (*concurring in part and dissenting in part*). I respectfully dissent. The trial court properly granted defendant's motion for summary disposition

on plaintiff's age discrimination claim, because plaintiff failed to present evidence from which a fact-finder could conclude that she was the victim of unlawful discrimination.

The Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., provides, in part, that an employer may not discriminate against an individual on the basis of age. MCL 37.2202(1)(a). "In some discrimination cases, the plaintiff is able to produce direct evidence of . . . bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "[D]irect evidence [is] evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. (quotation marks and citation omitted). In this case, plaintiff argues, and the majority agrees, that one isolated comment by Matthew Perry constitutes direct evidence of ageism and that summary disposition should not have been granted. That argument fails.

The only evidence of ageism plaintiff presents is that her direct supervisor, foreman Perry, once said, "You know . . . you're in your 50s now. And by the time you go through the school, if you go through the school, you'll be in your mid 50s. Do you think you'll be able to climb a pole then?" Perry also testified that plaintiff had neither purchased climbing gear nor accepted offers of climbing gear from journeymen and apprentice linemen, and she refused to climb poles as her position required. Perry asked plaintiff about her refusal to climb, inquiring, "[H]ow are you going to do it in five years from now, you know, if you don't learn now?" Perry explained that he referred to plaintiff's age only because apprentices were required to climb a

pole, and it had become much harder for him to climb as he approached 60 years of age. It was, he said, much easier for him to climb poles when he was 30 years old.

While the comment of which plaintiff complains was made by her immediate field supervisor, plaintiff does not identify any similar comments made on any other occasion. Plaintiff took offense to one isolated remark that was not part of any pattern of biased, age-related comments. See *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001). In and of itself, the comment was not reflective of any age bias harbored by Perry. He made an observation based on the amount of time that he perceived it would take for plaintiff to reach journeyman status in light of the fact that she had not acquired the proper gear for climbing, even though it had been offered to her *gratis*. Unlike the majority, I cannot reach the conclusion that unlawful discrimination, in the form of ageism, was any type of motivating factor to Perry based on a single comment in reaction to plaintiff's refusal to climb poles, as required in the apprenticeship program. *Hazle*, 464 Mich at 462.

Because there is no direct evidence of impermissible bias, to avoid summary disposition, plaintiff was required "to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination." *Hazle*, 464 Mich at 462 (quotation marks and citation omitted). To establish a pretextual prima facie case of age discrimination, a plaintiff must initially show that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) others, similarly situated and outside the protected class, were unaf-

fected by the employer's adverse conduct. *Town v Mich Bell Telephone Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997).

Because plaintiff has the burden of proof in her age discrimination claim, it is incumbent on her to show that there is a contestable issue of material fact concerning whether her decision to leave the position of apprentice lineman and return to her meter reader position was the result of a "materially adverse" action. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 365-366; 597 NW2d 250 (1999).

> The purpose of the prima facie test is to 1) remove the most common nondiscriminatory reasons for the employer's action, such as poor employee performance, and 2) to force the employer to articulate a nondiscriminatory reason for the discharge. Once the employer produces evidence of a nondiscriminatory reason for the discharge, even if that reason later turns out to be incredible, the presumption of discrimination evaporates.
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> * * *
>
> To prevail, the employee must submit admissible evidence to prove that the employer's nondiscriminatory reason was not the true reason for the discharge and that the plaintiff's age was a motivating factor in the employer's decision. Thus, the employee must prove that the employer's explanation was a pretext for discrimination. The proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis. The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts. [*Town*, 455 Mich at 695-697 (quotation marks and citation omitted).]

The Michigan Supreme Court also identified several standards that a trial court should follow in considering a motion for summary disposition of an age-based discrimination claim:

> [W]hen viewed in the light most favorable to the plaintiff, the evidence must create a material issue of fact on which reasonable minds could conclude that the employer's stated reason is a pretext for discrimination for summary judgment to be precluded. Thus, plaintiff will not always present a triable issue of fact merely by rebutting the employer's stated reason(s); put differently, that there may be a triable question of falsity does not necessarily mean that there is a triable question of discrimination. Furthermore, we note that in accordance with nine other federal circuits, evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's prima facie case, [may be] sufficient to support (but not require) a finding of discrimination. Where . . . either direct or circumstantial evidence from which a fact-finder could rationally conclude that the employer's stated reason is a pretext for discrimination, summary judgment normally should be denied. [*Id*. at 698 (quotation marks, citations, and emphasis omitted; second alteration in original).]

The trial court correctly found that the evidence plaintiff presented did not create an issue of material fact and that reasonable minds could not conclude that Perry's stated reason for his comment was a pretext for age discrimination.

Plaintiff meets the first two prima facie evidence requirements. She was 52 years old in 2010 when she became an apprentice lineman. Therefore, by virtue of her age, she was a member of a protected class, and she had the qualifications to become a lineman. *Id*. at 694-695. Defendant argues at length that plaintiff was not qualified to perform the job because she had been diagnosed with carpal tunnel syndrome and an ulnar

nerve issue in June 2012. She underwent surgery for those conditions in May 2013, and she had undergone rotator cuff surgery in 2007. However, the time period in question with regard to plaintiff's age discrimination claim is December 21, 2010, through March 2011, i.e., the time during which she performed the lineman job before she returned to the meter reader position. There is no evidence in the record to establish that she was physically incapable of performing the job that could rebut the testimony that plaintiff was qualified to do the job. However, plaintiff failed to present any evidence on the two remaining prima facie elements necessary to survive the summary disposition motion. Namely, there is no evidence in the record that she suffered an adverse employment action or that others similarly situated and outside the protected class were unaffected by the alleged adverse conduct. *Id*.

For purposes of a discrimination claim, "(1) the [employment] action must be materially adverse in than it is more than mere inconvenience or an alteration of job responsibilities, and (2) there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling." *Wilcoxon*, 235 Mich App at 364 (quotation marks and citations omitted; second alteration in original).

Plaintiff's change in position was not objectively adverse. *Id*. She chose not to attend school for apprentice linemen but instead, on December 21, 2010, plaintiff began on-the-job training for the position. Plaintiff *voluntarily quit* the apprentice lineman position at the end of February 2011 and returned to her meter reader position. She gave two reasons for her

decision: (1) Perry's supervision made her miserable, and (2) the requirement that she work 7,000 hours as a lineman before reaching journeyman status. Neither reason cited by plaintiff relates to her age. Perry's single comment and the hour requirements for becoming an apprentice lineman, which plaintiff decided she would not complete, do not rise to the level of constituting a constructive discharge. Plaintiff did not establish that her working conditions were so intolerable that she was forced to return to her meter reader position. See *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487-488; 516 NW2d 102 (1994) ("A constructive discharge is established where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign.") (quotation marks and citation omitted). Further, plaintiff's issue with the number of hours mandated to complete the apprentice program is a subjective reason that does not constitute an adverse employment action by defendant. *Wilcoxon*, 235 Mich App at 364. Because reasonable persons could not reach different conclusions on these factors, they were properly decided by the trial court on summary disposition. Therefore, plaintiff failed to establish this prima facie element.

Finally, even if there was an adverse employment action, plaintiff failed to establish the final prima facie element of an age-discrimination action, namely, that others similarly situated and outside the protected class were unaffected by the adverse conduct. The evidence established that plaintiff was not similarly situated with any other person. The other apprentice lineman position had been filled by Jake Lewis before

plaintiff received her position as a lineman. She and Lewis were not similarly situated because Lewis had been an apprentice lineman with the department for approximately a year before plaintiff applied for the position in 2008. Further, Lewis had the qualifications, which plaintiff was lacking, to do more complicated levels of work.

Because plaintiff did not establish a prima facie case of age discrimination, the trial court properly granted defendant's motion for summary disposition of this claim.

Therefore, I dissent from the majority. I would affirm the trial court on plaintiff's age discrimination claim. In all other respects, I join the majority's opinion.

In re FORFEITURE OF 2000 GMC DENALI AND CONTENTS

Docket No. 328547. Submitted July 6, 2016, at Detroit. Decided August 2, 2016, at 9:05 a.m.

Claimant, Shantrese Kinnon, asserted her property interest in several items seized by the police after her husband, Quinton Kinnon (Quinton), was arrested on drug-related charges. After a search of her home, claimant too was arrested. The city of Grand Rapids (plaintiff) served on the couple the required notices of its intent to forfeit the seized property. Quinton did not post bond on any of the property, and his interest in the items seized was administratively forfeited. Claimant filed a bond in the Kent Circuit Court amounting to less than the bond amount required to contest the seizure of all the items, and claimant had to select certain items she could afford to contest on the basis of the bond amount she posted. As a result, claimant was unable to post a bond amount sufficient to object to the forfeiture of a Cadillac. More than 20 days after claimant received notice of plaintiff's intent to forfeit, plaintiff filed a complaint for forfeiture. The complaint asserted that the items seized after claimant's and Quinton's arrests—a 1986 El Camino, a 2000 GMC Denali, a motorcycle, a laptop computer, a Nexus tablet, and $398 in cash found in claimant's purse at the time of her arrest—were proceeds from a violation of the Controlled Substances Act, MCL 333.7201 *et seq*., or were used or intended to be used to facilitate a violation of the Controlled Substances Act. Claimant denied the allegations in the complaint, obtained counsel, and moved to intervene, seeking to include the Cadillac in the proceedings and contending that she was denied access to the court and that she was denied an opportunity to be heard concerning the Cadillac's forfeiture because she was indigent and could not afford to post the entire amount of the required bond. Claimant further asserted that the bond requirement violated her right to equal protection because the requirement allowed individuals with sufficient resources to challenge forfeiture of their property but denied individuals, like herself, the opportunity to contest forfeiture of their property when they lacked the financial resources to post the required bond. The court, Donald A. Johnston, J., held that the forfeiture statute was constitutional and denied claim-

ant's motion to intervene. After trial on the matter, the court held that plaintiff failed to establish a connection between the criminal activity and the $398 in cash, the El Camino, the laptop computer, and the Nexus tablet. The court further concluded that there was a significant connection between the underlying criminal activity and the Denali and the motorcycle. Finally, the court ruled that the innocent-owner defense did not apply because claimant did not own the vehicles forfeited and because she had knowledge of the underlying criminal activity. The court ordered forfeiture of the Denali and the motorcycle. Claimant appealed.

The Court of Appeals *held*:

1. Under MCL 333.7521(1)(d), Michigan's civil asset forfeiture scheme allows for the seizure and forfeiture of a conveyance (including a vehicle) that is used or intended for use to transport, or to facilitate transport, of a controlled substance for the purpose of its sale or receipt. MCL 333.7523(1)(a) states that if property is seized without process and does not exceed a value of $50,000, the local unit of government that seized the property must give notice to the owner of the property of its intent to forfeit the property. When an individual receives notice of intent to forfeit, under MCL 333.7523(1)(c) he or she must file a claim in writing to contest the forfeiture and post a bond amounting to 10% of the value of the property claimed; the bond may not be less than $250 or more than $5,000. A claimant must post a bond in order to obtain a judicial hearing on the forfeiture of the claimant's property. The civil asset forfeiture scheme makes no allowance for a waiver of the bond amount in cases of a claimant's indigency. In this case, claimant was unable to post a bond amount sufficient to contest forfeiture of all the property seized from her and was forced to choose from among the property seized the items she wished to contest. She was denied the right to contest forfeiture of a Cadillac because she could not afford the bond amount. As a result, the Cadillac was forfeited without claimant's having had an opportunity to contest its forfeiture. A claimant who is indigent and whose indigency prevented him or her access to the courts to contest forfeiture of his or her property has been denied his or her constitutional right to due process.

2. Under MCL 257.233(9), transfer of a title to a vehicle is not complete until the present owner and the prospective owner both sign the existing title to the vehicle or an application for title to the vehicle. The signature of one of the parties is insufficient to transfer ownership of the vehicle. In this case, claimant held title to the Denali and the motorcycle but intended to transfer ownership of the vehicles to Quinton. She alone had signed the title

with the intent to transfer ownership. Because Quinton had not yet signed the title, transfer of ownership was incomplete and claimant remained the legal titleholder. The trial court clearly erred when it concluded that claimant did not own the Denali and the motorcycle.

3. The innocent-owner defense is an affirmative defense available under MCL 333.7521(1)(d)(*ii*), and the individual asserting the defense has the burden of proving that he or she had no knowledge of, and did not consent to, use of the vehicle to further criminal activity involving a controlled substance. In this case, the evidence showed that claimant was aware of Quinton's criminal activity, the marijuana growing in claimant's house, and the pills seized from Quinton when he was arrested. The trial court did not err when it held that claimant was not an innocent owner.

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

FORFEITURES AND PENALTIES — CONTROLLED SUBSTANCES ACT — CIVIL ASSET FORFEITURE — REQUIRED BOND — INDIGENCY.

An individual has the right to contest forfeiture of his or her property under the Controlled Substances Act, MCL 333.7201 *et seq*., by claiming an interest in the property and posting a bond determined by the value of the property seized; to forfeit an individual's property because of his or her failure to post the amount of bond required when the individual cannot afford to post the bond denies the individual his or her constitutional right to due process (US Const, Ams V and XIV).

William A. Forsyth, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *T. Lynn Hopkins*, Assistant Prosecuting Attorney, for the city of Grand Rapids.

Pinsky, Smith, Fayette & Kennedy, LLP (by *Sarah Riley Howard*), for Shantrese Kinnon.

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

MURRAY, P.J. One of the most important principles contained in our federal Constitution is that neither the state nor federal governments can deprive citizens

of their property without first providing them with due process of law. US Const, Ams V and XIV. That principle is put to the test here, where the claimant, Shantrese Kinnon, was precluded from fully challenging the government's seizing of her property, and later declaring it forfeited, without an opportunity to contest the action. Kinnon was unable to contest the seizure and resulting forfeiture of certain property because she could not afford to post the bond required by statute. She now appeals as of right the judgment of forfeiture. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Claimant's husband, Quinton Kinnon (Quinton), was arrested after he was seen by Grand Rapids Police Officers Tyler Smith and Lucas Nagtzaam engaging in a hand-to-hand drug transaction with an unidentified person. Upon arrest, Officer Nagtzaam retrieved from Quinton's person a bag containing hydrocodone pills. When confronted about the contents of the bag, Quinton told Officer Nagtzaam that the pills were Vicodin and belonged to someone else. Quinton was also in possession of keys to a blue Cadillac, which was subsequently impounded and held for possible forfeiture.

After Quinton was arrested, Officer Ernest Stafford, familiar with Quinton as one of the "main suppliers" of drugs in the area, obtained a search warrant for Quinton's home. When executing the search warrant, officers found in the basement of the house a marijuana growing operation, which led to the seizure of 19 marijuana plants. In the kitchen, officers found measuring containers containing crack cocaine residue, two sandwich bags containing marijuana residue, and

a sandwich bag containing a quarter ounce of marijuana. While executing the search warrant, officers seized a 2000 GMC Denali, a 1986 Chevrolet El Camino, a 2002 YZFR motorcycle, a Nexus tablet, and a Compaq laptop computer.

As a result of the search of her home, claimant was arrested. Upon claimant's arrest, $398 was seized from her purse. Claimant was subsequently charged with manufacturing marijuana, MCL 333.7401(2)(d)(*iii*), and maintaining a drug house, MCL 333.7405(d), while at the same time, Quinton was charged with possession with the intent to deliver a controlled substance, MCL 333.7401(1), and maintaining a drug house.

Quinton and claimant were served with the required notices by plaintiff, the city of Grand Rapids, of its intent to forfeit the property that was seized. See MCL 333.7523(1)(a). Quinton did not post a bond on any of the property, and more than 20 days after receiving the notice, any interest he held in the items seized was administratively forfeited. See MCL 333.7523(1)(d). Claimant, however, did post a bond, but not the full amount to contest all the seized property. To be able to contest the validity of the forfeiture of all the property, claimant was required to post a $2,005 bond, but according to claimant, she could only afford to post a bond of approximately $1,100, as a result of her indigency. Detective Preston informed claimant that because she did not have sufficient funds to contest all the seized property, she would have to select items that she could afford to contest. As a result, claimant did not post a bond for the Cadillac, which required a $1,020 bond.

More than 20 days after claimant received her notice, plaintiff filed a complaint for forfeiture asserting that the 1986 El Camino, the 2000 GMC Denali,

the motorcycle, the Compaq laptop computer, the Nexus tablet, and the $398 in cash were subject to forfeiture because the items were used or intended to be used to facilitate, or were proceeds from, a violation of the Controlled Substances Act, MCL 333.7201 *et seq*.

After denying the allegations in the complaint and obtaining counsel, claimant filed a motion to intervene seeking to add the Cadillac to the proceedings on the basis that the bond requirement denied her access to the courts and that she was denied an opportunity to be heard because she could not afford the bond requirement. Claimant also asserted that the bond requirement violated her right to equal protection because it allowed individuals with resources to contest forfeitures, while denying those without financial resources such an opportunity. Claimant requested that she be allowed to contest the forfeiture of her Cadillac without posting a bond.

In response, plaintiff argued that Michigan's civil asset forfeiture scheme was constitutional. Specifically, plaintiff relied on *People v Any & All Monies*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 1996 (Docket No. 185677), for the proposition that the statute did not infringe on an indigent claimant's right to due process or equal protection. In addition, plaintiff asserted that while the Michigan statute does not have a provision allowing for waiver of the bond requirement, a claimant may still petition the court under MCR 2.109(B)(1) to waive the bond requirement.[1]

The trial court heard arguments on claimant's motion to intervene and, relying on *Any & All Monies*, held that the forfeiture statute was constitutional. The

[1] Plaintiff never questioned claimant's inability to pay the full bond amount.

trial court subsequently entered an order denying claimant's motion to intervene.

The case then proceeded to trial. After receiving evidence and entertaining arguments, the trial court found that plaintiff failed to establish a connection between the criminal activity and the $398 in cash found in claimant's purse at the time of her arrest, the El Camino, the Compaq laptop computer, and the Nexus tablet. On the other hand, the trial court found that a significant nexus existed between the underlying criminal activity, the Denali, and the motorcycle. In addition, the trial court found that the innocent-owner defense was inapplicable because claimant was not the owner of the vehicles and because she had knowledge of the criminal activity. The trial court thereafter entered a judgment of forfeiture, forfeiting the 2000 GMC Denali and the motorcycle. This appeal ensued.

II. ANALYSIS

A. CONSTITUTIONALITY OF MICHIGAN'S CIVIL ASSET FORFEITURE SCHEME

Claimant asserts that the trial court abused its discretion by denying her motion to intervene because in doing so, she was denied due process and equal protection of the law.[2] More specifically, she argues that Michigan's bond requirement, as applied to her, deprived her of her property rights in the 2006 Cadillac without according her an opportunity to be heard solely because she could not afford the statutorily required bond.

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[2] "This Court reviews for abuse of discretion a trial court's decision on a motion to intervene." *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). This case also presents constitutional issues and issues of statutory interpretation, both of which are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

1. CONSTITUTIONAL REVIEW

A party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). To do so, we examine the plain language of the statute itself, and "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge. This is an as-applied challenge, meaning that claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992)

(Scalia, J., dissenting). See also *United States v Frost*, 125 F3d 346, 370 (CA 6, 1997).[3]

2. MICHIGAN'S FORFEITURE LAW

Under Michigan's civil asset forfeiture scheme, "a conveyance"—which includes a vehicle—"used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of [a controlled substance]" is subject to forfeiture. MCL 333.7521(1)(d). Property that is subject to forfeiture may be seized without process when it is seized incident to a lawful arrest or pursuant to a search warrant. MCL 333.7522(a). When property is seized without process, and the total value of the property seized does not exceed $50,000, the local unit of government that seized the property shall notify the owner of the property that the property has been seized and that the local unit of government intends to forfeit and dispose of the property by delivering a written

[3] According to the Court in *Washington State Grange v Washington State Republican Party*, 552 US 442, 450-451; 128 S Ct 1184; 170 L Ed 2d 151 (2008), "[f]acial challenges . . . run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " Quoting *Ashwander v TVA*, 297 US 288, 346-347; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring), quoting *Liverpool, New York & Philadelphia Steamship Co v Comm'rs of Emigration*, 113 US 33, 39; 5 S Ct 352; 28 L Ed 899 (1885) (some quotation marks omitted). Finally, facial challenges threaten to short-circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that " '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' " *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 329; 126 S Ct 961; 163 L Ed 2d 812 (2006) (alteration in original), quoting *Regan v Time, Inc*, 468 US 641, 652; 104 S Ct 3262; 82 L Ed 2d 487 (1984) (plurality opinion).

notice to the owner of the property or by sending the notice to the owner by certified mail.[4] MCL 333.7523(1)(a).

Within 20 days after receiving the notice, any person claiming an interest in the property must file a written claim and a bond with the local unit of government in the amount of 10% of the value of the claimed property, but the bond may not be less than $250 or greater than $5,000. MCL 333.7523(1)(c). When a claim and bond are posted, the prosecuting attorney "shall promptly institute forfeiture proceedings after the expiration of the 20-day period." *Id*. However, when no claim is filed or when no bond is given within the 20-day period, the "local unit of government shall declare the property forfeited . . . ." MCL 333.7523(1)(d). By force of the statute, the only means of obtaining a judicial hearing is to file a written claim asserting an interest in the property and to post a bond. *In re Return of Forfeited Goods*, 452 Mich 659, 667; 550 NW2d 782 (1996). As such, posting a bond is a condition to obtaining a judicial hearing regarding the forfeiture of seized property.

3. PROCEDURAL DUE PROCESS

That the Founding Fathers were concerned with protecting private property rights from government interference is beyond dispute. " '[O]ur founding fathers and their contemporary patriots were as much interested in protecting citizens' private property rights against encroachments by government as they

[4] If the name and address of the owner are not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice shall be published for 10 successive publishing days in a newspaper of general circulation in the county in which the property was seized. MCL 333.7523(1)(a).

were in liberty itself.' " *United Artists Theater Circuit, Inc v Philadelphia Historical Comm'n*, 528 Pa 12, 25; 595 A2d 6 (1991), quoting *First Presbyterian Church of York v York City Council*, 25 Pa Commw 154, 164; 360 A2d 257 (1976) (Kramer, J., concurring) (alteration in original). Accord *WJF Realty Corp v New York*, 176 Misc 2d 763, 764; 672 NYS2d 1007 (1998) ("At the time of our Revolution, one of our Founding Fathers specifically declared the commonly held belief that, '[t]he right of property is the guardian of every other right, and to deprive the people of this, is in fact to deprive them of their liberty,' (Belz, *Property and Liberty Reconsidered*, 45 Vand L Rev 1015, 1016-1017 [1992]), citing Ely, The Guardian of Every Other Right, at 26 [Oxford 1992], quoting Lee, An Appeal to the Justice and Interests of the People of Great Britain, in The Present Dispute with America, at 14 [4th ed 1775].") (alterations in original; quotation marks omitted). John Adams succinctly declared that "[p]roperty must be secured, or liberty cannot exist." Kaselonis, *The Greater Good? Can the Good v United States Court Be Any Further Off?*, 15 Regent U L Rev 253, 264 (2003), quoting VI Adams, *The Works of John Adams* (Boston: Little & Brown, 1851), p 280.

Because of the important role property rights have always played in our society, Alexander Hamilton (along with James Madison and John Jay) wrote the Federalist Papers in part to inform the citizenry of the " 'additional security, which . . . [the Constitution's] adoption will afford to the preservation of . . . property.' " *The Greater Good?*, 15 Regent U L Rev at 264, quoting The Federalist No. 1 (Alexander Hamilton) (alteration in original). One of the constitutional provisions intended to preserve private property rights against government encroachment is the Due Process Clause. See *Block v Hirsh*, 256 US 135, 165; 41 S Ct

458; 65 L Ed 865 (1921) (McKenna, J., dissenting) ("The security of property, next to personal security against the exertions of government, is of the essence of liberty. They are joined in protection, as we have shown, and both the National Government (Fifth Amendment) and the States (Fourteenth Amendment) are forbidden to deprive any person 'of life, liberty, or property, without due process of law . . . .' "); *United States v Twelve Thousand, Three Hundred Ninety Dollars*, 956 F2d 801, 810 (CA 8, 1992) ("From its inception, the Constitution recognized the importance of private property as a concomitant to liberty. The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government.").

The Due Process Clause of the Fourteenth Amendment provides that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV. While courts have expanded this language by interpreting it to contain a substantive component, see, e.g., *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014), our inquiry revolves around the original purpose of the Due Process Clause—the procedural requirements meant to protect persons "from the mistaken or unjustified deprivation of life, liberty, or property," *Zinermon v Burch*, 494 US 113, 125-126; 110 S Ct 975; 108 L Ed 2d 100 (1990) (quotation marks and citation omitted). In order to comply with the procedural requirements of the Due Process Clause, "individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *United States v James Daniel Good Real Prop*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). See also *United States v $8,850*, 461 US 555, 562 n 12; 103 S Ct 2005; 76 L Ed

2d 143 (1983), and *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ." *Fuentes v Shevin*, 407 US 67, 80-81; 92 S Ct 1983; 32 L Ed 2d 556 (1972).

Due process concerns arise when state legislatures condition access to the courts on posting a bond or paying a filing fee. See, e.g., *MLB v SLJ*, 519 US 102, 113; 117 S Ct 555; 136 L Ed 2d 473 (1996) (due process "prohibit[s] a State from denying, solely because of inability to pay, access to its courts" when a judicial proceeding is necessary to vindicate a fundamental right) (alteration in original). More specifically, while "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees," *Logan v Zimmerman Brush Co*, 455 US 422, 437; 102 S Ct 1148; 71 L Ed 2d 265 (1982) (citation omitted), "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Boddie v Connecticut*, 401 US 371, 380; 91 S Ct 780; 28 L Ed 2d 113 (1971).

The United States Supreme Court has confronted, in diverse settings, the mandates of the Due Process Clause with regard to an opportunity to be heard. With respect to laws requiring payment of costs or fees to enter the courts, *Boddie* is a foundational case. In that case, the appellants, welfare recipients residing in Connecticut, did not have the ability to pay the court fees and costs, as required by statute, to file their

lawsuit for a divorce. *Id*. at 372-373. As a result, the appellants sued the state challenging the requirements for payment of court fees and costs as a condition to access the court. *Id*. at 372.

In deciding that the fee statute was unconstitutional as applied to the appellants, the United States Supreme Court explained that due process requires, at a minimum, "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest" and that a cost requirement to filing a lawsuit, "valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id*. at 379, 380. Recognizing that ensuring due process is central to the operation of a system that is designed to resolve disputes, *id*. at 375, the Court noted that resort to the state courts was the only avenue to dissolve a marriage and that defendants were excluded—by way of the filing fees—"from the only forum effectively empowered to settle their dispute[]." *Id*. at 376. The Court further articulated that "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." *Id*. at 376-377.

Two years later, in *United States v Kras*, 409 US 434, 435; 93 S Ct 631; 34 L Ed 2d 626 (1973), the Court considered a constitutional challenge to the filing fees required for a no-asset bankruptcy proceeding. *Id*. In *Kras*, an indigent petitioner filed both a voluntary petition for bankruptcy and a motion to proceed in bankruptcy without payment of any of the filing fees. The motion, supported by an affidavit of indigency, was granted. *Id*. at 437-439. However, while the referee

allowed the petitioner to conduct the necessary proceedings in bankruptcy, it stayed the discharge of his debts pending the outcome of his appeal in the Supreme Court. *Id*. at 439.

On appeal, the petitioner argued that his case was governed by *Boddie* because payment was required as a condition precedent to his discharge in bankruptcy. *Id*. at 441. The Court rejected the petitioner's argument for several reasons. First, the Court determined that there was no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy. *Id*. at 445. Second, the Court noted that bankruptcy is not the sole method available to a debtor for the adjustment of his debt with his creditors, and unlike the termination of a marriage, readjustment of debts does not require access to a state's judicial machinery. *Id*. Lastly, the Court recognized that there was no constitutional right to obtain a discharge of one's debts in bankruptcy. *Id*. at 446.

That same year, in *Ortwein v Schwab*, 410 US 656; 93 S Ct 1172; 35 L Ed 2d 572 (1973), the Court considered due process and equal protection challenges to a mandatory $25 filing fee to appeal an adverse decision from a state welfare agency. Relying on *Boddie*, the appellants contended that the appellate filing fee, when applied to indigents like themselves who sought to appeal an adverse welfare decision, violated the Due Process Clause of the Fourteenth Amendment. *Id*. at 658. In concluding that the appellants were not denied due process, the Court relied on two factors. First, the Court explained that the appellants' claims did not implicate a fundamental constitutional right. *Id*. at 659. Specifically, the Court stated that appellants' interest in increased welfare benefits "ha[d] far less constitutional significance than the interest of the

Boddie appellants." *Id*. Second, the Court noted that each of the appellants received an agency hearing and that due process does not require a state to provide an appellate system for the redress of grievances. *Id*. at 659-660.

While *Boddie*, *Kras*, and *Ortwein* do not discuss the constitutionality of a bond requirement related to civil asset forfeiture, they nevertheless provide some insight into how our nation's highest court has addressed statutes dealing with mandatory filing fees and an opportunity to be heard. In addition, those cases set the stage for *Wiren v Eide*, 542 F2d 757 (CA 9, 1976), a case directly on point involving a bond requirement in a civil asset forfeiture scheme.[5]

In *Wiren*, the plaintiff, when returning from Canada, was stopped and searched at the United States border. *Id*. at 759. A body search of one of the passengers revealed a small quantity of hashish. *Id*. Customs agents seized the plaintiff's car on the basis that it was used to transport contraband into the United States in violation of 19 USC 1595a(a). *Id*. The plaintiff claimed he had no knowledge of the hashish and, because the civil asset forfeiture scheme allowed remission and mitigation proceedings,[6] he petitioned the Secretary of Treasury for the remission or mitigation of the impending forfeiture of his car. *Id*. The petition was denied. *Id*. at 760.

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[5] Federal courts of appeals decisions, while not binding, may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[6] Although Michigan's civil asset forfeiture scheme does not contain provisions regarding remission or mitigation proceedings, they are not necessary to a forfeiture determination and are thus not constitutionally required. *United States v Von Neumann*, 474 US 242, 250; 106 S Ct 610; 88 L Ed 2d 587 (1986).

The plaintiff was subsequently informed of the government's intention to forfeit his vehicle. *Id*. The letter informed the plaintiff that his vehicle was appraised at less than $2,500. *Id*. The federal statutory forfeiture scheme at the time provided owners of seized property valued at more than $2,500 the opportunity for a judicial hearing, but when the property was valued at less than $2,500, a judicial hearing was afforded only if the property owner filed a claim and posted a $250 bond. *Id*. In the event that the required bond was not posted, the property was summarily forfeited pursuant to 19 USC 1609. *Id*. at 759 n 2.

The plaintiff filed a claim in accordance with 19 USC 1608, but did not post the requisite $250 bond. *Id*. at 760. According to the plaintiff, he was indigent and could not afford the bond. *Id*. Because there was no statutory procedure for the plaintiff to call his indigent condition to the attention of the Bureau of Customs and no procedure for him to halt the summary forfeiture mandated by 19 USC 1609, the plaintiff filed a cause of action and a motion to proceed *in forma pauperis*,[7] which was accompanied by an affidavit of poverty. *Id*. The trial court granted the Bureau of Customs' motion to dismiss. *Id*.

On appeal, the plaintiff challenged the trial court's denial of his Fifth Amendment rights, asserting that he was denied due process. *Id*. at 763. The *Wiren* court held that the case was most similar to *Boddie* because the application of the bond requirement operated to deprive the appellant of a significant property interest without according him the opportunity for a hearing "of some sort." *Id*. at 763-764. The court held that the remission or mitigation proceeding was an inadequate

[7] Latin for "in the manner of a pauper[.]" *Black's Law Dictionary* (10th ed).

substitute for a hearing because, in those proceedings, granting relief "is purely a matter of administrative grace." *Id*. at 764. Absent a purely voluntary remission or mitigation, a claimant's sole remedy is a court judgment that forfeiture is inappropriate. *Id*. Lastly, and importantly for purposes of our case, the court rejected the argument that the waiver of fee provisions for indigent persons contained in 28 USC 1915(a) afforded an indigent person a means of obtaining relief from the bond requirement because that section solely applied to court proceedings and the forfeiture statute precluded court proceedings when a claimant fails to post a bond by mandating summary administrative forfeiture. *Wiren*, 542 F2d at 764. Ultimately, the court held that due process prohibits the "government from denying the opportunity for a hearing to persons whose property has been seized and is potentially subject to forfeiture solely because of their inability to post a bond." *Id*. at 763. Because the court determined that application of the bond requirement unconstitutionally deprived the plaintiff of the opportunity for a hearing, the court vacated the trial court's opinion and remanded the matter to the trial court to provide the plaintiff with a hearing. *Id*. at 764-765.[8]

Turning now to claimant's contention, we hold that Michigan's bond requirement effectively denied claimant the opportunity to be heard. Claimant is essentially put in a position similar to that of "the defendant called upon to defend his interests in court," in that her

[8] See also *Fell v Armour*, 355 F Supp 1319, 1333-1334 (MD Tenn, 1972) (holding that a Tennessee forfeiture statute containing no waiver of the bond requirement for indigents challenging a seizure violated the plaintiff's right to due process of law); *Brown v District of Columbia*, 115 F Supp 3d 56, 72 (D DC, 2015) (recognizing that "bond waivers for indigent individuals are a necessary element of a constitutionally valid forfeiture system").

resort to the courts was not entirely voluntary, and it was the only available means to resolve her dispute. Under Michigan law, when a claimant's property is seized, the sole remedy available to a claimant is a judicial determination that the seized property was not, in fact, subject to forfeiture, which can only be sought by posting the statutorily required bond. MCL 333.7521(2) and MCL 333.7523(1)(c). And when a claimant is unable to post the bond, the seized property is administratively forfeited. MCL 333.7523(1)(d). Thus, similar to the appellants in *Boddie*, whose only method to obtain a divorce was resort to the courts, the only avenue available to claimant was to post the statutorily required bond and then seek to obtain a judgment declaring that her property was not subject to forfeiture. In addition, there are no "effective alternatives" for claimant to pursue to have her car returned to her. *Boddie*, 401 US at 376. Because of her indigency and inability to pay the required bond, claimant was excluded "from the only forum effectively empowered to settle [her] dispute[]." *Id.*; see also *Wiren*, 542 F2d at 763. Therefore, we hold that application of the bond requirement operated to deprive claimant of a significant property interest without an opportunity for a hearing. *Wiren*, 542 F2d at 763.

Plaintiff suggests that claimant was given an opportunity to be heard because she potentially could have obtained a waiver of the bond requirement by filing a complaint that (1) asserted her indigency and (2) sought an injunction preventing the administrative forfeiture of her car and a waiver of the bond requirement. Plaintiff's argument is without merit for two reasons. First, the civil asset forfeiture scheme precludes claimant from filing a lawsuit for the return of seized property, MCL 333.7523(2), and in addition, a

circuit court does not have jurisdiction to hear a forfeiture proceeding if the bond is not posted and the action is not commenced by the attorney general or local governmental unit. *In re Return of Forfeited Goods*, 452 Mich at 667 (posting a bond, which triggers the government's obligation to initiate forfeiture proceedings, "is the *only* means by which the statute confers jurisdiction on the circuit court"). Second, plaintiff's procedural suggestion is not contemplated by the current statutory scheme. *Wiren*, 542 F2d at 764. As stated in *City of West Covina v Perkins*, 525 US 234, 241; 119 S Ct 678; 142 L Ed 2d 636 (1999), "[o]nce the property owner is informed that his property has been seized, he can turn to these public sources," i.e., statutes and caselaw, "to learn about the remedial procedures available to him." When turning to the public sources in Michigan, a claimant will see that the only remedial procedure available is a judicial determination that his property is not subject to forfeiture, which can only be triggered by the filing of a written claim and the posting of a bond. MCL 333.7523(1)(c); see *In re Return of Forfeited Goods*, 452 Mich at 667. The statutory scheme does not set forth any remedial procedure with regard to obtaining a waiver of the bond requirement. We therefore reject plaintiff's argument.

We also reject plaintiff's contention that the waiver provisions of MCR 2.109(B)(1) allow an indigent claimant the opportunity to request a waiver in connection with the forfeiture proceedings. That court rule applies solely to civil court proceedings, MCR 2.001, and because under the civil asset forfeiture statute a failure to post a bond mandates that the property is forfeited after 20 days, the failure to post a bond precludes the very court proceedings in which the court rule could be

applied. See *Wiren*, 542 F2d at 764.[9] In other words, because claimant could not file a bond, she could not get into court, and therefore could never seek to invoke the waiver provisions of MCR 2.109(B)(1). MCR 2.001 (court rules in Chapter 2 only apply to civil court proceedings). Simply put, the waiver provisions of MCR 2.109(B)(1) were unavailable to claimant at the time she was required to post the bond.[10]

Lastly, plaintiff rests on the fact that at the motion hearing, the prosecutor was personally aware of at

[9] While an unpublished decision may be considered for its persuasive reasoning, *Beyer v Verizon North, Inc*, 270 Mich App 424, 431; 715 NW2d 328 (2006), the decision in *Any & All Monies* is not persuasive as applied to this case as it fails to recognize that MCR 2.109(B)(1) may only be utilized in civil court proceedings *that will never be instituted* when property is administratively forfeited as a result of a claimant's inability to post the required bond. Furthermore, *Any & All Monies* relied on *Derrick v Detroit*, 168 Mich App 560, 563; 425 NW2d 154 (1988), for the proposition that the statute is constitutional. However, *Derrick* did not involve an indigent claimant who was deprived of an opportunity to be heard. For this same reason, the unpublished opinion in *Langston v Charter Twp of Redford*, 623 F Appx 749 (CA 6, 2015), provides no assistance because it relied upon the reasoning of *Any & All Monies*.

[10] Because the *Wiren* court held that the waiver provisions of 19 USC 1915(a) were not available to the claimant, the Customs Service amended its implementing regulations to allow an indigent claimant to obtain a waiver of the bond requirement from the seizing governmental unit. *Jones v US Drug Enforcement Admin*, 801 F Supp 15, 23 (MD Tenn, 1992). 19 CFR 162.47(e) provides, "Waiver of bond. Upon satisfactory proof of financial inability to post the bond, the Fines, Penalties, and Forfeitures Officer shall waive the bond requirement for any person who claims an interest in the seized property." Since *Wiren*, several courts have recognized that this type of provision is necessary to comply with the constitutional protections afforded to indigent claimants. See *In re Williams*, 628 F Supp 171, 173 (ED NY, 1986) ("*In forma pauperis* provisions [in a forfeiture statute] are thus constitutionally mandated for the indigent."); *Tourus Records, Inc v Drug Enforcement Admin*, 347 US App DC 262, 267; 259 F 3d 731 (2001) (holding that 19 CFR 162.47(e) was adopted in response to *Wiren* and the waiver of the bond is an important means of affording equal access to judicial forfeiture hearings and the right to proceed as an indigent).

least two other claimants in other cases who obtained a waiver of the bond requirement. As noted, there is no indication that the statutory scheme made such a procedure accessible to claimant. In order for claimant to take advantage of such a procedure, "if it existed at all, [claimant would have had to] depend[] on the vagaries of 'word of mouth referral,' " *Memphis Light, Gas & Water Div v Craft*, 436 US 1, 14 n 14; 98 S Ct 1554; 56 L Ed 2d 30 (1978) (citation omitted), which is insufficient to satisfy due process because this is not a public source to which a claimant can turn "to learn about the remedial procedures available to him," *City of West Covina*, 525 US at 241.

Ultimately, Michigan's civil asset forfeiture scheme operated to deprive this claimant of a significant property interest without according her the opportunity for a hearing, contrary to the requirements of the Due Process Clause.[11] This holding does not render MCL 333.7523(1)(c) and (d) unconstitutional. Instead, those provisions as applied to plaintiff violated her constitutional right to due process of law.

B. TRIAL COURT'S FACTUAL FINDINGS

Claimant also challenges the trial court's factual findings regarding claimant's property interests in the Denali and the motorcycle. A circuit court's findings of fact are reviewed for clear error. *CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 337; 804 NW2d 781 (2011). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

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[11] Having determined that claimant was denied due process of law, it is unnecessary to address her equal protection argument.

In order to forfeit the property, the trial court was required to find by clear and convincing evidence that the Denali and the motorcycle were "used or intended for use, to transport, or in any manner to facilitate the transportation [of a controlled substance], for the purpose of sale or receipt . . . ." MCL 333.7521(1)(d) and (2). In addition, the trial court was required to "find that there [wa]s a substantial connection between that asset and the underlying criminal activity." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 146; 486 NW2d 326 (1992). "[P]roperty that has only an incidental or fortuitous connection to the unlawful activity is not subject to forfeiture." *Id*. The power to forfeit property is also limited by MCL 333.7521(1)(d)(*ii*), which establishes the "innocent owner" defense as follows: "A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent."[12] Innocent ownership is an affirmative defense, so the burden is on the claimant to produce evidence that he neither had knowledge of nor consented to the illegal activity forming the basis for forfeiture. See *In re Forfeiture of $53*, 178 Mich App 480, 496; 444 NW2d 182 (1989); *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 250; 805 NW2d 217 (2011). In the context of the forfeiture statute, our Court has interpreted the word "knowledge" to "not include the concept of constructive knowledge." *Id*. at 252. However, a claimant's consent may be implied from the circumstances even without knowledge. *Id*. at 253.

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[12] MCL 333.7521(f) also provides, in pertinent part, "To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent."

Here, the trial court found that the Denali and the motorcycle were subject to forfeiture, and this finding was not clearly erroneous. Officer Stafford's testimony established more than a substantial connection between the underlying activity and the Denali and the motorcycle. Officer Stafford testified that he was familiar with Quinton's role as a drug dealer in the area and that he had seen Quinton in the area in a Denali and on a motorcycle while dealing drugs. Therefore, the trial court's factual finding that the Denali and the motorcycle were subject to forfeiture was not clearly erroneous as there was a substantial connection between the underlying criminal activity and the property.

Claimant also contends that the trial court erred when it found that claimant was not an innocent owner. Specifically, claimant argues that the trial court erred when it failed to find that claimant was the owner of the Denali and the motorcycle. Our Court has previously defined the term "owner" with regard to the innocent-owner defense as: "The person in whom is vested the ownership, dominion, or title of property; . . . He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases." *In re Forfeiture of $53*, 178 Mich App at 493 (quotation marks and citation omitted).

The trial court clearly erred in finding that claimant did not have an ownership interest in the Denali and the motorcycle. Evidence was presented that title to the vehicles was in claimant's name. Although claimant signed the title of the Denali and the motorcycle with the intent of transferring them to Quinton, Quinton was required to sign the title in order to complete the transfer of title. See MCL 257.233(9) ("[T]he effec-

tive date of the transfer of title or interest in the vehicle is the date of signature on either the application for title or the assignment of the certificate of title by the purchaser, transferee, or assignee."); see also *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 66-67; 729 NW2d 500 (2007) (holding that transfer of a vehicle's ownership is complete at signing). The record is devoid of any evidence that Quinton signed the title. Thus, the evidence did not support that the transfer of ownership of the vehicles was complete and, as a result, claimant retained legal title, making her the owner of both vehicles. *In re Forfeiture of $53*, 178 Mich App at 493. Accordingly, the trial court's finding that claimant was not the owner of the vehicles was clearly erroneous.

Although the trial court clearly erred in finding that claimant had no property interest in the Denali and the motorcycle, the trial court nonetheless found that claimant had actual knowledge of Quinton's criminal activity. This finding is not clearly erroneous and defeats her claim that she was an innocent owner. As in *People v One 1979 Honda Auto*, 139 Mich App 651, 654; 362 NW2d 860 (1984), the innocent-owner defense pertinent to this case is set forth in MCL 333.7521(1)(d)(*ii*), which provides: "A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent." Evidence was presented that claimant admitted to officers that she knew marijuana plants were being grown in the basement of her house, and that she had seen defendant in the kitchen mixing cocaine and baking soda (to make crack cocaine). Claimant also admitted that she knew Quinton was "hanging out in the streets." In addition, when Quinton called claimant from jail, claimant, without being

prompted, asked Quinton if he had the whole bag of pills, indicating that she had knowledge of the pills. On that same call, Quinton requested that claimant "check the corn in the cabinet," and claimant agreed that she would.[13] While claimant testified that she did not have knowledge of the underlying drug activity, the burden was on claimant to prove that she neither had knowledge of nor consented to the illegal activity. *In re Forfeiture of $53*, 178 Mich App at 496; *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 250. The trial court, as the assessor of credibility, apparently did not believe claimant's testimony. Therefore, the trial court's finding that claimant had actual knowledge of the underlying criminal activity was not clearly erroneous and defeats her argument on appeal that she was an innocent owner.

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

SAWYER and METER, JJ., concurred with MURRAY, P.J.

[13] Testimony was presented that the term "corn" refers to crack cocaine when it is mixed with marijuana.

PEOPLE v TRAVER

Docket No. 325883. Submitted May 10, 2016, at Traverse City. Decided August 2, 2016, at 9:10 a.m.

Gary M. Traver was convicted following a jury trial in the Mackinac Circuit Court of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, but was acquitted of interfering with electronic communications, MCL 750.540(a), and carrying a concealed weapon (CCW), MCL 750.227. Defendant had a year-long dispute with his neighbor over the location of the property line between their adjoining properties. The dispute culminated in a physical altercation between the two men and resulted in defendant initially being charged with felonious assault, interfering with electronic communications, and CCW. Defendant entered into a plea agreement that allowed him to avoid incarceration but later withdrew that plea. After the plea withdrawal, the prosecution charged defendant with the additional crime of felony-firearm, conviction of which requires a mandatory two-year prison term. The court, William W. Carmody, J., provided the jury with written instructions regarding the elements of the charged offenses but did not read them aloud. In addition, while the written instructions listed the elements of possession for purposes of felony-firearm, the actual elements of felony-firearm, as set forth in M Crim JI 11.34, were omitted. Defendant appealed.

The Court of Appeals *held*:

1. A trial judge charges a jury by verbally instructing the jurors on the law and explaining the deliberative process. Jury instructions are always spoken because it aids in the jurors' understanding of them and, for that reason, aids in a fair trial. The trial court cannot assume that all jurors read or are able to read the provided written instructions; oral instructions allow a jury to consider the applicable law before deliberating.

2. In Michigan, MCR 2.512 and MCR 2.513 address the process of instructing a jury. MCR 2.512(A)(4) provides that after the parties submit written requests for jury instructions, the court must inform the attorneys of its proposed action on the

requests before their arguments to the jury. Under MCR 2.512(B)(2), once the trial court determines which instructions it will give, it must instruct the jury on the applicable law either before or after the arguments of counsel, or at both times, as the court elects. MCR 2.512(B)(2) provides that jury instructions approved by the Committee on Model Criminal Jury Instructions must be given if the instruction applies, it is accurate, and it is requested by a party. MCR 2.513(N)(1) provides, in part, that after closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. While instructions may also be given in written form, by using the word "instruct" in MCR 2.513(N)(1), the Supreme Court signaled that a trial judge must orally instruct the jury. In addition, MCR 2.513(N)(3)—which requires a trial court to provide the jury with a written copy of the final jury instructions to take into the jury room for deliberation—would be surplusage had the Supreme Court intended trial courts to dispense with oral instructions.

3. The trial court plainly erred by failing to verbally communicate a complete set of jury instructions, and the plain error affected defendant's substantial right to have a properly instructed jury consider the evidence. The error seriously affected the integrity of the proceedings because defendant had a constitutional right to have the jury determine his guilt by considering every essential element of the charged offenses. The integrity of the process was impugned because it was impossible to determine from the record whether the jurors received and considered the instructions addressing the elements of the charged offenses.

4. A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense. Although instructional errors that misstate or omit elements of a crime do not necessarily mandate a new trial, the absence of any instruction at all does. Automatic reversal is required when structural error occurs, such as when a jury is allowed to deliberate a criminal charge without first being instructed regarding the elements of the offense. In Michigan, M Crim JI 11.34 provides that to prove the crime of felony-firearm, the prosecution must prove that the defendant committed (or attempted to commit) a specified felony (but conviction of that offense is unnecessary) and that at the time defendant committed (or attempted to commit) the felony, he or she knowingly carried a firearm. In this case, the trial court violated MCR 2.512(D)(2) because the felony-firearm instruction

requested by the prosecution, M Crim JI 11.34, was applicable and accurate. The error required reversal of defendant's convictions without consideration of defendant's waiver of instructional error or his related ineffective assistance claims; the structural error mandated automatic reversal because the trial court did not instruct the jury on the elements of felony-firearm and provided inaccurate written instructions regarding those elements.

5. It was not possible to determine from the record whether trial counsel's performance was deficient in relation to defendant's plea withdrawal. Remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), was necessary to determine whether trial counsel adequately informed defendant of the promised collateral consequence of withdrawing his plea, specifically that the prosecution would add the charge of felony-firearm, which, if defendant were convicted, would carry a two-year mandatory sentence.

Reversed and remanded.

SAWYER, J., dissenting, disagreed with the majority's jury-instruction analysis, concluding that because defendant expressed satisfaction with the given instruction, he waived any claimed error in the instructions themselves. Defendant's claim that he was denied effective assistance because trial counsel failed to raise certain objections to the felony-firearm instruction was without merit. Defendant failed to establish the factual predicate of his claim that the jury instructions were not correct, specifically that the felony-firearm instruction erroneously required the jury to find him guilty of felony-firearm if it found him guilty of felonious assault. The trial court's instruction was an incorrect statement of the law, but the error was prejudicial to the prosecution, not defendant. Because he was not prejudiced by any error related to the jury instructions, defendant was unable to establish ineffective assistance of counsel. Contrary to the majority's argument, the court rules do not specifically require the jury to be verbally instructed on the law, rather than instructed in writing; while reading the instructions to a jury is common practice, that does not make it required. Even if it were error to give instructions only in writing, defendant was unable to demonstrate that he was denied effective assistance because he cannot prove there is a reasonable likelihood he would have been acquitted had the instructions been spoken, rather than provided only in writing. Defendant also failed to establish the factual predicate for his claim that he was denied effective assistance during the plea withdrawal hearing. Judge SAWYER would have affirmed defendant's convictions.

1. JURY — INSTRUCTIONS — VERBAL COMMUNICATION OF INSTRUCTIONS REQUIRED.

While jury instructions in a criminal case may be in written form, taken as a whole the court rules—MCR 2.512(A)(4), MCR 2.512(B)(2), MCR 2.512(D)(2), and MCR 2.513(N)(1) and (3)—require a trial judge to verbally communicate a complete set of jury instructions that includes the elements of each charged offense before deliberations begin; the court rules require the trial judge to orally instruct, or teach, the jury the relevant law.

2. JURY — INSTRUCTIONS — LACK OF VERBAL COMMUNICATION — STRUCTURAL ERROR REQUIRING REVERSAL.

A trial court's failure to verbally communicate instructions to a jury regarding the elements of each charged offense in a criminal case constitutes structural error requiring reversal.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jessica E. LePine*, Assistant Attorney General, for the people.

Cecilia Quirindongo Baunsoe for defendant.

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

GLEICHER, P.J. More than a century ago, our Supreme Court declared that "it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts." *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888). In this case, the circuit court shirked that duty in two respects. First, the court provided the jurors with written instructions regarding the elements of the offenses with which defendant, Gary Traver, was charged, but never read the elements aloud. While providing a jury with written instructions is a welcome reform, it does not substitute for a spoken

charge. Second, the written felony-firearm instruction handed to the jury was hopelessly incorrect, as it omitted the actual elements of the offense.

These errors compel us to reverse Traver's convictions for assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and remand for a new trial.

I

Traver and his neighbor, Patrick St. Andre, shared an access route to their adjacent properties. They disagreed about where each was entitled to park. Tensions flared when Traver allegedly threatened to shoot St. Andre if St. Andre touched Traver's car. A sheriff's deputy called to the scene temporarily defused the situation by suggesting that the two resolve their dispute in "civil court."

The feud re-erupted the next morning. St. Andre recalled that as he walked toward his cabin, Traver shouted obscenities from his trailer window and brandished a gun. Traver advanced an alternate account. St. Andre appeared at his trailer window before daybreak, Traver asserted, "yelling and screaming . . . maybe a little window banging." Traver recounted that he pulled out the "Glock 40" he kept next to his bed, pointed it "at a 90" and told St. Andre to "get away from my window. Which he did." St. Andre called 911.

According to St. Andre, Traver "come [sic] around the corner with the gun and proceeded to assault me," grabbing St. Andre by the shoulders and pushing him down. St. Andre maintained that Traver clutched a weapon throughout the attack. Traver testified that St. Andre had approached in the semidarkness "with his hand out in front of him," so Traver "swatted it out of

my face" before returning to his trailer and calling a towing company to have St. Andre's car moved. Traver denied possession of his gun during this phase of the action. When the tow truck arrived, Traver recounted, he put his gun in his back pocket. Traver denied pointing the gun at anyone that day.

In addition to these two widely divergent recollections, allies of the combatants offered conflicting eyewitness versions of what had transpired. A friend of St. Andre's claimed that Traver "flung" St. Andre to the ground and was "waving a handgun . . . all over the place." Traver's friend testified that Traver did not have a gun and that he did not see Traver physically assault St. Andre. An audiotape of St. Andre's 911 call capped the evidence. From start to finish, this was a credibility contest rather than a slam dunk for the prosecution.

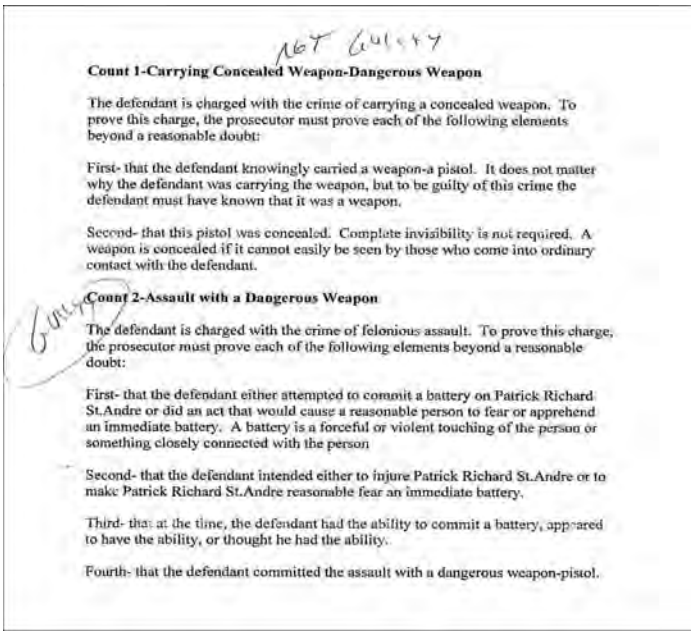
Following closing arguments, the trial court read to the jury most of the routine model criminal jury instructions, but omitted M Crim JI 3.20, which provides in relevant part that "[y]ou may find the defendant guilty of all or [any one/any combination] of these crimes . . . or not guilty." The court then stated:

> When you go to the jury room, ladies and gentlemen, you will be provided with a written copy of these instructions *should you so choose*. If there are instructions that I have given and others that I will give that you wish copies of, they will be provided to you. You've already received the charges and the elements of the same. [Emphasis added.]

At the outset of the trial, the court had provided the jurors with written instructions reciting the elements of the charged offenses.[1] An official copy of these

[1] In its preliminary instructions the trial court stated: "To prove the charges, the prosecutor must prove beyond a reasonable doubt the following information that you have in your hand. I'd ask you to take a look now at what has been passed out to you."

instructions is nowhere to be found in the record. Attached to a couple of handwritten juror questions stuck loosely in the court file are two heavily folded copies of a two-page, typed document, which we reprint in their entirety here, complete with a juror's notes:



NOT GUILTY

Count 1-Carrying Concealed Weapon-Dangerous Weapon

The defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First- that the defendant knowingly carried a weapon-a pistol. It does not matter why the defendant was carrying the weapon, but to be guilty of this crime the defendant must have known that it was a weapon.

Second- that this pistol was concealed. Complete invisibility is not required. A weapon is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant.

GUILTY

Count 2-Assault with a Dangerous Weapon

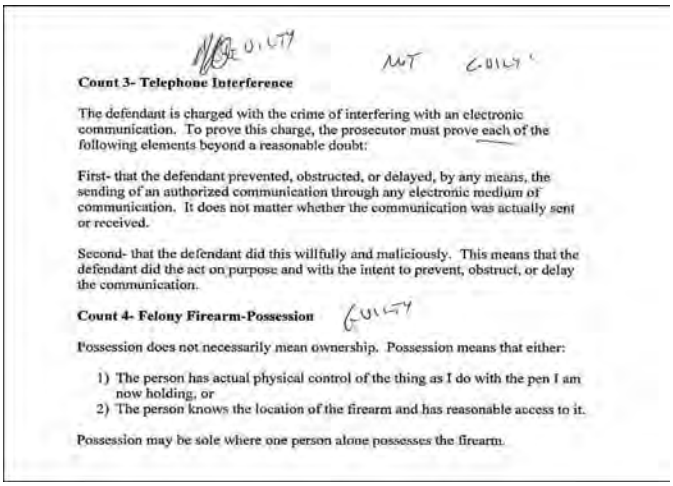
The defendant is charged with the crime of felonious assault. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First- that the defendant either attempted to commit a battery on Patrick Richard St.Andre or did an act that would cause a reasonable person to fear or apprehend an immediate battery. A battery is a forceful or violent touching of the person or something closely connected with the person

Second- that the defendant intended either to injure Patrick Richard St.Andre or to make Patrick Richard St.Andre reasonable fear an immediate battery.

Third- that at the time, the defendant had the ability to commit a battery, appeared to have the ability, or thought he had the ability.

Fourth- that the defendant committed the assault with a dangerous weapon-pistol.



GUILTY NOT GUILTY

Count 3- Telephone Interference

The defendant is charged with the crime of interfering with an electronic communication. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First- that the defendant prevented, obstructed, or delayed, by any means, the sending of an authorized communication through any electronic medium of communication. It does not matter whether the communication was actually sent or received.

Second- that the defendant did this willfully and maliciously. This means that the defendant did the act on purpose and with the intent to prevent, obstruct, or delay the communication.

Count 4- Felony Firearm-Possession GUILTY

Possession does not necessarily mean ownership. Possession means that either:

1) The person has actual physical control of the thing as I do with the pen I am now holding, or
2) The person knows the location of the firearm and has reasonable access to it.

Possession may be sole where one person alone possesses the firearm.

Likely these are the same instructions distributed at the outset of the case. At no time did the trial court orally instruct the jury regarding the elements of the charged offenses. The jury convicted Traver of felonious assault and felony-firearm. It acquitted him of carrying a concealed weapon (CCW), MCL 750.227, and interfering with electronic communications, MCL 750.540(5)(a).

II

Traver's appellate counsel contends that the trial court "deprived the jury of an understanding of what the Prosecutor had to prove beyond a reasonable doubt" by failing to read aloud the elements of the two counts on which Traver was found guilty. The absence of any objection to this omission, Traver asserts, constitutes ineffective assistance of counsel. Appellate counsel further complains that the trial court failed to give M Crim JI 3.20, and that the instructions as given were defective.

Two court rules address the process of instructing a jury. Neither specifically states that the instructions must be oral. But both contemplate that instructions must always be spoken, at least in the first instance. Under the court rules, written instructions serve as an adjunct to the spoken instructions. Read in context, a trial court may not simply skip the reading-aloud step by merely handing the jurors a document listing the elements of the charged crimes.

The first pertinent court rule, MCR 2.512(A)(4), provides that after the parties submit written requests for jury instructions, "[t]he court shall inform the attorneys of its proposed action on the requests before their arguments to the jury." Perhaps that was done here, despite that it was not recorded.[2] Once the trial court determines which instructions it will give, it "shall instruct the jury on the applicable law" either before or after the arguments of counsel, "or at both times, as the court elects . . . ." MCR 2.512(B)(2). If the Committee on Model Criminal Jury Instructions approves an instruction, it must be given if it applies, is accurate, and is requested by a party. MCR 2.512(D)(2).

MCR 2.513(N) also addresses jury instructions. It provides:

> Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests

[2] The trial court required the parties to submit written jury instructions, and those instructions appear in the record. Conspicuously absent from the record is any indication that the court and the parties discussed the jury instructions. If a conference occurred, it was not transcribed or otherwise noted. No "official" complete copy of the instructions appears in the record.

> before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate. [MCR 2.513(N)(1).]

The phrase "the court must instruct the jury" carries a plain, ordinary, and commonly understood meaning. Judges instruct juries by speaking to them out loud, reading jury instructions or reciting them from memory. Spoken communication of the final instructions is deeply ingrained in the history of jury trials. "Charging" a jury, a time-honored description of the instruction process, involves a judge *telling* the jurors what the law is and explaining the deliberative process.

Subrule (N)(3) cements our commonsense construction of the court rules as a mandate for spoken instructions. It states:

> Copies of Final Instructions. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

Had the Supreme Court contemplated that a trial court could dispense with orally instructing the jury, MCR 2.513(N)(3) would be surplusage.

Resorting to a dictionary yields the same conclusion. These rules repeat the same verb in relation to a trial court's task of imparting the law: "instruct." That word is commonly defined as "to give knowledge to: TEACH, TRAIN," "to provide with authoritative information or advice," or "to give [someone] an order or command."

Merriam-Webster's Collegiate Dictionary (11th ed), p 649. While "instructions" may be in written form, by using the word "instruct" in MCR 2.513(N)(1), the Supreme Court signaled that a trial judge would orally "teach" the jury the law. Teaching almost always begins as a verbal experience. And historically judges have taught jurors the law by speaking to them, reading instructions, and by answering their questions aloud.[3]

There are important reasons that in the English and American legal traditions, jury instructions are always spoken. "Reading a complete set of instructions after the evidence ensures that the jury hears and considers all applicable law before deliberations." *State v Nelson*, 587 NW2d 439, 444; 1998 SD 124 (1998). "Instruction of the jury is one of the most fundamental duties of the court and it is only through their oral delivery that the court can be assured that each member of the jury has actually received all of the instructions." *State v Norris*, 10 Kan App 2d 397, 401; 699 P2d 585 (1985).

In *Nelson*, the South Dakota Supreme Court explained that reading instructions aloud facilitates a fair trial. Reading out loud "aids understanding." *Nelson*, 587 NW2d at 444. "Repetition by first hearing the instructions and then reading them enhances recall as well as comprehension." *Id*. And the court cannot

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[3] As sagely stated in Smith, *Effective Instructions to the Federal Jury in Civil Cases: A Consideration in Microcosm*, 18 Syracuse L Rev 559, 570 (1967):

> A jury charge is in effect a lecture on the law and the facts of a particular case. As such, the judge becomes a professor and acting in that capacity he must impart to his students, the jurors, a wide yet basic understanding of many new and complicated matters (some of which are not easily comprehended even by lawyers) in one lecture. If impediments in the court's medium of communication arise, the charge may just as well have been delivered in a foreign language.

assume that all jurors have actually read the instructions sent into the jury room, even if each was handed a copy. *Id*. We would add several other considerations. First, some jurors may not be able to read, or may read poorly. For those jurors, hearing instructions read aloud is the only method that ensures a measure of comprehension. Poorer readers may elect not to engage in the deliberations for fear that their comprehension may be called into question. Second, that a judge speaks the elements of an offense, in conjunction with the admonition that all must be proven beyond a reasonable doubt, communicates the gravity of the task of sitting in judgment. Handing jurors a few pieces of paper and telling them, in essence, to "make the best of it" sends a message that the legal "technicalities" are too unimportant to justify further expenditure of the court's time.[4]

The trial court's failure to verbally communicate a complete set of jury instructions constituted plain error that affected Traver's substantial "right to have a

[4] The Kansas Court of Appeals raised similar concerns in *Norris*, 10 Kan App 2d at 401-402:

> If, for example, written copies of the instructions are given to each juror, a divergence in literacy and reading comprehension may well leave some jurors uninstructed. On the other hand, if the foreman is directed to read the instructions to the other jurors, defendant is deprived of the opportunity to witness the manner in which the foreman intones the instructions. A judge is obligated to act in an impartial and unbiased manner in delivering instructions. He may not sneeringly describe the defendant's defense or make editorial comments while reading the instructions. A jury foreman is under no such constraint once the case has been submitted. Moreover, if, as in this case, the court does not even instruct the jury to read the instructions before deliberating, there is no assurance that the instructions were in fact read or that the verdict is based upon an application of the law to the evidence.

properly instructed jury pass upon the evidence." *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967).[5] That error seriously affected the integrity of the proceedings, as a defendant in a criminal case "has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). It is impossible to determine whether the jurors who determined Traver's guilt actually received and considered the instructions addressing the elements of the charged offenses. This hole in the record impugns the integrity of the proceedings, requiring reversal of both convictions.

III

A second instructional error more definitively compels a new trial.

As displayed earlier, the written information given to the jury regarding the felony-firearm charge covered the issue of possession, but said nothing at all about the actual offense of felony-firearm. The model instruction for this charge states in relevant part:

> **M Crim JI 11.34**
>
> **Possession of Firearm at Time of Commission or Attempted Commission of Felony (Felony Firearm)**
>
> (1) The defendant is also charged with the separate crime of possessing a firearm at the time [he / she] committed [or attempted to commit] the crime of _____.
>
> (2) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (3) First, that the defendant committed [or attempted to commit] the crime of _____, which has been

[5] *Liggett* was abrogated on other grounds by *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

> defined for you. It is not necessary, however, that the defendant be convicted of that crime.
>
> (4) Second, that at the time the defendant committed [or attempted to commit] that crime [he / she] knowingly carried or possessed a firearm.

The jury was not instructed as to either of the two elements of this offense. Nor did defense counsel request that the trial court instruct the jury as to the elements of felony-firearm. To his credit, the prosecutor did. By failing to provide the jury with the model instruction, the trial court violated MCR 2.512(D)(2), as the instruction requested by the prosecutor was applicable and accurate.

We need not dwell on the standard governing review of this error, or resort to ineffective assistance of counsel principles to circumvent potential waiver issues, as the bottom line is not subject to debate. "A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *Kowalski*, 489 Mich at 501. Although instructional errors that misstate or omit elements of a crime do not necessarily mandate a new trial, *id*., the *absence of any instruction* at all surely does. Indeed, our Supreme Court held in a substantially similar case, *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), that the failure to instruct on the elements of felony-firearm constitutes structural error. The Court iterated a "bright line rule" that governs this case: "It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *Id*. at 48.

The trial court never instructed the jury regarding the elements of the crimes and then provided inaccurate written instructions regarding the elements of felony-firearm. Those errors obligate this Court to reverse Traver's convictions, both for felonious assault and felony-firearm.

IV

Traver also contends that ineffective assistance of counsel tainted his decision to withdraw a plea agreement that would have avoided incarceration. Traver alleged in an affidavit that he would not have proceeded to withdraw his plea had he known that the prosecution planned to add a felony-firearm charge if the plea-withdrawal motion succeeded. In his accompanying affidavit, Traver avers:

> 9. . . . [S]ubsequent to my motion to withdraw plea being granted the prosecutor added a charge of felony firearm.
>
> 10. . . . I [sic] was never explained that the prosecutor was going to do this and that I was not told that this charge carried a 2 year mandatory prison sentence if convicted.

Traver's allegations regarding his counsel's deficient performance require a remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The United States Supreme Court held in *Padilla v Kentucky*, 559 US 356, 368-369; 130 S Ct 1473; 176 L Ed 2d 284 (2010), that the right to the effective assistance of counsel encompasses counsel's obligation to inform a defendant of the immigration consequences of a guilty plea. The converse must also apply: before withdrawing a guilty plea, a defendant must be advised of the advantages and disadvantages of that decision. Whether Traver was adequately ad-

vised of the promised collateral consequence of plea withdrawal cannot be ascertained on this record. Accordingly, before retrying Traver on the charges levied against him, the trial court must conduct a *Ginther* hearing if Traver requests one. If the court determines that counsel performed ineffectively by failing to advise Traver that the prosecutor intended to file a felony-firearm charge carrying a mandatory two-year imprisonment penalty, and that Traver would have declined to withdraw his plea had he been aware of this risk, the court must then order the prosecutor to reoffer the original plea agreement. See *Lafler v Cooper*, 566 US 156, 174; 132 S Ct 1376; 182 L Ed 2d 398 (2012).

We reverse Traver's convictions and sentences and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY, J., concurred with GLEICHER, P.J.

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

Defendant's expressed satisfaction with the instructions as given by the trial court waived any claimed error in the instructions themselves. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). However, defendant also claims that his counsel was ineffective for failing to raise certain objections to the jury instructions. Accordingly, this Court's review is limited to determining if there was ineffective assistance of counsel. Moreover, because defendant did not move for a new trial or an evidentiary hearing on his claim of ineffective assistance, our review is limited to mistakes apparent on the existing record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v Walker*, 497 Mich 894, 895; 855 NW2d 744 (2014). We approach a claim of ineffective assistance with a "strong presumption that counsel's challenged actions were sound trial strategy." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015). Accordingly, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). To demonstrate prejudice, "the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id*.

Defendant first argues that the trial court's instructions regarding possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, left the jury with no choice but to find him guilty of the offense once it found him guilty of felonious assault. The trial court instructed the jury, at defense counsel's behest, as follows: "If you do find the defendant guilty in count one, two, or three and understand, in your belief, that a weapon was used to commission those crimes, then count four would be applicable."

Defendant has failed to establish the factual predicate of his argument. The court only stated that felony-

firearm would be "applicable" in the identified circumstances, not that the jury must find defendant guilty. In other words, what the court told the jury was that consideration of the felony-firearm charge was appropriate or relevant if and only if it found defendant guilty of one or more of the other charged crimes and that a weapon was used in the commission of the crime(s).

Nonetheless, I would agree that the court's instruction was erroneous. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (quotation marks and citation omitted). Thus, a conviction of an underlying felony is not an element of felony-firearm; the jury must only find that a defendant committed *or attempted* to commit a felony. *People v Lewis*, 415 Mich 443, 453-454; 330 NW2d 16 (1982). The court compounded this error when it instructed, "If . . . you find the defendant not guilty of the other three counts, you cannot find him guilty of the felony firearm." This error, however, worked to defendant's advantage in that it took away from the jury the discretion to find him guilty of felony-firearm while acquitting him of the underlying felony. *Id*. Additionally, because a defendant need only carry or have a firearm in his possession during the commission or attempted commission of a crime, the court's instruction that the felony-firearm charge was only applicable if the jury concluded "that a weapon was used to commission" any of the underlying crimes for which the jury found defendant guilty was erroneous.[1] In short, the prejudice in this instruction was against the prosecution, not defendant.

[1] This portion of the instruction was also wrong because a defendant cannot be found guilty of felony-firearm if the underlying crime is carrying a concealed weapon (CCW), MCL 750.227. MCL 750.227b(1)

Defendant also argues that he was prejudiced by the cited instruction because the court failed to instruct the jury that it could find defendant guilty on all, some, or none of the charged crimes in accordance with M Crim JI 3.20.[2] However, the "use of the standard criminal jury instructions is not mandatory and they are not binding authority." *People v Williams*, 288 Mich App 67, 76 n 6; 792 NW2d 384 (2010). Furthermore, in the context of general instructions addressing the general concept of a charged crime, the court instructed the jury that "[i]f you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty of the relative charge." This instruction speaks to how the jury must approach consideration of each crime charged. Moreover, as noted earlier, in its attempt to clarify the felony-firearm instruction, the trial court did refer to the jury's finding defendant guilty on counts one, two, *or* three. This had the effect of informing the jury that it need not find defendant guilty on all counts. Additionally, the jury did, in fact, acquit defendant of some of the charges, while convicting him of

("A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230, is guilty of a felony and shall be punished by imprisonment for 2 years."). This error would have prejudiced defendant had the jury found him guilty of CCW. But because it did not, the error was harmless.

[2] M Crim JI 3.20 provides as follows:

> (1) The defendant is charged with ____ counts, that is, with the crimes of _____ and _____. These are separate crimes, and the prosecutor is charging that the defendant committed both of them. You must consider each crime separately in light of all the evidence in the case.
>
> (2) You may find the defendant guilty of all or [any one / any combination] of these crimes [, guilty of a less serious crime,] or not guilty.

others. Thus, it is clear that the jury understood that it was to consider each charge separately. Defendant is unable to establish prejudice by the omission of this instruction.

Defendant next argues that the trial court effectively took consideration of one of the elements of felonious assault away from the jury when it stated that a pistol was admitted into evidence and that a pistol is a firearm, which is dangerous per se. The elements of assault with a dangerous weapon are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Bosca*, 310 Mich App 1, 20; 871 NW2d 307 (2015) (quotation marks and citation omitted). "When a trial court instructs that an essential element of a criminal offense exists as a matter of law, error requiring reversal will be found." *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996).

Again, defendant fails to establish the factual predicate of his claim of error. The trial court did not state that defendant had a firearm or dangerous weapon during the alleged assault, but rather that "[o]ne of the exhibits has been a pistol" and that a pistol "*can be* considered a dangerous weapon." (Emphasis added.) Hence, the essential elements of whether defendant assaulted St. Andre and whether he did so with a dangerous weapon were left for the jury. Furthermore, the court did not err by stating that a pistol can be a dangerous weapon because, by statute, "a pistol or other firearm" is a dangerous weapon. MCL 750.226(1).[3] De-

[3] MCL 750.226(1) provides, "A person shall not, with intent to use the same unlawfully against the person of another, go armed with a pistol or other firearm . . . or any other dangerous or deadly weapon or instrument."

fense counsel cannot be deemed to have rendered ineffective assistance predicated on the failure "to make a meritless request or objection." *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014).

Finally, defendant argues that the trial court erred by not instructing the jury "on all the elements of the crimes." In response, the prosecution asserts the court provided the jury with written instructions that contained the elements of each of the felony counts, which it attached as an exhibit to its brief on appeal. The prosecution bases this assertion on the following statement made by the court to the jury: "To prove the charges, the prosecutor must prove beyond a reasonable doubt the following information *that you have in your hand*." (Emphasis added.) Defendant maintains that "it is unknown what was given to the jury as this is not part of the record."

Although there is no copy in the record of what was given to the jury, the trial transcript strongly supports the prosecution's position that the jury received written instructions of the elements for each crime. Specifically, after the jury was chosen, the court asked the court deputy to "pass these out to the jurors . . . ." Shortly thereafter, the court asked the jury "to take a look now at what has been passed out to you." The court then went over the elements for CCW and stated, "Now, as you can see in count two and count three, and count four, *those are the elements*, ladies and gentlemen, that you will need to pay attention to during the course of this trial." (Emphasis added.) Before dismissing the jurors to the jury room after closing arguments and instructions, the court then stated:

> When you go to the jury room, ladies and gentlemen, you will be provided with a written copy of these instructions should you so choose. If there are instructions that I

> have given and others that I will give that you wish copies of, they will be provided to you. *You've already received the charges and the elements of the same*. [Emphasis added.]

The prosecution's position is further bolstered by defense counsel's contention that he had a "problem with count four" because it was unclear "that there has to be an underlying felony before . . . they could find anybody guilty of count four." As the court's oral instructions did not explain the elements of felony-firearm,[4] defense counsel had to be referring to a written instruction. It is clear that the jury did receive written instructions regarding the elements of the charged offenses. Additionally, with respect to the felony-firearm charge, the trial court did, at counsel's request, clarify the instruction. As noted earlier, although the clarification was inaccurate, those inaccuracies actually worked to defendant's advantage because they created a higher burden on the prosecution than required by the law.

No prejudicial error having been shown with respect to the trial court's instructions on the elements of the crimes charged, defendant's claim of ineffective assistance predicated on the same is without merit. *Chelmicki*, 305 Mich App at 69. However, I do wish to address the majority's concerns with the fact that much of the jury instructions on the elements of the crime were given only in written form, not read aloud to the jury.

I note that defendant barely presents an argument on this point. In one sentence in his brief, defendant states that "the trial court omitted reading the elements of the count of felonious assault and the count of felony firearm; coincidentally, the two counts the

[4] Instead, they merely defined "possession."

Defendant-Appellant was found guilty of." Defendant, however, does not address that the trial court had provided written instructions, nor does defendant address any issue regarding whether it is legally adequate to only provide written instructions or whether all instructions must also be read aloud to the jury.

Nonetheless, without the assistance of adequate briefing by defendant, the majority ventures off into this issue and attempts to create a requirement that instructions must be read aloud, without providing an actual basis for the existence of that requirement. While the majority looks to the court rules regarding instruction of the jury in criminal cases, those rules do not specifically require that the jury be verbally instructed, rather than instructed in writing. The majority then states, without referring to authority, that judges instruct juries by reading the instructions out loud. While I do not doubt that this is the customary practice, that it is customary does not translate into it being a required practice.

The majority then turns to the dictionary to find that the word "instruct" is defined as "to teach." Then, without even turning to the dictionary, the majority pronounces that teaching is a verbal experience. Again, while teaching is often verbal, that does not mean that it must be verbal.

In short, the majority points to no established authority in this state that jury instructions must be verbal rather than written. While this may be the customary, and perhaps even the preferred practice, that does not mean that it is the required practice. And we must not forget that defendant did not object to the trial court's engaging in this practice. Because we must analyze this issue as one of ineffective assistance of counsel, to reverse we must be able to reach the

conclusion that there is a reasonable likelihood that a different result would have occurred absent the error. Even if I were to accept the proposition that providing some of the instructions only in writing is, in fact, error, I am not persuaded that this error resulted in prejudice to the defendant. That is, neither defendant nor the majority can make the case that there is a reasonable likelihood that defendant would have been acquitted had the instructions been spoken rather than just provided in writing.

I also disagree with the majority's analysis of defendant's argument that he received ineffective assistance of counsel during the withdrawal of his plea agreement. There is no indication in the record whether defense counsel informed defendant of the consequences of withdrawing his plea agreement. And because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to the record before us. Defendant has not established a factual predicate for his claim, and the presumption that defense counsel acted effectively is not undermined. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Similarly, the record fails to show that the alleged error prejudiced defendant. There is nothing in the lower court record showing that he would not have sought a withdrawal of the plea had he been informed of the possible felony-firearm charge. Defense counsel stated at the hearing that defendant was seeking a withdrawal of the plea agreement because he was innocent of the charges and because he was concerned that his status as a marijuana caregiver would be affected. That a charge of felony-firearm may have been brought does not negate those motivating factors.

In sum, I am not persuaded that defendant has established that he received ineffective assistance of counsel. I would affirm.

WILLIAMS v KENNEDY

Docket No. 325267. Submitted April 6, 2016, at Lansing. Decided August 2, 2016, at 9:15 a.m. Leave to appeal denied 500 Mich 959.

Madison P. Williams, by her next friend and mother, Kellie A. Williams, brought this action for negligence against defendants, Mark R. Kennedy, Turner Land Jack LLC, Jack Visser, and Michael Metcalf, in the Kent Circuit Court. Madison was struck and injured by a boat piloted by Kennedy on September 1, 2013. The original owner of the boat, Metcalf, had sold the boat to Kennedy on August 26, 2013, for $45,000, which was paid in full on the date of purchase. Metcalf properly indicated on the boat's certificate of title that he had transferred ownership of the boat to Kennedy. Metcalf signed and delivered to Kennedy the completed certificate of title at the time of sale. At the time of the accident, Kennedy had not yet obtained from the Secretary of State a transfer title to the boat in his name. On behalf of Madison, Kellie contended that all defendants were liable for damages, and she specifically moved for summary disposition against Metcalf to establish that he was an owner of the boat at the time of the accident. Metcalf filed a cross-motion for summary disposition to establish that he was not an owner of the boat at the time of the accident. The trial court, James R. Redford, J., ruled that genuine issues of material fact existed concerning Metcalf's ownership and denied both motions. Metcalf appealed by leave granted the denial of his motion for summary disposition.

The Court of Appeals *held*:

The Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., sets forth the procedures for selling and transferring title to watercraft. MCL 324.80304 states that to sell a watercraft the seller must deliver to the purchaser a certificate of title showing the assignment of title to the purchaser. The purchaser must then, under MCL 324.80307, apply for a certificate of title with the Secretary of State within 15 days after the date of purchase or transfer. The language of MCL 324.80307 suggests that transfer of ownership precedes completion of legal transfer of title with the Secretary of State. Moreover, MCL 324.80103(i) defines the term "owner" as a person who claims or

is entitled to lawful possession of a vessel by virtue of his or her legal title or equitable interest. Accordingly, an individual "owns" a watercraft at the time of purchase when the individual pays the purchase price in full, receives a properly completed certificate of title transferring ownership of the watercraft to the individual, and takes possession of the watercraft. "Ownership" of the watercraft transfers from the seller to the purchaser under these circumstances, even when the purchaser has not yet obtained from the Secretary of State title to the watercraft in the purchaser's name. In this case, Metcalf no longer owned the boat at the time of Kennedy's allegedly negligent operation of the boat even though Kennedy had yet to register the boat in his name as required by MCL 324.80307(1). Metcalf did not claim lawful possession of the boat, and he was not entitled to lawful possession of the boat by virtue of any legal title. Because Metcalf was not the owner of the boat at the time of the accident, he was not liable for any damages claimed by Kellie on Madison's behalf. The trial court erred by failing to grant Metcalf's motion for summary disposition.

Reversed and remanded.

STATUTES — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — WATERCRAFT — SALE — TRANSFER OF OWNERSHIP.

Under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., an individual "owns" a watercraft at the time of purchase when the individual pays the purchase price in full, receives a properly completed certificate of title transferring ownership of the watercraft to the individual, and takes possession of the watercraft; "ownership" of the watercraft transfers from the seller to the purchaser under these circumstances, even when the purchaser has not yet obtained from the Secretary of State title to the watercraft in the purchaser's name (MCL 324.80103(i); MCL 324.80304; MCL 324.80307).

Holmes & Wiseley, PC (by *Aaron D. Wiseley*), for Madison W. Williams, by her next friend, Kellie A. Williams.

Law Office of Storck & Dinverno (by *Steven D. Brock*) for Michael Metcalf.

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

METER, J. Defendant Michael Metcalf appeals by leave granted the trial court's order denying his motion for summary disposition. Metcalf challenges the trial court's determination that genuine issues of fact exist regarding whether he owned a boat at the time of its allegedly negligent operation. We reverse and remand for entry of judgment in favor of Metcalf.

Plaintiff Madison P. Williams, through her next friend and mother, Kellie A. Williams, brought this negligence action after a boat struck Madison in Silver Lake in Kent County, causing partial amputation of her right foot. Plaintiff claims entitlement to relief against Metcalf under MCL 324.80157, which holds watercraft owners liable for damages resulting from the negligent operation of their vessels. Defendant Mark R. Kennedy piloted the boat on September 1, 2013, when the accident occurred.

Kennedy had obtained the boat from Metcalf on August 26, 2013, for $45,000. Kennedy paid with two $22,500 checks, one drawn from his own account and one from the account of defendant Turner Land Jack LLC, a business owned by defendant Jack Visser. In exchange, Metcalf signed and delivered the boat's "Watercraft Certificate of Title," which contains a section entitled "Title Assignment by Seller." The certificate states that "the ownership of the watercraft . . . has been transferred to the following purchaser(s)" and lists Kennedy as transferee. Kennedy left Metcalf's residence with both the boat and the "Watercraft Certificate of Title" when the transaction was complete. Metcalf expected Kennedy to apply to the Secretary of State to transfer legal title using the paperwork he completed and delivered to Kennedy at the point of sale. Twice, on August 28 and August 30, 2013, Kennedy attempted to do so at an office of the Secretary of

State. On both occasions, long lines deterred him from completing the process. Therefore, when Kennedy piloted the boat that struck Madison in Silver Lake on September 1, 2013, the boat's sale had not yet been formally reported to the Secretary of State.

Kennedy successfully completed the transaction at the Secretary of State on September 5, 2013. The transfer-of-title documents list the date of purchase from Metcalf as August 26, 2013.

In addition to her complaint alleging that all defendants are liable for damages, plaintiff filed a motion for summary disposition, requesting that the trial court find that Metcalf qualified as an "owner" of the boat at the time of the accident. Metcalf subsequently filed a cross-motion for summary disposition, asking the court to determine that he did not own the boat at the pertinent time. The trial court found genuine issues of material fact regarding the question of Metcalf's ownership and denied both motions. Metcalf presently appeals by leave granted the denial of his cross-motion for summary disposition.

This Court reviews de novo the trial court's order denying summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). The subrule at issue here is MCR 2.116(C)(10). When reviewing a motion under this subrule, "our task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). "We must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id*. (quotation marks and citation omitted).

This appeal also involves issues of statutory interpretation, which we review de novo. *2000 Baum Family Trust v Babel*, 488 Mich 136, 143; 793 NW2d 633 (2010).

"[T]he proper role of the judiciary is to interpret and not write the law . . . ." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Accordingly, this Court enforces a statute as written if the statutory language is unambiguous. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). While a term "must be applied as expressly defined" within a given statute, *Barrett v Kirtland Community College*, 245 Mich App 306, 314; 628 NW2d 63 (2001), undefined words are to be given their "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) (citations omitted). We may consult a dictionary to ascertain "common and ordinary meaning[s]." *Id*. This Court must avoid an interpretation that would render any part of a statute surplusage or nugatory. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

The Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., sets forth procedures for selling and transferring title to watercraft. MCL 324.80304(1) states that, except in a situation not applicable here, a person may not sell a watercraft "without delivering to the purchaser or transferee of the watercraft a certificate of title with such assignment on the certificate of title as is necessary to show title in the purchaser." MCL 324.80304(2), a complementary provision, states that a person "shall not purchase or otherwise acquire a watercraft without obtaining a certificate of title for it in the person's name[.]" In this case, it is indisputable from the

evidence that Metcalf qualifies as a seller and Kennedy qualifies as a purchaser under these provisions of NREPA. Metcalf successfully delivered the "Watercraft Certificate of Title" to Kennedy at the point of sale and expressly assigned ownership to Kennedy with this document in the section entitled "Title Assignment by Seller."

NREPA further provides that "[a]pplication for a certificate of title for a watercraft . . . shall be filed with the secretary of state within 15 days after the date of purchase or transfer." MCL 324.80307(1). In a case such as this, in which a "certificate of title was previously issued for the watercraft, [the application] shall be accompanied by the certificate of title duly assigned, unless otherwise provided in this part." *Id*. Thus, Kennedy was required to apply to the Secretary of State to register the transfer of title within 15 days after purchase of the watercraft. Kennedy successfully completed this requirement on September 5, 2013, after the boating accident occurred, by presenting to the Secretary of State the certificate of title that had been delivered to him by Metcalf on the date of purchase.

The issue in this appeal is whether the seller of a boat qualifies as an owner during the period after a seller delivers the certificate of title to a purchaser but before the transfer of title has been registered with the Secretary of State. Whether Metcalf is deemed an owner during this period determines his liability under MCL 324.80157 for damages resulting from the boating accident.

We note, initially, that after discussing the requirements for applying for a certificate of title, MCL 324.80307(1) goes on to state that, "[i]f satisfied that the applicant is the owner of the watercraft and that

the application is in the proper form, the secretary of state shall issue a certificate of title." This sentence suggests that ownership precedes completion of legal transfer of title with the Secretary of State. Indeed, legal transfer is impossible if the Secretary of State is not satisfied that "the applicant is the owner" of the watercraft. The statute implies, then, that Kennedy, not Metcalf, was the owner at the time of the accident.

More significantly, MCL 324.80103(i) sets forth an explicit definition of the term "owner": "a person who claims or is entitled to lawful possession of a vessel by virtue of that person's legal title or equitable interest in a vessel." No party suggests that Metcalf *claimed* lawful possession of the boat at the time of the accident. Nor does any party argue that Metcalf was *entitled* to lawful possession by virtue of an equitable interest. Indeed, in exchange for Kennedy's full $45,000 payment, Metcalf assigned the boat to Kennedy with the boat's certificate of title by signing his name to a declaration that ownership had been transferred. Delivery to Kennedy was completed when Kennedy accepted both the certificate and the boat into his possession. Metcalf testified that he expected Kennedy to fulfill the remaining requirements for title transfer by applying to the Secretary of State in accordance with MCL 324.80307(1).

In light of these facts, it is only possible that Metcalf qualified as an owner under MCL 324.80103(i) if he was entitled to lawful possession by virtue of his legal title at the time of the accident. Legal title, as defined by *Black's Law Dictionary* (10th ed), exists when a title "evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." Metcalf's name did appear on the certificate of title registered with the state at the time of the

accident because Kennedy had not yet successfully transferred title with the Secretary of State. Accordingly, Metcalf arguably had legal title to the boat at the time of the accident. We cannot conclude, however, that Metcalf was entitled to lawful possession of the boat "by virtue of" any legal title. MCL 324.80103(i).

"By virtue of" means "through the force of" or "by authority of." *Merriam-Webster's Collegiate Dictionary* (11th ed). Even if Metcalf had legal title to the boat at the time of the accident, it is clear that Metcalf was not entitled to lawful possession through the force of or by authority of this title. *Black's Law Dictionary* (10th ed) defines "possession" as "having or holding property in one's power" or "the right under which one may exercise control over something to the exclusion of all others," and it defines "lawful possession" as possession that is "based on a good-faith belief in and claim of ownership" or "granted by the property owner to the possessor." Metcalf expressly transferred his possessory interest in the boat to Kennedy at the point of sale. Kennedy had not granted Metcalf a possessory interest in the boat, nor could Metcalf possess the boat on the basis of a good-faith claim of ownership.

Additionally, Kennedy was to apply to the Secretary of State to transfer official title within 15 days after the sale in accordance with MCL 324.80307(1). Any suggestion that Metcalf's right to lawful possession continued into this 15-day postpurchase period conflicts with MCL 324.80307(1). Indeed, the Secretary of State would be unable to determine that the applicant for title registration, the purchaser, is the owner of a vessel if the seller retains the right to possession after a proper transfer of possession and title at the point of sale.

For the foregoing reasons, Metcalf did not qualify as an owner of the boat for purposes of the present lawsuit.[1]

Reversed and remanded for entry of judgment in favor of Metcalf. We do not retain jurisdiction.

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

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[1] Plaintiff cites *Hunt v Adams*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2012 (Docket No. 304563), in support of her appeal. We decline to rely on this case because it is nonbinding, see MCR 7.215(C)(1), and also because it is sufficiently distinguishable. Indeed, in *Hunt*, the Secretary of State refused to issue a certificate of title to a purported purchaser, Janis Jones, because of an outstanding lien on the boat. *Hunt*, unpub op at 2-3. The *Hunt* Court's holding that Jones "never legally took title to the boat," *id*. at 4, does not apply here, when the Secretary of State found that Kennedy was indeed the owner and issued a formal certificate of title on September 5, 2013, and when the transfer-of-title documents filed with the Secretary of State specified a purchase date of August 26, 2013. We note that, even if we were to conclude that Kennedy did not acquire legal title to the boat until he obtained a certificate of title from the Secretary of State, this would not mean that Metcalf was an owner under MCL 324.80103(i) after the sale. The question at issue in this case—whether, at the time of the accident, Metcalf was an owner of the boat under the definition set forth in MCL 324.80103(i)—does not involve an inquiry into whether the assignee acquired legal title to the boat. Kennedy was, in fact, an "owner" under MCL 324.80103(i) at the time of the accident, in that he had lawful possession by virtue of his equitable title. See *Black's Law Dictionary* (10th ed) (defining "equitable title" as "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title"). Finally, we note that the additional opinion cited by plaintiff—*Jerry v Second Nat'l Bank of Saginaw*, 208 Mich App 87; 527 NW2d 788 (1994)—is distinguishable because in the present case, as contrasted with *Jerry*, an assignment of title from Metcalf to Kennedy occurred. Cf. *id*. at 92-93.

JENDRUSINA v MISHRA

Docket No. 325133. Submitted February 10, 2016, at Detroit. Decided August 4, 2016, at 9:00 a.m. Leave to appeal sought.

Kerry Jendrusina filed a medical malpractice action in the Macomb Circuit Court against his primary care providers, Dr. Shyam Mishra and Shyam N. Mishra, M.D., PC, alleging that defendants failed to take action as required by the relevant standard of care when plaintiff's blood tests demonstrated worsening and eventually irreversible kidney disease. Mishra diagnosed plaintiff with renal insufficiency in 2007, and subsequent lab reports revealed abnormal and worsening levels of two blood measures related to kidney function. However, plaintiff was neither informed of the diagnosis nor given copies of the lab reports. Plaintiff was aware that his kidneys were being tested, but plaintiff did not understand the reason for the testing; Mishra did not always communicate the test results to plaintiff. In 2009, Mishra conducted an ultrasound on plaintiff's kidneys and informed plaintiff that his kidneys were "fine." On January 3, 2011, plaintiff went to the hospital with flu-like symptoms, and hospital staff determined that plaintiff was in irreversible kidney failure. On September 20, 2012, plaintiff was examined by Dr. Jukaku Tayeb, a treating nephrologist, who informed plaintiff that plaintiff's irreversible kidney failure could have been prevented had defendants referred plaintiff to a nephrologist earlier. Plaintiff alleged that, before his conversation with Tayeb, he did not know that his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. Plaintiff notified defendants of his intent to sue on March 18, 2013, and plaintiff filed the claim on September 17, 2013. Defendants moved for summary disposition, alleging that the complaint was time-barred under MCL 600.5838a(2) because plaintiff should have discovered his claim on January 3, 2011, and plaintiff failed to initiate the claim within six months of that date. Plaintiff responded that the limitations period did not begin to run until September 20, 2012, and therefore the claim had been initiated within the six-month discovery period. The court, James M. Biernat, Jr., J., granted summary disposition in favor of defendants, concluding

that plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure on January 3, 2011. Plaintiff appealed.

The Court of Appeals *held*:

MCL 600.5838a(2) provides, in pertinent part, that an action involving a claim based on medical malpractice is barred unless the action is commenced within six months after the plaintiff discovers or should have discovered the existence of the claim. The discovery period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. Significantly, the Legislature chose the phrase "should have" rather than "could have" in the statutory text. Therefore, the inquiry is not whether it was possible for a reasonable lay person to have discovered the existence of the claim; rather, the inquiry is whether it was probable that a reasonable lay person would have discovered the existence of the claim. The determination of what a plaintiff should have discovered must be based on what the plaintiff knew or was told, not on what the plaintiff's doctors knew or what can be found in specialized medical literature. In this case, defendants never informed plaintiff that plaintiff had kidney disease or might develop kidney disease, and defendants never provided plaintiff with copies of his lab reports. Additionally, the mere performance of a noninvasive, commonly administered kidney-imaging study that yielded a normal result did not constitute an objective fact from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. The record did not support the view that plaintiff should have known of a possible cause of action when plaintiff was informed of his diagnosis of kidney failure on January 3, 2011, because plaintiff was unaware that he had a history of kidney disease and because plaintiff was unaware that his lab reports indicated that his kidney failure was the result of a slowly progressing condition rather than an acute event. There was no evidence that plaintiff should have discovered his claim until he talked with Tayeb on September 20, 2012. Therefore, the trial court erred by granting defendants' motion for summary disposition.

Reversed and remanded for further proceedings.

JANSEN, J., dissenting, agreed with the trial court's holding that the limitations period began to run on January 3, 2011, the date on which plaintiff became aware of his diagnosis of kidney failure that so plainly contradicted everything Mishra had told plaintiff until that point. Judge JANSEN disagreed with the majority's conclusion that plaintiff's ignorance of the progres-

sive nature of his kidney disease demonstrated that he should not have known of a possible cause of action: first, the majority did not limit its review to the medical evidence in the record but instead conducted its own research on the pathophysiology of kidney failure; and second, plaintiff knew that he had elevated kidney test levels and that Mishra had performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. Furthermore, Michigan Supreme Court caselaw provides that the discovery rule applies to the discovery of an injury, not to the discovery of a later-realized consequence of the injury. While plaintiff's testimony indicated that he did not have actual knowledge of the existence of his claim until September 20, 2012, MCL 600.5838a(2) requires the court to consider when a plaintiff should have discovered the existence of a claim. Because plaintiff should have discovered the existence of his claim on January 3, 2011, the date on which he learned that he had kidney failure, Judge JANSEN would have affirmed the trial court's order granting summary disposition in favor of defendants.

LIMITATIONS OF ACTIONS — MEDICAL MALPRACTICE — DISCOVERY RULE.

MCL 600.5838a(2) provides, in pertinent part, that an action involving a claim based on medical malpractice is barred unless the action is commenced within six months after the plaintiff discovers or should have discovered the existence of the claim; the discovery period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action; the inquiry is not whether it was possible for a reasonable lay person to have discovered the existence of the claim, but rather whether it was probable that a reasonable lay person would have discovered the existence of the claim; the determination of what a plaintiff should have discovered must be based on what the plaintiff knew or was told, not on what the plaintiff's doctors knew or what can be found in specialized medical literature.

McKeen & Associates, PC (by *Brian J. McKeen* and *John R. LaParl, Jr.*), and *Bendure & Thomas, PLC* (by *Mark R. Bendure*), for Kerry Jendrusina.

Plunkett Cooney PC (by *Karen E. Beach*) for Shyam Mishra, M.D., and Shyam Mishra, M.D., PC.

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

SHAPIRO, J. Plaintiff, Kerry Jendrusina, filed this medical malpractice case against his primary care providers, Dr. Shyam Mishra, a specialist in internal medicine, and Shyam N. Mishra, M.D., PC. Defendants moved for summary disposition, asserting that plaintiff's notice of intent to sue, and therefore the complaint, had not been timely filed. Plaintiff responded that the claim had been initiated within the six-month discovery period defined by the Legislature in MCL 600.5838a. That statute provides, in pertinent part, "[A]n action involving a claim based on medical malpractice may be commenced . . . within 6 months after the plaintiff discovers or *should have* discovered the existence of the claim . . . ." MCL 600.5838a(2) (emphasis added). The trial court granted defendants' motion, finding that the claim was not timely. In so ruling, the trial court effectively substituted the phrase "*could have*" for "*should have*" in the statute. Because we are to follow the text of the statute as written, we reverse and remand.

On January 3, 2011, plaintiff went to the hospital with flu-like symptoms. He was found to be dehydrated, and, after performing various tests, the hospital staff determined that plaintiff was in irreversible kidney failure. As a result, plaintiff was placed on lifetime dialysis with its attendant morbidity and mortality.

Plaintiff asserts that defendants failed to take action as required by the relevant standard of care, such as a referral to a nephrologist (kidney specialist), despite the fact that for several years plaintiff's blood tests—contained within plaintiff's medical chart maintained by Mishra—demonstrated worsening and even-

tually irreversible kidney disease. Plaintiff further asserts that had Mishra complied with the standard of care, plaintiff's irreversible kidney failure would have been avoided.

According to plaintiff, he did not discover the existence of his claim until September 20, 2012. On that date, plaintiff was seen by Dr. Jukaku Tayeb, a treating nephrologist. According to plaintiff's testimony:

> [Tayeb] came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your full pathology report here," and he goes, "Did your doctor -- Why didn't you come to a nephrologist?" I said I was with an internist. The internist said everything was fine . . . . Then he started ranting, saying, "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Plaintiff testified that when Tayeb told him this, he "was shocked. I was dumbfounded. That was like someone punching me in the gut." He testified that before that conversation with Tayeb, he did not know his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. He testified that until then, "I thought it happens, it happens." He testified that immediately after this visit with Tayeb, he called his wife and said: "Oh, my God. I think Mishra screwed up." The following day, plaintiff contacted an attorney. Calculating the six-month discovery period from September 20, 2012, plaintiff timely initiated this case. The trial court concluded, however, that plaintiff should have discov-

ered the existence of his claim when he was diagnosed with kidney failure in January 2011.

In reviewing the trial court's analysis, we must be strictly guided by the language of the statute. "If the language of a statute is clear and unambiguous, this Court must enforce the statute as written." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

> Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. [*Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012) (citations omitted).]

Significantly, we note that the Legislature chose the phrase "should have" rather than "could have" in the statutory text. According to the *New Oxford American Dictionary* (3d ed), "could" is "used to indicate *possibility*," whereas "should" is "used to indicate what is *probable*." (Emphasis added.)[1] Therefore, the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; rather, the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim.

Plaintiff's medical chart maintained by Mishra includes the results of his routine blood tests. Beginning in 2007, lab reports filed within the chart consistently

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[1] Other dictionaries provide consistent definitions. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "could" as "an alternative to *can* suggesting less force or certainty" and "should" as "used in auxiliary function to express obligation." *Random House Webster's College Dictionary* (2d ed) defines "could" as "used to express conditional possibility or ability" and "should" as "used to indicate duty, propriety, or expediency."

contained abnormal and worsening levels of two blood measures related to kidney function: *creatinine*[2] and *eGFR*.[3]

While these test results are clearly relevant to the issue of whether Mishra complied with the standard of care, they are not relevant to the issue of when plaintiff should have discovered his potential claim unless there is evidence that plaintiff was made aware of the repeated and increasingly abnormal indications of kidney disease. Defendants offer no evidence that this was the case. First, it is undisputed that defendants' office never provided plaintiff with copies of his lab reports. Second, plaintiff testified that defendants never told him that he had kidney disease or that he might develop kidney disease. Indeed, given defendants' failure to introduce contrary evidence, defendants have not even created a question of fact on the issue.[4]

Defendants point out that in a 2008 office note, Mishra wrote down a diagnosis of "chronic renal fail-

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[2] Creatinine is a waste product of muscle metabolism that is normally filtered out by the kidneys and discharged in urine. Standard blood test panels include a measure of creatinine in the blood. According to the record before us, normal blood levels of creatinine are in the range of 0.5 to 1.3 milligrams per deciliter of blood (mg/dL). If creatinine levels go above that range, the elevated levels suggest that the kidneys are not adequately filtering creatinine, which may be a sign of kidney failure. According to Dr. Mishra's records, plaintiff's creatinine level in 2007 was 1.5 mg/dL. Over the next several years, plaintiff's creatinine level, according to Dr. Mishra's chart, grew increasingly elevated until it reached 4.99 mg/dL by the end of 2010.

[3] The lab measure known as eGFR refers to "estimated glomerular filtration rate" and should normally be greater than 60 milliliters of blood per minute (mL/min/1.73m^2). Beginning in 2007, plaintiff's level fell below 60 mL/min/1.73m^2 and continued to decrease over the next five years until it was measured at 12 mL/min/1.73m^2 in 2011.

[4] Even if there were a question of fact, it should be resolved by the jury, not by the trial court on a motion for summary disposition. See *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

ure." However, the note contains no reference to a discussion of this with the patient, i.e., plaintiff, and plaintiff testified that no such discussion ever occurred. Specifically, plaintiff testified as follows:

> *Q*. . . . I'm looking at your records from Dr. Mishra's [office], December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?
>
> *A*. No, he never told me that.
>
> *Q*. You don't remember having any discussion with him about that then?
>
> *A*. No, not at all.
>
> *Q*. You had swelling in your legs at that time. Do you remember that?
>
> *A*. Yes. He said it was because of my weight problem.
>
> *Q*. So you don't remember any discussion December 2008 about having chronic renal failure?
>
> [Objection omitted.]
>
> *A*. No.
>
> *Q*. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?
>
> *A*. He never discussed it with me.

Defendants have not submitted any evidence indicating that, contrary to plaintiff's testimony, Mishra discussed this diagnosis with plaintiff. As noted, the office chart does not indicate that the diagnosis was relayed to or discussed with the patient, and it is undisputed that plaintiff neither saw nor had copies of those records until after he retained an attorney immediately following his September 20, 2012 conversation with Tayeb.[5]

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[5] In addition, despite the fact that defendants obtained an order to conduct ex parte meetings with plaintiff's physicians, the record con-

In *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), our Supreme Court held that what the claimant discovered or should have discovered is "a possible cause of action." This point was critical in *Solowy* because the plaintiff in that case did not dispute that she knew her doctor might have committed malpractice. *Id*. at 225. Instead, she argued that the six-month time frame was not triggered until she had, in her own mind, confirmed that this was the case. *Id*. at 218-219. The facts of *Solowy* merit description. In 1986, the plaintiff had skin cancer on her ear. *Id*. at 216. The defendant excised it, and, according to the plaintiff, he told her in the same year that the cancer was "gone." *Id*. at 216-217. Then in 1992, the plaintiff discovered a similar lesion on her ear at the same site, but she took no action for some time because of the defendant's assurance that the cancer was gone. *Id*. at 217-218. Eventually she went to a new doctor who advised that the new lesion was either a recurrence of the prior cancer or a benign lesion. *Id*. at 217. A biopsy showed that it was a recurrence, and the plaintiff claimed that a more invasive surgery was required as a result of the defendant's incorrect assurance to her that the cancer was gone. *Id*. at 217-218. The plaintiff filed suit less than six months from the date of the biopsy but more than six months from the date the second doctor told her that the lesion might be a recurrence of her cancer. *Id*. at 218.

The plaintiff argued that even though she knew that she had a *possible* cause of action after being so advised, it was only after the biopsy that she knew or should have known that she had an *actual* cause of

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tains no testimony or affidavits from any of these physicians indicating that before the September 20, 2012 conversation with Tayeb, they advised plaintiff that his kidney disease could or should have been recognized and treated years earlier by Mishra.

action. *Id*. at 224-225. She argued that, had the biopsy been benign, she would have learned that her possible cause of action was, in fact, not a cause of action. *Id*. The *Solowy* Court concluded that the discovery date is when the plaintiff learns of a "possible cause of action" rather than learning of a "certain" cause of action. *Id*. at 221-222. However, the *Solowy* Court continued to apply the "should have" standard, stating:

> [T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Id*. at 222.]

In *Solowy*, the time began to run when the plaintiff learned that there was a significant chance—in *Solowy* it was 50/50—that her doctor had committed malpractice. She knew that if her diagnosis was skin cancer, then she had grounds to file suit because she had previously had skin cancer at that location, it had been treated, and her doctor told her that it was "gone." *Id*. at 217, 224.

In the instant case, the record does not support the view that, when diagnosed with kidney failure, plaintiff "should have known of a possible cause of action." *Id*. at 222. As far as he knew, he had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event. In *Solowy*, the plaintiff knew that her doctor might have committed malpractice as soon as the tumor grew back; she was only waiting to learn whether she was in fact injured as a result of his actions. In this case, the opposite is true; after diagnosis in January 2011, plaintiff knew he was sick, but he lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical

difference between plaintiff in this case and the plaintiff in *Solowy* is that the plaintiff in *Solowy* neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history.[6] She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur until January 2011 when it precipitated his hospitalization.

"[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id*. at 222. An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Therefore, the question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.

Indeed, defendants do not contend that a reasonable lay person understands the anatomy, physiology, or pathophysiology of kidneys. One would be hard-pressed to find a reasonable, ordinary person—who is

[6] "Natural history" is a medical term meaning the expected course of a disease absent treatment. See *Merriam-Webster's Collegiate Dictionary* (11th ed). For example, whether kidney failure can occur suddenly or only over an extended period of time requires knowledge of the "natural history" of kidney disease.

not a medical professional—who knows what creatinine is or what an abnormal creatinine level means in addition to knowing how kidneys fail, why they fail, and how quickly they can fail.[7]

Moreover, plaintiff did not visit Mishra specifically for kidney problems. He saw him as a primary care provider for over 20 years. Unlike the plaintiff in *Solowy*, plaintiff never had surgery or even any treatment for the relevant organ or condition. He had routine complete blood counts and metabolic lab work done, as does virtually every patient who undergoes annual physicals. There is no evidence that he ever saw the blood test reports that showed the normal reference ranges, which would have revealed that his creatinine levels were high, or that he was ever advised of the relationship between creatinine levels and kidney disease. Defendants suggest that because Mishra once ordered a kidney ultrasound for plaintiff after an episode of edema and one slightly elevated lab report in 2008, plaintiff should have realized upon diagnosis of kidney failure that he had kidney disease back in 2008. However, the ultrasound was reported as normal.[8] As-

[7] Our dissenting colleague suggests that any reasonable person would know that kidney failure must develop over a long period. She offers no grounds for such a conclusion. Moreover, her assertion is inconsistent with medical knowledge. Kidney failure can occur very quickly and has several possible causes, such as reduction in blood flow, allergic reaction, infection, adverse reaction to medication, dehydration, kidney stones, cancer, nerve damage, and others. See Mayo Clinic, *Acute Kidney Failure: Causes* <http://www.mayoclinic.org/diseases-conditions/kidney-failure-basics/causes/con-20024029> (accessed April 28, 2016) [https://perma.cc/5MPK-RZBP]. And contrary to the dissent's claim, we do not cite this medical text to justify plaintiff's belief; we do so to refute the dissent's claim that plaintiff's belief was inconsistent with science and therefore unreasonable.

[8] The dissent suggests that plaintiff was told by Mishra that his blood tests were being done specifically due to concern about his kidneys and that after each test, Mishra assured plaintiff that his kidneys were fine.

suming that a reasonable, ordinary person would even recall a normal ultrasound performed years earlier, there is no reason that such a person would consider a *normal* ultrasound result as evidence that Mishra was simultaneously committing malpractice in some manner. Rather, the normal ultrasound rationally supported that Mishra had made no errors at all. The mere *performance* of a noninvasive, commonly administered kidney-imaging study that yielded a normal result does not constitute an "objective fact" from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. See *Solowy*, 454 Mich at 222.

It was *possible* for plaintiff to have discovered the existence of a possible claim shortly after presenting to the hospital and being told that he had kidney failure. To have done so, however, he would have had to have undertaken an extensive investigation to discover more information than he had. Presumably, plaintiff could have (1) studied the various causes and speeds of progression of kidney disease, (2) requested

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However, this suggestion is not consistent with the record. As already noted, plaintiff testified that he was told only once, in late 2008, that his "kidney number" on a single blood test was a little high and that he was correctly advised that his follow-up ultrasound was normal. There is *no* testimony that Mishra thereafter discussed plaintiff's kidney health with him except in notifying him that his annual blood tests, which included many non-kidney tests, were normal. The dissent's characterization of these communications as revealing to plaintiff that he had "elevated kidney level*s*" (i.e., plural) is inaccurate. (Emphasis added.) There is a substantial and striking difference between a single conversation three years before diagnosis and a subject of repeated discussion. Therefore, contrary to the dissent's argument, the 2012 diagnosis was not "plainly contradictory to everything Dr. Mishra had said up until that point." Mishra likely told plaintiff many things between 2008 and 2012. Regarding plaintiff's kidneys, there were but two conversations: one in 2008 referring to a mildly elevated test, and the accurate report of a normal kidney ultrasound in early 2009.

copies of his previous years' blood test reports, and (3) considered whether there were signs of progressive kidney disease in those reports. However, there is no basis in statute, common law, or common sense to impute such a duty to people who become ill.

Defendants seem to suggest that the diagnosis of any serious illness in and of itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician *tested* an organ involved in a later diagnosis and reported normal results.[9] Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an "objective fact," but it is a substantial leap to conclude that this fact alone *should* lead any reasonable person to *know* of a possible cause of action. We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual *could* consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature. Therefore, the elevated levels of creatinine in plaintiff's blood tests during prior years is of no moment given the absence of any evidence that plaintiff ever saw those reports or that he knew what the word "creatinine" meant, let alone the pathophysiology of kidney failure, its measures, its

[9] The discovery rule does not incorporate the logical fallacy of *post hoc, ergo propter hoc* (after this, therefore because of this).

causes, its natural history, or its treatment.[10]

To hold as defendants suggest would not merely be inconsistent with the text of the statute, but it would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the Legislature intended such a result, it would have used the phrase "could have discovered," not "should have discovered."

On the present facts, defendants have demonstrated that before the September 20, 2012 meeting with Tayeb, plaintiff *could* have discovered that he had a possible cause of action for malpractice. However, the statute triggers the six-month discovery period only when plaintiff *should* have discovered that he had a possible cause of action. Given the plain language of the statute, the trial court erred by granting defendants' motion for summary disposition.[11]

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[10] Although plaintiff's kidney disease was diagnosed after he had undergone tests for kidney disease (among many other tests), it simply does not follow that the tests were related to his disease. More information was required to make that link, and that information was supplied by Tayeb.

[11] Plaintiff also challenges another ruling which we agree was erroneous. However, in light of our ruling, the issue appears to be moot. Before being deposed, plaintiff provided an affidavit to the trial court, averring, as he later did in his deposition, that he had spoken with Tayeb on September 20, 2012, and that, on that date, Tayeb informed him that had he been referred to a nephrologist earlier, he may have delayed or avoided his current state of renal failure and dialysis. More specifically, plaintiff averred that Tayeb stated that defendants' failure to refer plaintiff to a nephrologist was inappropriate and was a serious contributor to plaintiff's medical condition. Plaintiff presented this affidavit in his brief addressing the timeliness of his claim. The trial court refused to consider the affidavit on the grounds that it was inadmissible hearsay. This ruling was erroneous as a matter of law given that the affidavit was not offered for the truth of the matter asserted by

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

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

JANSEN, J. (*dissenting*). I respectfully dissent because I believe that the limitations period began to run when plaintiff learned that he had kidney failure in January 2011. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendants.

In 1988, defendant Dr. Shyam Mishra began treating plaintiff as his primary care physician. According to plaintiff's complaint, Dr. Mishra diagnosed him with renal insufficiency in 2007. The evidence presented by the parties establishes that Dr. Mishra began regularly testing plaintiff's kidneys at least as early as 2007. The tests continued on a regular basis. According to plaintiff, Dr. Mishra did not always communicate with plaintiff regarding his test results. Plaintiff testified that he did not know why Dr. Mishra was testing his kidneys, but he did know that Dr. Mishra was testing his kidney levels. He believed that the tests were connected with the edema he began to experience in 2008. He explained, "I didn't hear until the leg started swelling they were monitoring something for kidneys."

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the declarant. See *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986) (holding that statements were not hearsay because they were not introduced to prove the truth of the matter asserted). Plaintiff did not offer the evidence to prove that defendants were negligent, and whether Tayeb's alleged statements were accurate is not relevant to the present issue. Plaintiff relied on Tayeb's alleged statement only to demonstrate how and why he became aware of his possible malpractice claim, not that Mishra was negligent or that his negligence was a proximate cause of any damages. The trial court therefore erred by ruling that the affidavit contained inadmissible hearsay for this purpose. See *id*.

Plaintiff testified that Dr. Mishra never informed him that he suffered from kidney failure or that he should see a nephrologist.

Plaintiff testified in his deposition that Dr. Mishra told him in 2008 that his kidney test results were not a cause for concern and that, although his kidney levels were a bit elevated, there was nothing to worry about because his "kidney number" was under five. In 2009, Dr. Mishra conducted an ultrasound of plaintiff's kidneys and told plaintiff that his kidneys were "fine." He did not tell plaintiff that plaintiff had chronic renal failure. On January 3, 2011, plaintiff reported to the hospital with flu-like symptoms. The emergency room doctors found that plaintiff was in kidney failure and diagnosed him with acute end-stage renal failure. Plaintiff began regular dialysis. More than 20 months later, on September 20, 2012, plaintiff had a conversation with Dr. Jukaku Tayeb, a nephrologist. Plaintiff testified that, during that conversation, Dr. Tayeb told him that he should have been sent to a nephrologist in 2008. Plaintiff testified that Dr. Tayeb stated:

> "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Following that conversation, on March 18, 2013, plaintiff provided Dr. Mishra and Dr. Mishra's practice with a notice of intent to sue. The present case was then filed on September 17, 2013. Relevant to this appeal, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the claim was time-barred under the statute of limitations. The trial court agreed with defendants and concluded that plaintiff should have discovered

his claim on January 3, 2011. Therefore, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), finding that plaintiff's claim was barred by the statute of limitations.

I respectfully disagree with the majority's conclusion that plaintiff should not have discovered his claim until he talked with Dr. Tayeb on September 20, 2012. It is undisputed that plaintiff's complaint fell outside the general two-year period of limitations set forth in MCL 600.5805(6). Instead, plaintiff asserts that the alternate six-month "discovery rule" period of limitations set forth in MCL 600.5838a(2) should apply to his claims. The Michigan Supreme Court in *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997), explained that "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin." Instead, the plaintiff merely needs to know of a *possible* cause of action. *Id*. The rule does not require a plaintiff to be able to prove every element of a cause of action in order for the limitations period to begin running. *Id*. at 224. The Court explained, "In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id*. at 227. Our Supreme Court has also explained that "[t]he discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993). Additionally, "[t]his Court has held that the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a

claim." *Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Plaintiff admits that he was aware that Dr. Mishra was testing his kidneys and that Dr. Mishra never said anything was wrong. He testified in his deposition that in 2008, Dr. Mishra told him that his "kidneys [were] a little bit elevated but not to the point where there was anything to worry about . . . ." In 2009, Dr. Mishra ordered an ultrasound test for plaintiff's kidneys, and Dr. Mishra informed plaintiff that the ultrasound indicated that plaintiff's kidneys were "fine." On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with sufficient information to protect [his] claim." See *Moll*, 444 Mich at 24. Therefore, the limitations period expired six months after this date. See *id*.

Plaintiff argues that he was not able to make the connection between the new diagnosis and Dr. Mishra's alleged negligence until September 20, 2012. The Michigan Supreme Court has stated, however, that this connection is not necessary: "The 'possible cause of action' standard does not require that the plaintiff know that the injury . . . was in fact or even likely caused by the [doctor's] alleged omissions." *Solowy*, 454 Mich at 224. Further, this Court has previously held that "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." *Turner*, 210 Mich App at 353 (citation omitted). Considering this, it is plain that plaintiff should have discovered his potential claim on January 3, 2011. Therefore, the period of limitations in MCL 600.5838a(2) expired six months after January 3, 2011.

Plaintiff's notice of intent was delivered on March 18, 2013, which was well after the six-month limitations period expired.

The majority concludes that defendants failed to demonstrate that plaintiff should have known that he had a possible cause of action for malpractice when he was hospitalized in January 2011. The majority points to the fact that Dr. Mishra did not inform plaintiff that he had kidney disease and that plaintiff did not have access to his records or lab reports. The majority reasons that plaintiff did not know he had a previous history of kidney disease and was unaware that his kidney disease was a slowly progressing condition, rather than an acute incident.

I disagree with the majority's conclusion that the fact that plaintiff was unaware that he had a progressive kidney disease demonstrates that he should not have known of a possible cause of action. First, the majority relies on evidence outside the record in concluding that kidney failure can occur quickly and has several causes. The majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the medical evidence in the record. The parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. Second, contrary to the majority's conclusion, plaintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound

test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known that he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and plaintiff knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

The majority also reasons that a reasonable, ordinary person would not understand the medical terminology or the pathophysiology connected with kidney diseases. However, plaintiff's understanding of the terminology and physiology of his condition was not necessary in order for him to know of a possible cause of action. Indeed, Dr. Mishra discussed the issue with plaintiff in terms that plaintiff could understand by informing plaintiff that his "kidney number" was a bit elevated, but informing him that he had nothing to worry about. Plaintiff's deposition testimony reveals that he understood that Dr. Mishra was monitoring his kidneys. Plaintiff was also aware that Dr. Mishra ordered an ultrasound test for his kidneys and that Dr. Mishra concluded that his kidneys were fine after looking at the test. Therefore, this was not a situation in which plaintiff was presented with information that he could not understand. Instead, plaintiff was aware that Dr. Mishra was monitoring his kidneys for a potential problem, but Dr. Mishra reassured him that there was no issue.

Plaintiff's testimony indicated that he had actual knowledge of the existence of his claim once Dr. Tayeb informed him that he could have avoided kidney failure if his physician referred him to a nephrologist earlier. However, MCL 600.5838a(2) requires the court to consider when a plaintiff discovered or *should have* discovered the existence of his claim. Plaintiff should have discovered the existence of a cause of action on January 3, 2011, and he failed to commence the action within six months of this date. Accordingly, I conclude that plaintiff's action was barred by the limitations period in MCL 600.5838a(2), and summary disposition was properly granted pursuant to MCR 2.116(C)(7). Therefore, I would affirm the trial court's order granting summary disposition in favor of defendants.

BAYNESAN v WAYNE STATE UNIVERSITY

Docket No. 326132. Submitted April 5, 2016, at Detroit. Decided August 4, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 991.

In December 2012, Joseph Baynesan brought an action in the Wayne Circuit Court against Wayne State University (WSU) under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Baynesan's two-count complaint alleged a violation of the WPA for which he sought money damages and a public policy tort claim for which he sought equitable relief. WSU informed Baynesan that the Court of Claims had jurisdiction over his public policy tort claim, and the parties stipulated the claim's dismissal. Baynesan filed his tort claim in the Court of Claims and moved to join the tort action with the WPA claim pending in the Wayne Circuit Court. The Court of Claims granted Baynesan's motion in June 2013 and ordered both claims to be heard in the Wayne Circuit Court. In 2013, the Legislature enacted 2013 PA 164 and 2013 PA 205, affecting the location and jurisdiction of the Court of Claims. Specifically, the acts enlarged the jurisdiction of the Court of Claims and preserved the right of a party to obtain a jury trial in actions within the Court of Claims' expanded jurisdiction. The changes in law also created concurrent jurisdiction with a circuit, district, or probate court so that, with the approval of the parties, a trial court could hear and determine equitable claims traditionally within the Court of Claims' exclusive jurisdiction when those claims were joined with legal claims arising from the same transaction or series of transactions. The parties continued litigation in the Wayne Circuit Court until November 2014 when WSU, in accordance with MCL 600.6404(3), moved to transfer the matter from the Wayne Circuit Court to the Court of Claims. The transfer was effective immediately under MCL 600.6404(3). Baynesan filed an emergency motion to transfer the case back to the Wayne Circuit Court, which the Court of Claims, AMY RONAYNE KRAUSE, J., granted. The Court of Claims concluded that WSU had approved the Wayne Circuit Court's jurisdiction over Baynesan's claims by litigating the case in the Wayne Circuit Court for more than one year. The Court of Claims ruled that WSU's motion to transfer was untimely and therefore ineffective. The Court of Claims ordered Baynesan's claims to remain in the Wayne Circuit

Court by exercising its inherent authority to manage its docket and issue sanctions. WSU appealed.

The Court of Appeals *held*:

Under MCL 600.6421(3), a circuit, district, or probate court has concurrent jurisdiction with the Court of Claims over a claim formerly within the exclusive jurisdiction of the Court of Claims when all parties approve of joining those claims with a claim pending in a circuit, district, or probate court and when those claims arise out of the same transaction or series of transactions giving rise to the claim pending in a circuit, district, or probate court. There is no formalistic method of approving the joinder of claims that were once under the exclusive jurisdiction of the Court of Claims with those claims that were traditionally under the jurisdiction of circuit, district, and probate courts. In this case, the Court of Claims properly concluded that WSU had approved joinder of Baynesan's two claims in the Wayne Circuit Court by its participation in the litigation in circuit court long after the opportunity for removal to the Court of Claims was authorized by the changes in the law. WSU's tacit approval of the joinder in the Wayne Circuit Court defeated the Court of Claims' exclusive jurisdiction. WSU's motion to transfer the case to the Court of Claims immediately gave the Court of Claims jurisdiction to transfer the matter back to the Wayne Circuit Court. To allow a different outcome would have promoted gamesmanship and forum-shopping. The Court of Claims' inherent power to manage its docket and issue sanctions authorized it to order this matter transferred back to the Wayne Circuit Court, and it did not abuse its discretion by doing so. Further, to the extent the Court of Claims' ruling depended on factual findings, those findings were not clearly erroneous.

Affirmed.

COURT OF CLAIMS — JOINDER OF LEGAL AND EQUITABLE CLAIMS — CONCURRENT JURISDICTION WITH CIRCUIT, DISTRICT, OR PROBATE COURTS.

Under MCL 600.6421(3), parties may approve a circuit, district, or probate court's jurisdiction over an issue traditionally within the exclusive jurisdiction of the Court of Claims under certain circumstances; when an issue with a legal remedy is pending in a trial court, MCL 600.6421(3) allows a party to move for joinder of an equitable claim against the state, ordinarily within the Court of Claims' exclusive jurisdiction, with the case pending in the trial court; according to MCL 600.6421(3), if all parties approve of the trial court's jurisdiction over both the legal and equitable claims, the trial court has jurisdiction over all the claims.

Deborah Gordon Law and *Gordon & Prescott* (by *Deborah L. Gordon*) for Joseph Baynesan.

Law Office of Daniel J. Bernard (by *Daniel J. Bernard*) for Wayne State University.

Before: MARKEY, P.J., and K. F. KELLY and O'BRIEN, JJ.

PER CURIAM. Defendant Wayne State University (WSU) appeals by leave granted an order of the Court of Claims transferring plaintiff Joseph Baynesan's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., from the Court of Claims back to the Wayne Circuit Court. This Court limited the appeal to the issues raised in the application and supporting brief, "as well as the question whether the construction of the [C]ourt of [C]laims [A]ct as advocated by appellant violates plaintiff's jury trial right." *Baynesan v Wayne State Univ*, unpublished order of the Court of Appeals, entered July 7, 2015 (Docket No. 326132). We affirm the Court of Claims on the limited basis that it did not abuse its discretion by transferring this action back to the Wayne Circuit Court in the exercise of its inherent authority to control its docket and sanction litigants. See *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963).

I. FACTS AND PROCEEDINGS

In December of 2012, plaintiff filed a two-count complaint in the Wayne Circuit Court that alleged a violation of the WPA, for which he sought money damages, and a public policy tort claim, for which he sought equitable relief. Regarding the latter claim, plaintiff sought to be returned to his former position with WSU, and he sought an injunction prohibiting

WSU from committing any further actions of retaliation or discrimination. Defense counsel then notified plaintiff that the Court of Claims, and not the Wayne Circuit Court, had jurisdiction over his public policy tort claim. Upon stipulation of the parties and by order entered on March 18, 2013, the circuit court dismissed plaintiff's public policy tort claim.

Plaintiff subsequently filed his tort claim in the Court of Claims, then residing in the Ingham Circuit Court. Plaintiff also filed a motion to join the tort action with the WPA action still pending in the Wayne Circuit Court. The Court of Claims, by order of June 19, 2013, granted the motion, directing that plaintiff's tort claim be joined with the WPA action in the Wayne Circuit Court.

In late 2013, 2013 PA 164 became law. The act amended several statutes pertaining to the Court of Claims, enlarging its jurisdiction and transferring the Court of Claims to the Michigan Court of Appeals. See *Fulicea v Michigan*, 308 Mich App 230, 231; 863 NW2d 385 (2014); *Okrie v Michigan*, 306 Mich App 445, 449; 857 NW2d 254 (2014). As amended, MCL 600.6419(1)(a) conferred jurisdiction on the Court of Claims, in part,

> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

Moreover, the act created a new mechanism for the transfer of cases pending before the circuit court to the Court of Claims. This mechanism is codified in MCL 600.6404(3), and provides in part:

> Beginning on the effective date of the amendatory act that added this subsection [November 12, 2013], any matter within the jurisdiction of the court of claims described in section 6419(1) [MCL 600.6419(1)] pending or later filed in any court must, upon notice of the state or a department or officer of the state, be transferred to the court of claims described in subsection (1). The transfer shall be effective upon the filing of the transfer notice. . . .

On December 18, 2013, 2013 PA 205 became law. This amendatory act preserved the rights of parties to secure jury trials in actions that now came within the jurisdiction of the Court of Claims in light of the expanded jurisdiction conferred on the Court of Claims by 2013 PA 164. As amended by 2013 PA 205, MCL 600.6421 provides in part:

> (1) Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.
>
> (2) For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in section 6419(1) and arising out of the same transaction or series of transactions with a matter asserted for which a party has the right to a trial by jury under subsection (1), unless joined as provided in subsection (3), the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has been entered, and the matter

> asserted for which a party has the right to a trial by jury under subsection (1) shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ.
>
> (3) With the approval of all parties, any matter within the jurisdiction of the court of claims described in section 6419(1) may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state. A case in the court of claims that has been joined with the approval of all parties shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.
>
> (4) Except as provided in subsection (5),[1] the court of claims' jurisdiction in a matter within its jurisdiction as described in section 6419(1) and pending in any circuit, district, or probate court on November 12, 2013 is as follows:
>
> (a) If the matter is not transferred under section 6404(3), the jurisdiction of the court of claims is not exclusive and the circuit, district, or probate court may continue to exercise jurisdiction over that matter.
>
> (b) If the matter is transferred to the court of claims under section 6404(3), the court of claims has exclusive jurisdiction over the matter, subject to subsection (1).

Despite these late 2013 changes in the law, the parties continued to litigate plaintiff's claims in the Wayne Circuit Court through most of 2014. Then, with a final pretrial conference scheduled for November 5, 2014, and a jury trial scheduled for December 1, 2014, WSU filed a "Notice of Transfer to Court of Claims" on November 3, 2014, notifying plaintiff and the circuit

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[1] Subsection 5 refers to the transfer of cases pending in the Court of Claims, pursuant to MCL 600.6404(2), at the time the Court of Claims was transferred from the Ingham Circuit Court to the Court of Appeals. This provision is not at issue in this case.

court that it was transferring the entire case to the Court of Claims "pursuant to MCL 600.6404(3), as amended by 2013 PA 164."

On November 4, 2014, plaintiff filed an emergency motion in the Court of Claims to transfer the case back to the Wayne Circuit Court and for sanctions. The Court of Claims heard oral arguments on the motion on January 12, 2015, and granted plaintiff's motion for transfer by opinion and order entered on January 30, 2015. After relating the case's procedural history and the changes in the law made by 2013 PA 164 and 2013 PA 205, the Court of Claims opined in part:

> The parties continued to litigate the matter in the Wayne Circuit Court until November 3, 2014, when defendant filed a notice of transfer pursuant to MCL 600.6404(3), transferring the matter to this Court. The Court finds that doing so was inappropriate and impermissible, for two reasons. First, although the Court recognizes, and plaintiff concedes, that MCL 600.6404(3) does not have a time limit, defendant's act of continuing to litigate the matter in the Wayne Circuit Court for *almost a year* after the option of transferring to this Court became possible and known constitutes an unequivocal act of approval to the matter being joined for trial in that court. MCL 600.6421(3) does not require any particular manner of expressing approval; under the circumstances, the Court finds that such approval was clearly and unambiguously expressed. That statute therefore provides that the action therefore "shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge." MCL 600.6421(3).

The Court of Claims continued, making comments on the new legislation and noting "that the Legislature could [not] have intended to permit parties to have an unrestricted ability to forum-shop at their convenience with no regard to the effect thereof on other

parties, the efficient administration of the involved courts, [and] the pursuit of justice . . . ." The Court of Claims further stated:

> Having elected to remain in the Wayne Circuit Court for almost a year, defendant committed itself to that venue, and the notice of transfer was untimely and impermissible because by the time it was filed, MCL 600.6421(3) has already established that the matter *shall* be heard in the Wayne Circuit Court. Therefore, MCL 600.6421(4)(b) never became effective. The Court does not purport to be able to say with certainty "how long is too long" for a party to wait, but this was clearly beyond the pale. The Court declines, however, to speculate that defendant's transfer was motivated by any improper purpose under MCR 2.114(D)(3) and chooses instead to believe that defendant's counsel believed the transfer was allowed. The Court will not sanction an honest error, although the Court trusts that counsel is now fully apprised of the error and will not attempt to repeat it.

The Court of Claims went on to discuss the effect of a hypothetical timely filed request for a transfer to the Court of Claims, which we decline to address as a court should not decide hypothetical issues. See *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008). We address only the Court of Claims' determination that on the facts and circumstances in this case, WSU's request for transfer was untimely and ineffective.

II. STANDARDS OF REVIEW

Both jurisdictional issues and matters of statutory interpretation are reviewed de novo. *Fulicea*, 308 Mich App at 232. The Court also reviews constitutional issues de novo. *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014).

The goal of construction and interpretation of a statute is to discern and give effect to the intent of the Legislature. *Id*. at 222. " '[O]ur obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted.' " *Fulicea*, 308 Mich App at 232, quoting *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).

In this case, the Court of Claims was acting as a trial court. A trial court has the inherent authority to control its own docket. *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); see also *Brenner v Kolk*, 226 Mich App 149, 159 & n 5; 573 NW2d 65 (1997). "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner*, 226 Mich App at 160. An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes. *Maldonado*, 476 Mich at 388.

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). "A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made." *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012).

III. DISCUSSION

Pursuant to the plain terms of MCL 600.6419(1)(a), as amended, the Court of Claims has jurisdiction of

both plaintiff's statutory WPA claim for money damages and his claim for equitable relief. In analyzing the jurisdictional issues of this case, we note that our Supreme Court has held that a plaintiff has a right to a jury trial regarding a WPA money damages claim, but no such right exists with respect to a claim for equitable relief. *Anzaldua v Band*, 457 Mich 530, 538 n 6, 541-543, 553-554; 578 NW2d 306 (1998). This is important because § 6419(1) provides that "[e]xcept as provided in [MCL 600.]6421 and [MCL 600.]6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive." But as noted already, § 6421 provides, "[I]f a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue." MCL 600.6421(1). Furthermore, "[w]ith the approval of all parties, any matter within the jurisdiction of the court of claims described in section 6419(1) may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state." MCL 600.6421(3). Thus, under these statutory provisions and "[w]ith the approval of all parties," the Court of Claims and the Wayne Circuit Court had concurrent jurisdiction of both plaintiff's WPA damages claim and his claim for equitable relief. *Id*.

We agree with the Court of Claims that no formalistic approval is required to invoke joinder under § 6421(3), and that by continuing in the Wayne Circuit Court for almost a year with pretrial proceedings after the statutory right of removal under MCL 600.6404(3) came into existence, WSU tacitly and through its conduct approved of the continuing jurisdiction of the Wayne Circuit Court for a trial of both plaintiff's jury claim for money damages and his claim for equitable

relief. This joinder under § 6404(3) defeated the exclusive jurisdiction of the Court of Claims as to plaintiff's claim for equitable relief. MCL 600.6419(1); MCL 600.6421(2).

When, on November 3, 2014, WSU filed a "Notice of Transfer to Court of Claims," the transfer of plaintiff's case became "effective upon the filing of the transfer notice." MCL 600.6404(3), as amended by 2013 PA 164. A transfer of a matter to the Court of Claims is mandated under the statute if (1) the matter is within the jurisdiction of the Court of Claims, (2) the matter was pending on or is filed after the effective date of the amendatory act, and (3) a notice of transfer is filed. MCL 600.6404(3). With regard to the first requirement, we note that § 6404(3) requires only that the matter subject to transfer be within the "jurisdiction of the court of claims," as opposed to within the "exclusive jurisdiction" of the Court of Claims, the latter phrase being employed in other sections of the Court of Claims Act but not in § 6404(3). Therefore, the first requirement may be satisfied so long as the matter is subject to the Court of Claims' concurrent jurisdiction, i.e., it is a matter subject to the Court of Claims' jurisdiction but also subject to a jury trial right. In this case, there is no dispute that plaintiff's claims were pending in the Wayne Circuit Court at the time the amendatory act became effective on November 12, 2013. There also can be no dispute that plaintiff's claims fall within the expanded jurisdiction of the Court of Claims as provided in the amended MCL 600.6419(1)(a): "[t]o hear and determine any claim or demand, *statutory* or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for *monetary*, *equitable*, or declaratory relief . . . against the state or any of its departments or officers . . . ." (Emphasis added.) Therefore, pursuant

to the clear and unambiguous terms of § 6404(3), WSU's filing of its notice under that section transferred plaintiff's entire case to the Court of Claims, which then had jurisdiction over plaintiff's emergency motion to return the case to the Wayne Circuit Court.

If the notice of transfer were indeed valid, then the Court of Claims obtained "exclusive jurisdiction over the matter, subject to subsection (1)." MCL 600.6421(4)(b). Subsection (1) of § 6421 preserves the existing right to a jury trial that accompanies any claim now under the expanded jurisdiction of the Court of Claims, as well as the right of another court, such as the circuit court, to hear and determine those claims for which the right to a jury trial is authorized by law. Therefore, when a matter is transferred to the Court of Claims under § 6404(3), the otherwise exclusive jurisdiction of the Court of Claims, see § 6419(1) and § 6421(4)(b), becomes concurrent with the circuit court, among other courts, with respect to matters to which "a party has the right to a trial by jury and asserts that right as required by law . . . ." MCL 600.6421(1). Because plaintiff's WPA claim for damages is subject to the right of trial by jury, *Anzaldua*, 457 Mich at 554, which right plaintiff asserted, the circuit court would retain concurrent jurisdiction over that part of plaintiff's claim. But plaintiff's claim for equitable relief would remain in the exclusive jurisdiction of the Court of Claims pursuant to MCL 600.6421(2). Furthermore, the claim for equitable relief in the Court of Claims must be resolved first. Until the equitable claim is resolved, the claim for damages pending a jury trial in the court of concurrent jurisdiction is stayed. *Id*. ("[T]he matter asserted for which a party has the right to a trial by jury . . . shall be stayed until final judgment on the matter of declaratory or equitable relief . . . .").

On the other hand, if WSU's notice of transfer pursuant to § 6404(3) was ineffective, then as already discussed, pursuant to MCL 600.6421(1) and (3), plaintiff's WPA claim for money damages and his claim for equitable relief remain joined and within the concurrent jurisdiction of the circuit court. Indeed, MCL 600.6421(4)(a) specifically provides, "If the matter is not transferred under section 6404(3), the jurisdiction of the court of claims is not exclusive and the circuit, district, or probate court may continue to exercise jurisdiction over that matter."

The Court of Claims ruled that WSU's notice was ineffective because it was not timely filed and would, if allowed to stand, foster gamesmanship and forum-shopping detrimental to the administration of justice. To the extent these findings are factual, we see they are supported by the record. Consequently, on appeal we are not left with the definite and firm conviction that a mistake was made. *Loutts*, 298 Mich App at 26. The Court of Claims' findings are thus not clearly erroneous. MCR 2.613(C).

We also conclude that the Court of Claims' determination that the transfer notice was ineffective was within the inherent authority of a court "to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." *Maldonado*, 476 Mich at 375. "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id*. at 376. While such cases often involve the dismissal of an action, see *id*.; *Banta*, 370 Mich at 368; *Brenner*, 226 Mich App at 154-155, in this case, there was no drastic sanction; the court merely ordered the case returned to the court that WSU had already, by its

conduct, consented to have decide the litigation of all issues presented by plaintiff's complaint. Under these circumstances, we cannot conclude that the Court of Claims abused its discretion because the court's decision was within the range of principled outcomes. *Maldonado*, 476 Mich at 388.

We affirm.

MARKEY, P.J., and K. F. KELLY and O'BRIEN, JJ., concurred.

SOUTHEAST MICHIGAN SURGICAL HOSPITAL, LLC v ALLSTATE INSURANCE COMPANY

Docket No. 323425. Submitted February 9, 2016, at Detroit. Decided August 9, 2016, at 9:00 a.m. Convening of special panel declined 317 Mich App 801. Leave to appeal sought.

Southeast Michigan Surgical Hospital, LLC (SEMSH) and Jamie Letkemann brought separate actions under the no-fault act, MCL 500.3101 *et seq.*, in the Wayne Circuit Court against Allstate Insurance Company. The court consolidated the cases. Letkemann had suffered injuries as a passenger in a vehicle that was rear-ended, and he received treatment at SEMSH. During discovery, Allstate learned that the no-fault policy covering the vehicle had been obtained on the basis of misrepresentations the driver made on behalf of Letkemann's former wife. Allstate moved for summary disposition, arguing that it was entitled to rescind the policy because of fraud. Plaintiffs responded by asserting that even if the policy had been procured by fraud, Letkemann was an innocent third party, so Allstate could not rescind the policy coverage with regard to him. The court, Daphne Means Curtis, J., found that the policy had been procured by fraud, but agreed with plaintiffs that Letkemann was an innocent third party to that fraud and, therefore, protected against rescission by the innocent-third-party doctrine. The court denied Allstate's motion for summary disposition and, instead, granted summary disposition to plaintiffs under MCR 2.116(I)(2).

The Court of Appeals *held*:

Michigan caselaw had long held that although fraud in the inducement was generally a valid basis to rescind a no-fault policy, rescission did not avoid a no-fault insurer's obligation to pay benefits to innocent third parties. However, in *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016), the Court of Appeals held that this innocent-third-party doctrine was no longer viable. In this case, the insurance policy was procured by fraudulent representations from the vehicle's owner to Allstate. Letkemann was an innocent third party who made no representations to Allstate. Therefore, the trial court's factual findings were affirmed. Although Allstate had never validly asserted fraud in the induce-

ment as an affirmative defense, plaintiffs would not have been prejudiced by a late amendment to add the defense. Likewise, plaintiffs could not establish prejudice and, therefore, could not establish entitlement to equitable estoppel. Regarding the demise of the innocent-third-party doctrine, although the case was wrongly decided, *Bazzi* was controlling and required holding that the trial court's decision had to be reversed and the matter remanded. Were *Bazzi* not controlling, the panel would have affirmed and held that the innocent-third-party doctrine remained viable. Because this decision was made only because it was required by MCR 7.215(J)(1), the panel declared a conflict with *Bazzi* in accordance with MCR 7.215(J)(2) and requested that a special panel be convened.

Reversed and remanded.

SAWYER, J., concurring in part and dissenting in part, agreed that the case was controlled by the decision in *Bazzi* and that once the trial court determined that the policy at issue was obtained by fraud, Allstate was entitled to summary disposition. Allstate's rescission was effective with regard to Letkemann, and because Letkemann was barred from recovering no-fault benefits under the policy, so was SEMSH. Neither of the alternative grounds advanced by plaintiffs had merit. Judge SAWYER disagreed with the majority's conclusion that *Bazzi* was incorrectly decided and dissented from the decision to declare a conflict with *Bazzi* and from the call to convene a special panel.

Ira B. Saperstein, PC (by *Ira B. Saperstein*), for Southeast Michigan Surgical Hospital, LLC.

The Hastings Law Firm, PC (by *Christopher J. Hastings*), for Jamie Letkemann.

Magdich & Associates, PC (by *Karen W. Magdich* and *Neil E. Hansen*), for Allstate Insurance Company.

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

RONAYNE KRAUSE, P.J. In this no-fault insurance action, the parties filed cross-motions for summary disposition; the trial court denied Allstate Insurance

Company's motion and granted summary disposition in favor of Southeast Michigan Surgical Hospital, LLC (SEMSH) and Jamie Letkemann (collectively, plaintiffs). The trial court concluded that, even though the vehicle's owner and primary driver committed fraud that induced Allstate to issue a no-fault policy covering the vehicle involved in the accident, the innocent-third-party doctrine precluded Allstate from rescinding the policy to deny coverage of Letkemann's injuries. Allstate appeals by leave granted.[1] We are bound, under MCR 7.215(J)(1), by this Court's recent opinion in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), to hold that the trial court's decision must be reversed and the matter remanded. However, we agree with the dissenting opinion in that case, and, were we not bound, we would decline to continue the trend of eroding injured plaintiffs' recovery options and conclude that the innocent-third-party doctrine remains a viable part of the law in Michigan; we would therefore affirm. Consequently, we declare a conflict with *Bazzi* in accordance with MCR 7.215(J)(2).

The proceedings arose out of injuries Letkemann suffered as a passenger in a vehicle that was rear-ended. SEMSH provided medical treatment to Letkemann for those injuries and then asserted the instant third-party no-fault claim against Allstate. Letkemann filed his own action against SEMSH for first-party no-fault benefits, and the claims were consolidated for discovery purposes. During discovery, Allstate learned that the no-fault policy covering the vehicle in which Letkemann had been a passenger had been obtained

[1] *Southeast Mich Surgical Hosp LLC v Allstate Ins Co*, unpublished order of the Court of Appeals, entered November 25, 2014 (Docket No. 323425).

on the basis of fraudulent misrepresentations the driver made on behalf of Letkemann's former wife. Allstate then moved for summary disposition, arguing that it was entitled to rescind the policy because of the fraud and thus avoid plaintiffs' claims. Plaintiffs responded by asserting that even if the policy had been procured by fraud, Letkemann was an innocent third party, so Allstate could not rescind the policy coverage as to him. The trial court found that the policy had been procured by fraud, but agreed with plaintiffs that Letkemann was an innocent third party to that fraud and protected against rescission by the innocent-third-party doctrine. Accordingly, the trial court denied Allstate's motion for summary disposition and, instead, granted summary disposition to plaintiffs under MCR 2.116(I)(2).

A trial court's resolution of a motion for summary disposition is reviewed 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). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Summary disposition is granted "in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law." *City of Holland v Consumers Energy Co*, 308 Mich App 675, 681-682; 866 NW2d 871 (2015). We review de novo, as a question of law, the proper interpretation and application of the no-fault act, MCL 500.3101 *et seq*. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 694; 671 NW2d 89

(2003). "Equitable issues, such as arguments for rescission or reformation, are also reviewed de novo." *Kaftan v Kaftan*, 300 Mich App 661, 665; 834 NW2d 657 (2013).

As an initial matter, we affirm the trial court's conclusion that Letkemann was an innocent third party. The parties functionally agree on the material facts. The vehicle at issue is a 2010 Ford Escape owned and insured by David Kreklau. In obtaining insurance for the vehicle, Kreklau represented to Allstate that the vehicle would be garaged at his residence and that he would be the principal driver. However, within days of purchasing the vehicle and obtaining insurance, Kreklau turned the car over to his sister-in-law, Danielle Riordan. For the next six months, the vehicle was driven primarily by Riordan and garaged at her residence. During this time, Riordan made monthly car and insurance payments to Kreklau. Given this evidence, the trial court correctly determined that the insurance policy was procured by Kreklau's fraudulent representations to Allstate.

At the time this arrangement was established, Letkemann was living in North Carolina. He did not participate in Riordan and Kreklau's scheme to defraud Allstate and made no representations to Allstate. Subsequently, Letkemann moved into Riordan's residence and later married Riordan. Letkemann owned and insured his own vehicle without the assistance of Kreklau but would occasionally drive the 2010 Escape insured under Kreklau's name. During the few months they were married, Letkemann and Riordan would both contribute money to the payments made to Kreklau. Letkemann testified that he understood that the Escape was in Kreklau's name because it would be cheaper than naming Riordan as the driver. During the

time in which Riordan and Letkemann were cohabitating before marriage, Allstate informed Kreklau that the policy needed to be renewed. Kreklau signed the renewal, and Allstate did not personally ask him for additional information. Allstate's investigation at the time of renewal relied primarily on Kreklau's statements made when initially obtaining the policy.

Clearly, Letkemann was not involved in, or knowledgeable regarding, the initial coverage acquisition. Equally clearly, Letkemann received a benefit from the fraudulently obtained insurance. The innocent-third-party doctrine—presuming its continued viability for the moment—assumes that the third party will receive benefits that he or she otherwise would not be entitled to as a result of the fraud. The public policy allowing the third party's receipt of these benefits is undergirded by the third party's innocence in the fraudulent procurement of the policy. Notwithstanding the renewal of the policy during Letkemann's cohabitation with Riordan, there is no evidence that Letkemann was aware of that renewal, and there is no evidence that even Kreklau made any representations at that time. Because Letkemann did not make a fraudulent misrepresentation or allow such a misrepresentation to be made to the insurer, Letkemann should be protected by the innocent-third-party doctrine despite Kreklau and Riordan's fraud in obtaining the policy. The trial court's factual findings are affirmed.

Before addressing the innocent-third-party doctrine, we also note that plaintiffs have asserted two alternative grounds for affirmance that are unrelated to the innocent-third-party doctrine and would therefore, if applicable, render any analysis of that doctrine moot. This Court will, after all, affirm a correct result regardless of whether the trial court employed proper reason-

ing to achieve it. *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012).

Plaintiffs first argue that Allstate never validly asserted fraud in the inducement as an affirmative defense and, therefore, waived it. Plaintiffs correctly note that fraud in the inducement is an affirmative defense that may be used to avoid the enforcement of an insurance policy. *Stein v Home-Owners Ins Co*, 303 Mich App 382, 387-388; 843 NW2d 780 (2013). Furthermore, we agree with plaintiffs that Allstate did not validly assert fraud in the inducement; although Allstate generally described plaintiffs' claims as "fraudulent," it did not explain why, how, or any implications of that fraud. However, "[a]lthough affirmative defenses are not 'pleadings,' *McCracken v Detroit*, 291 Mich App 522, 528; 806 NW2d 337 (2011), the court rules unambiguously permit them to be amended in the same manner as pleadings," *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 213; 850 NW2d 667 (2013), rev'd in part on other grounds 498 Mich 68 (2015).

Accordingly, a party's failure to set forth a valid statement of an affirmative defense in its first responsive pleading does not necessarily result in waiver of the defense. *Id*. at 213-214. A party "may move to amend [his or her] affirmative defenses to add any that become apparent *at any time*, and any such motion should be granted as a matter of course *so long as doing so would not prejudice the plaintiff*." *Id*. at 213 (emphasis added), citing MCR 2.118(A)(2) (providing that, when a party requires leave to amend a pleading, "[l]eave shall be freely given when justice so requires"). Under MCR 2.118(A)(2), a plaintiff is prejudiced when an amendment adds an affirmative defense "*after* the expiration of the limitations period," thereby preclud-

ing the plaintiff from a recovery that could have been secured had the affirmative defense been timely asserted. *Tyra*, 302 Mich App at 217. It appears undisputed that the fraud at issue did not become apparent until discovery took place.

A one-year statute of limitations generally applies to an insured's claim for personal protection insurance (PIP) benefits, measured from "the date of the accident causing the injury," with two exceptions: (1) "when 'written notice of injury as provided herein has been given to the insurer within 1 year after the accident,' " and (2) "when 'the insurer has previously made a payment of [PIP] benefits for the injury.' " *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 642; 858 NW2d 105 (2014), rev'd 499 Mich 29 (2016), quoting MCL 500.3145(1). When a responsible insurer cannot be identified, or there is a dispute regarding the priority of various insurers, an insured can obtain benefits through the Assigned Claims Plan (ACP) under MCL 500.3172. To do so, however, the insured must "notify the Michigan automobile insurance placement facility of [the] claim within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect." MCL 500.3174; *Spencer v Citizens Ins Co*, 239 Mich App 291, 309; 608 NW2d 113 (2000).

Other than Allstate, there is no evidence that any no-fault insurer in the chain of priority to pay plaintiffs' claims was ever identified or that such an insurer made a payment of PIP benefits or received written notice of Letkemann's injuries. Likewise, there is no evidence that Allstate ever made a payment of PIP benefits for Letkemann's injuries, but Allstate was, within a year of the accident, evidently provided with notice of the injuries. The accident at issue occurred on

December 12, 2010, and plaintiffs did not file suit against Allstate until December 18, 2011. Because this was more than one year after the accident causing Letkemann's injuries, plaintiffs evidently relied on the notice exception in MCL 500.3145(1).

As a consequence, plaintiffs' no-fault claims would have *already* been time-barred, if not for the notice exception, by the time Allstate became a party. Had Allstate asserted a valid affirmative defense immediately, the result would have been the same: it would have been too late for plaintiffs to file a new claim against a different insurer, MCL 500.3145(1), and also too late to file the requisite notice for an ACP claim, MCL 500.3174; *Spencer*, 239 Mich App at 309. Accordingly, regardless of whether Allstate's delay in asserting the defense could be considered good practice, the delay did not have a practically prejudicial effect. See *Jesperson*, 306 Mich App at 647 ("[H]ad the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend . . . , in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff's claim.").

Plaintiffs also assert that Allstate is equitably estopped from rescinding the policy. Plaintiffs argue that Allstate's initial representations that it insured the vehicle induced plaintiffs to believe that it was in fact insured, plaintiffs justifiably relied on that belief, and if Allstate could now deny that it insured the vehicle, plaintiffs would be prejudiced because it was too late for them to file a claim seeking payment of no-fault benefits for the accident from the ACP. As discussed, plaintiffs were already time-barred from pursuing an ACP claim before the complaint was filed in this action.

Prejudice is an essential element of establishing entitlement to equitable estoppel. *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). The party seeking equitable estoppel bears "a heavy burden" of proving its applicability. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 333; 869 NW2d 635 (2015). Because plaintiffs cannot establish prejudice, they cannot establish entitlement to equitable estoppel.

Remaining at issue is whether the innocent-third-party doctrine is *legally* available. "Insurance policies are contracts and, in the absence of an applicable statute, are 'subject to the same contract construction principles that apply to any other species of contract.' " *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012), quoting *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Under the common law of this state, an insurer may deny coverage under an insurance contract when that insurance policy was procured by the policy holder's fraudulent "misrepresentation material to the risk and hazard" attendant in the policy. *Keys v Pace*, 358 Mich 74, 82-83; 99 NW2d 547 (1959). In *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568, 578-579; 242 NW2d 530 (1976), this Court held that an insurer may not invoke this common-law exception if the insurer has not undertaken a reasonable discovery to uncover easily ascertainable fraud within the 55-day window in which MCL 500.3220 allows an insurer to cancel a policy.

Applicable to this case, Michigan's insurance statutes separate personal liability coverage from PIP coverage. Under MCL 257.520, an insurer is required to insure the owner of the policy and authorized persons driving the covered vehicle at a minimum

dollar amount for liability arising from injury to other persons or property. MCL 257.520(b)(2). Further, under MCL 257.520(f)(1), "[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 cannot invoke the common-law rule to avoid mandatory coverage and "is estopped from asserting fraud to rescind the insurance contract." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998).

Nonetheless, the parties to an insurance contract are free to contract for personal liability coverage in excess of the statutory minimums. In *Hyten*, our Supreme Court was faced with the question whether an insurer may avail itself of the traditional common-law remedy to avoid liability coverage amounts in excess of the statutory minimum when the insurance contract was procured by fraud and coverage extended to an innocent third party. The insurer in *Hyten* challenged only its responsibility for the liability coverage in excess of the statutory minimum, acknowledging its responsibility for the statutory minimum liability coverage. *Hyten*, 491 Mich at 552 n 2. Our Supreme Court overruled *Kurylowicz*, holding that when an insurance contract providing coverage in excess of the statutory minimum is procured by fraudulent misrepresentation, the insurer may invoke the traditional remedy to rescind the excess coverage "notwithstanding that the fraud may have been easily ascertainable and the claimant is a third party." *Id*. at 572-573.

What *Hyten* did not address is an insurer's responsibility for PIP coverage under Michigan's statutory no-fault insurance regime. Michigan's no-fault insurance regulations require vehicle owners to obtain PIP coverage. MCL 500.3101(1). A "person suffering accidental bodily injury arising from a motor vehicle acci-

dent while an occupant of a motor vehicle" may seek PIP benefits from "the insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a). An injured occupant is entitled to certain unlimited benefits covering the medical expenses resulting from the accident. MCL 500.3105; MCL 500.3107. The insurance company will pay the entirety of the claim but may be reimbursed by the Michigan Catastrophic Claims Association for expenses incurred in excess of a specified dollar amount. MCL 500.3104. Accordingly, there is no need to contract for excess PIP coverage.

An insurer may invoke the common-law rule to avoid payment of PIP benefits when the policy was procured by fraud. *Lake States Ins*, 231 Mich App at 331. However, this Court has issued a long line of published opinions indicating that, although fraud in the inducement was generally a valid basis to rescind a no-fault policy, such rescission did not avoid a no-fault insurer's obligation to pay benefits to innocent third parties. See, e.g., *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997); *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 171; 505 NW2d 895 (1993); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985); *Kurylowicz*, 67 Mich App at 578, overruled in part by *Hyten*, 491 Mich at 572-573.

We are bound by *Bazzi*'s holding that the innocent-third-party doctrine is no longer viable in any situation after our Supreme Court's decision in *Hyten*. Nevertheless, *Hyten* involved the avoidance of contractual insurance entitlements in excess of the statutory minimum; in this case, the alleged innocent third party's insurance entitlement is statutorily mandated, not contractual. As this Court observed in *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*:

> The insurer in *Titan*[2] 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. [*Hyten*, 491 Mich at 552 n 2.] 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. *Id*. at 552. [*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), p 9.]

We have not found any authority other than *Bazzi* that invalidates the innocent-third-party doctrine in the context of an insurer's responsibility for statutorily mandated personal protection benefits, and were we not bound by *Bazzi*, we would hold that the innocent-third-party doctrine is still viable in the context of an innocent third party's claim for PIP benefits under Michigan's no-fault insurance act. Furthermore, we agree completely with the dissenting opinion authored by Judge BECKERING in *Bazzi*, and we adopt it in its entirety herein.

We are required to reverse the trial court and remand for further proceedings consistent with this opinion. However, we do so strictly because MCR 7.215(J)(1) requires us to do so, and we call for the convening of a special conflict panel in accordance with MCR 7.215(J)(2).

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

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[2] *Titan* is just a different shortened name for *Hyten*.

SAWYER, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that this case is controlled by our decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), and, therefore, we must reverse the trial court. Because *Bazzi* concluded that the innocent-third-party doctrine is no longer viable in light of the Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), the trial court erred by denying summary disposition to defendant. Once the trial court determined that the policy was obtained through fraud, defendant was entitled to summary disposition. The record firmly establishes that Kreklau made material misrepresentations in the application, and those misrepresentations were material to the risk and hazard associated with the policy because they induced Allstate to charge drastically lowered premiums. Therefore, Allstate's rescission was effective with regard to Letkemann. Moreover, since Letkemann is barred from recovering no-fault benefits under the rescinded policy, so is Southeast Michigan Surgical Hospital, LLC. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424; 864 NW2d 609 (2014).

I also agree with the majority's conclusion that neither of the alternative grounds advanced by plaintiffs to affirm the case has merit. But because I believe that *Bazzi* was correctly decided, I disagree with the majority's conclusion that it was incorrectly decided, and I dissent from the majority's call to convene a conflict panel pursuant to MCR 7.215(J)(2).

Accordingly, I would merely reverse the trial court's grant of summary disposition to plaintiffs and remand this matter to the trial court for entry of an order granting Allstate's motion for summary disposition under MCR 2.116(C)(10).

PEOPLE v VENTURA

Docket No. 327289. Submitted July 6, 2016, at Grand Rapids. Decided August 16, 2016, at 9:00 a.m.

Lorenzo E. Ventura was convicted following a bench trial in the Kent Circuit Court of possession with intent to deliver less than 5 kilograms of marijuana or fewer than 20 marijuana plants, MCL 333.7401(2)(d)(*iii*), and manufacturing less than 5 kilograms of marijuana or fewer than 20 marijuana plants, MCL 333.7401(2)(d)(*iii*). Because of his status as a qualifying registered patient and primary caregiver under MCL 333.26424(a) and (b) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., defendant was legally allowed to cultivate up to 24 marijuana plants—12 plants as a qualifying registered patient and 12 plants as the qualifying primary caregiver of a qualifying patient. The police found 21 marijuana plants and 22 clones—the portion of a mature plant used to start a new plant—when they executed a search warrant on defendant's home; the clones had hair-like fibers growing from their main roots. Defendant asserted he was immune from prosecution, arguing that he cultivated less than the 24 marijuana plants he was allowed under the MMMA because the clones seized were only cuttings from leaves, not independent plants. The court, Donald A. Johnston, J., rejected defendant's argument, reasoning that defendant cultivated more than the legally allowed 24 marijuana plants because the clones constituted individual plants for purposes of the MMMA. Defendant appealed.

The Court of Appeals *held*:

1. Under the MMMA, MCL 333.26424(a) provides that a qualifying registered patient may legally cultivate up to 12 marijuana plants, and MCL 333.26424(b)(2) provides that a qualifying registered primary caregiver may legally cultivate up to 12 marijuana plants to assist a qualifying registered patient. The MMMA does not define the term "plant." Adopting the definition used by federal and other state jurisdictions, for purposes of calculating the quantity of plants a qualifying registered patient or primary caregiver may legally cultivate under the MMMA, the term "plant" includes a marijuana cutting if there is readily observable evidence of root formation. In this case, the trial court correctly concluded that defendant had cultivated

more than the 24 marijuana plants he was allowed under the MMMA because the clones had root systems, making the clones individual "plants" for purposes of the MMMA. There was sufficient evidence to support his conviction of the charged offenses.

2. The possession, manufacture, use, creation, and delivery of marijuana are still illegal in Michigan after enactment of the MMMA. To establish probable cause, a search warrant affidavit does not have to provide facts from which a magistrate could conclude that the suspect's marijuana-related activities are specifically not legal under the MMMA. In this case, the trial court correctly refused to suppress the evidence seized from the search; it was unnecessary for the affidavit to establish that defendant was not entitled to immunity from prosecution under MCL 333.26424(a) and (b)(2) of the MMMA.

3. Under MCL 333.26423(k) of the MMMA, the term "usable marihuana"—that which a qualifying registered patient or primary caregiver may legally possess—does not include marijuana seeds, stems, and residue when calculating the amount possessed. However, for purposes of establishing a crime under MCL 333.7401, the definition of the term "marihuana" is set forth in MCL 333.7106(4), and that definition includes marijuana seeds, stems, and residue. In this case, the MCL 333.26423(k) definition of "usable marihuana" is irrelevant for purposes of determining what constitutes evidence of intent to deliver marijuana under MCL 333.7401. For that reason, the court correctly included the seeds, stems, and residue found in the occupant's room for purposes of supporting defendant's conviction of possession with intent to deliver.

Affirmed.

EVIDENCE — MEDICAL MARIJUANA — WORDS AND PHRASES — PLANT.

Under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., for purposes of determining the quantity of marijuana plants a qualifying registered patient, MCL 333.26424(a), or qualifying registered caregiver, MCL 333.26424(b)(2), may cultivate, a "plant" includes a marijuana cutting in grow material if there is readily observable evidence of root formation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Anthony C. Greene for defendant.

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

SAWYER, J. This case presents an issue of first impression in Michigan, namely what constitutes a marijuana plant. More specifically, we must determine at what point does a cutting from a mature marijuana plant that is placed in "grow material" become a "plant" that may be separately counted as a plant for purposes of determining how many plants defendant, Lorenzo E. Ventura, had in his possession.

In this case, the Grand Rapids Police Department executed a search warrant at defendant's residence. In the "grow room" located on the main floor of the house, the officers found 21 marijuana plants plus 22 so-called "clone" plants. It is the clones that are at issue in this case. One of the officers involved in the search testified that a "clone" is a portion of a mature plant that is used to start a new plant. The officer testified that he pulled the clones out of the grow material that they were placed in and that some of the clones had hair-like fibers growing off the main root, with those fibers visible to the naked eye.

The search of the home also yielded a number of items related to the sale of marijuana: a digital scale with marijuana residue on it, an open box of sandwich bags, and a marijuana grinder. A purse was also found with a small bag of marijuana in it. Additional marijuana and marijuana seeds were also found in the home. Also during the search, defendant's wallet was located, and it contained registration cards identifying defendant as a qualifying medical marijuana patient and as a primary medical marijuana caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.[1] During an interview, defendant stated that he

[1] Although the MMMA uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion.

had one additional patient for whom he was a medical marijuana caregiver. Under MCL 333.26424(a) and (b)(2), this allowed defendant to cultivate up to 24 marijuana plants.[2]

Defendant was charged and convicted following a bench trial of one count of possession with intent to deliver marijuana and one count of manufacturing marijuana.[3] He was sentenced to 24 months' probation and 120 hours of community service. He now appeals, and we affirm.

We turn first to the primary issue in this case, namely how many plants did defendant cultivate and have in his possession. It is undisputed that defendant possessed at least 21 plants and that under § 4 of the MMMA[4] he is immune from prosecution if he cultivates no more than 24 plants. What is in dispute is whether the additional 22 clones should be considered plants as well under the MMMA. If they are considered to be individual plants themselves, then defendant exceeded the allowed amount by 19 plants. Defendant argues that the trial court erred by ruling that the clones constituted individual plants and thus finding defendant guilty of the charged offenses. In essence, defendant argues that the cuttings were still only leaves and had not yet become independent plants.

We begin by noting that the MMMA does not provide a definition of "plant." Nor are there any published opinions in this state that have interpreted the word "plant" as used in the MMMA. Moreover, resorting to

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[2] MCL 333.26424 allows a registered qualifying patient to possess up to 12 plants and a qualifying registered caregiver to possess up to 12 plants per qualifying registered patient.

[3] MCL 333.7401(2)(d)(*iii*) (less than five kilograms or fewer than 20 plants).

[4] MCL 333.26424(a) and (b)(2).

the dictionary does not provide significant assistance. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "plant" as "a young tree, vine, shrub, or herb planted or suitable for planting." That definition merely brings us back to where we started: were these clones still just leaves or had they progressed to the point that they were suitable for planting?

While there are no cases in Michigan that provide assistance, there are decisions in other jurisdictions that are instructive. In *United States v Edge*,[5] the Sixth Circuit, in determining what constitutes a marijuana plant for purposes of the federal sentencing guidelines, concluded that a "marijuana cutting is a 'plant' for federal sentencing purposes if there is readily observable evidence of root formation. A marijuana cutting with root balls or 'root hairs' easily meets this test." The court concluded that this definition would be easy to apply and comported with the plain and ordinary meaning of the statute at issue.[6]

We also find guidance in *State v Schumacher*,[7] in which the Idaho Court of Appeals determined what constituted a "plant" for purposes of calculating the number of marijuana plants the defendant had in his possession. Similar to the Sixth Circuit's decision in *Edge*, the *Schumacher*[8] court concluded that a cutting becomes a plant when it has a readily observable root system:

> We think it clear that in ordinary usage, the word "plant" contemplates the presence of a root structure. In common parlance, one plant does not immediately become many plants as soon as it is cut into pieces, even if those pieces

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[5] *United States v Edge*, 989 F2d 871, 879 (CA 6, 1993).

[6] *Id*. at 878-879.

[7] *State v Schumacher*, 136 Idaho 509; 37 P3d 6 (Idaho App, 2001).

[8] *Id*. at 519-520.

> have been placed in soil or a growing medium. Therefore, we hold that for a cutting to achieve plant status, it must have readily observable evidence of root formation.
>
> Our decision is consonant with those of many federal courts that have been called upon to determine the meaning of "marijuana plant" for purposes of the federal sentencing guidelines. Those courts hold that root formation is necessary for a cutting to be counted as a plant. *See United States v Robinson*, 35 F3d 442, 446 (9th Cir. 1994); *United States v Burke*, 999 F2d 596, 601 (1st Cir. 1993); *United States v Edge*, 989 F2d 871, 879 (6th Cir. 1993); *United States v Bechtol*, 939 F2d 603, 605 (8th Cir. 1991); *United States v Eves*, 932 F2d 856, 860 (10th Cir. 1991). As noted by the Sixth Circuit Court of Appeals, this is a "commonsensical, easy to administer test." *Edge*, 989 F2d at 877. In applying it, "a court must be permitted to use its eyesight and common sense to conclude that it has before it a plant with roots." *Burke*, 999 F2d at 600.

We are satisfied that the "root formation" standard adopted by the Idaho Court of Appeals and the federal cases it relied on is consistent with the plain and ordinary meaning of "plant," and we apply the same interpretation to the word "plant" as used in the MMMA.

The trial court employed a similar definition in reaching its decision. And, perhaps more importantly, it specifically held that only those plants with root systems could be and were counted:

> Probably the key ingredients in any plant would be some leaf material, some kind of stem, and some sort of root material. . . . And it seems to me once you have those components in place, you have a plant.
>
> * * *
>
> I'm inclined to agree with the detective's approach of only counting those . . . that had root systems. They, from

> the photographs, have leaves, they appear to be alive and healthy, unlike the five plants in the basement which have shriveled and died.
>
> So it seems to me the 22 so-called clones that had root structures and leaves and are green and are alive constitute plants. They're not very big plants and they're not mature plants, but the statute doesn't address that. It just says plants.

For these reasons, the trial court correctly concluded that defendant cultivated and possessed a total of 43 marijuana plants, which was more than the 24 allowed him under the MMMA. Accordingly, the trial court did not err by holding that defendant was not entitled to claim immunity under § 4 of the MMMA.

Next, we turn to defendant's challenge to the search warrant in this case. Specifically, defendant argues that the trial court should have suppressed the fruits of the search because there were material omissions in the affidavit in support of the search warrant. We disagree. In particular, defendant argues that the affidavit failed to mention that he was a qualifying registered patient under the MMMA as well as a qualifying registered caregiver. Therefore, defendant argues, the delivery observed by the informant could have been defendant giving his patient a supply of marijuana.

This Court addressed this issue in *People v Brown*,[9] concluding that probable cause may be established without proving that the suspect's activities come within the MMMA:

> The possession, manufacture, use, creation, and delivery of marijuana remain illegal in this state, even after the enactment of the MMMA. Thus, we conclude that to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude

[9] *People v Brown*, 297 Mich App 670, 677-678; 825 NW2d 91 (2012).

> that a suspect's marijuana-related activities are specifically not legal under the MMMA. Probable cause exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place. [*People v*] *Kazmierczak*, 461 Mich [411,] 417-418[; 605 NW2d 667 (2000)]. Defendant has presented no authority indicating that for probable cause to exist, there must be a substantial basis for inferring that defenses do not apply. See, generally, [*People v*] *Lemons*, 454 Mich [234,] 246 n 15[; 562 NW2d 447 (1997)] (discussing affirmative defenses). We disagree with the trial court's holding pertaining to probable cause. Accordingly, we affirm the trial court on alternative grounds, and defendant's issue regarding the good-faith exception to the exclusionary rule is moot. See *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987) (discussing mootness). [Citation omitted.]

Accordingly, the trial court did not err by refusing to suppress the evidence merely because the affidavit did not establish that defendant was not entitled to the immunity defense under § 4 of the MMMA.[10]

Finally, defendant argues that the trial court erred by finding that he had delivered marijuana to another occupant of the house, Kelrick Traylor. We disagree. We review de novo a challenge to the sufficiency of the evidence in a bench trial, viewing the evidence in the light most favorable to the prosecution and determining whether the trial court could have found the essential elements proved beyond a reasonable doubt.[11] Defendant presents a brief argument in support of his position. Defendant first argues that there was insuf-

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[10] We also note that, as pointed out by the prosecution, defendant was identified in the search warrant by description rather than by name. Thus, it is unclear how the police would have been able to establish that defendant was a registered patient and caregiver in advance of the search.

[11] *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

ficient evidence that he delivered marijuana to Traylor. But it is unnecessary to prove delivery because the charge is supported by possession with the intent to deliver.[12] And defendant does not argue that there was insufficient evidence to support the conclusion that he possessed marijuana with the intent to deliver. Defendant also argues that the relevant material found in Traylor's room consisted of seeds, stems, and residue, which are not considered "usable marijuana" under the MMMA.[13] But what constitutes "usable marijuana" under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401. The relevant definition is that contained in MCL 333.7106(4), which provides the following definition:

> "Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. Marihuana does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination. Marihuana does not include industrial hemp grown or cultivated, or both, for research purposes under the industrial hemp research act.

Accordingly, the material was in fact marijuana.

Affirmed.

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

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[12] MCL 333.7401.

[13] See MCL 333.26423(k).

TROWELL v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC

Docket No. 327525. Submitted August 3, 2016, at Detroit. Decided August 16, 2016, at 9:05 a.m. Leave to appeal sought.

Plaintiff, Audrey Trowell, filed a complaint in the Wayne Circuit Court against Providence Hospital and Medical Centers, Inc., seeking damages for injuries she sustained when a patient-care technician employed by the hospital allegedly dropped her twice while assisting her to the bathroom. Pursuant to a stipulated order, venue was transferred to the Oakland Circuit Court. Plaintiff alleged "medical negligence" in her complaint, and the parties did not dispute that plaintiff did not take the mandatory procedural steps associated with a medical malpractice action because plaintiff failed to serve a notice of intent, failed to file an affidavit of merit, and failed to file the lawsuit within the two-year period of limitations generally applicable to medical malpractice actions. The hospital moved for summary disposition but did not present any documentary evidence in support of the motion. The court, Colleen A. O'Brien, J., concluded that plaintiff's lawsuit sounded in medical malpractice and granted summary disposition in favor of the hospital solely on the basis of the allegations in plaintiff's complaint. Plaintiff moved for reconsideration and to amend the complaint, and the court denied both motions. Plaintiff appealed, arguing that the claim was not filed as a medical malpractice action but rather as an ordinary negligence action, that medical expertise was not necessary for a jury to determine whether a hospital aide dropping a patient constituted ordinary negligence, and that summary disposition was premature because discovery had not yet been completed.

The Court of Appeals *held*:

1. In determining whether a claim alleged medical malpractice or ordinary negligence, a court must read the complaint as a whole, disregard the labels applied to the claim, and ask two fundamental questions: (1) whether the claim pertains to an action that occurred within the course of a professional relationship and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experi-

ence. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. The physical movement or transfer of a patient by medical staff may or may not implicate professional judgment; the court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances—for example, the medical condition of the plaintiff or the sophistication required to safely effect the move—implicate medical judgment. With respect to an ordinary negligence action in an employment setting, an employer is generally subject to direct liability for its negligence in hiring, training, and supervising employees and can also be held vicariously liable for the wrongful acts of its employees that are committed while performing some duty within the scope of their employment. In this case, the claims of direct and vicarious liability were ultimately predicated on a negligence theory pertaining to (1) the use of one nurse's aide to assist plaintiff and not two aides or nurses and (2) the manner in which the nurse's aide physically handled plaintiff when providing assistance, regardless of the number of hospital personnel involved. With respect to the first claim, the absence of documentary evidence made it impossible to ascertain whether medical expertise and judgment had to be contemplated or whether common knowledge and experience would be sufficient to properly assess the reasonableness of the number of aides or nurses that should have been employed to safely assist plaintiff. Similarly, with respect to the second claim, it was impossible to determine solely from the allegations in plaintiff's complaint whether medical expertise and judgment had to be contemplated or whether common knowledge and experience would be sufficient to properly assess the reasonableness of the aide's conduct in assisting plaintiff. Accordingly, the trial court erred by summarily dismissing plaintiff's lawsuit because further factual development was required to properly ascertain whether plaintiff's claims sounded in medical malpractice, ordinary negligence, or a combination of both.

2. Under *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411 (2004), when medical personnel have knowledge of a particular hazard confronting a patient and no corrective action is taken to reduce the risk presented, a claim of failure to take steps or respond generally sounds in ordinary negligence. In this case, even if medical judgment was implicated with respect to the allegation that the nurse's aide dropped plaintiff the first time, the alleged subsequent or second dropping required additional thought: it was possible that lay jurors could determine that it was unreasonable for the aide to continue her effort to get

plaintiff to the bathroom without seeking help after dropping plaintiff the first time. While there remained a possibility that medical judgment would be implicated with regard to the second dropping, on remand the trial court has to keep in mind that the first and second droppings might be distinguishable under *Bryant* when considering whether plaintiff's action sounded in medical malpractice or ordinary negligence.

Reversed and remanded for further proceedings.

Carla D. Aikens, PC (by *Carla D. Aikens*), for Audrey Trowell.

Grier, Copeland & Williams, PC (by *Wilson A. Copeland, II*, and *Rhonda Y. Reid Williams*), for Providence Hospital and Medical Centers, Inc.

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

MURPHY, P.J. Plaintiff, Audrey Trowell, appeals as of right the trial court's order granting summary disposition in favor of defendant, Providence Hospital and Medical Centers, Inc. (the hospital), in this dispute that, at this juncture, concerns whether plaintiff's complaint sounded in medical malpractice or ordinary negligence. The substance of the case concerns an incident in which a patient-care technician employed by the hospital allegedly "dropped" plaintiff twice while assisting and escorting her to the bathroom, resulting in various injuries. There is no dispute that plaintiff did not take the mandatory procedural steps associated with a medical malpractice action, such as serving a notice of intent, MCL 600.2912b, and procuring and filing an affidavit of merit, MCL 600.2912d. Additionally, the lawsuit was filed beyond the two-year period of limitations generally applicable to medical malpractice actions, MCL 600.5838a(2); MCL 600.5805(1) and (6). Solely on the basis of the allegations in plaintiff's complaint, as there

was no documentary evidence presented in regard to the hospital's motion for summary disposition, the trial court ruled that plaintiff's lawsuit sounded in medical malpractice and dismissed the action in its entirety. The trial court denied plaintiff's motion for reconsideration and her motion to amend the complaint. Because the allegations in the complaint did not lend themselves to a definitive determination that the negligence claims in plaintiff's suit necessarily sounded in medical malpractice, we reverse and remand for further proceedings.

I. BACKGROUND

On February 11, 2014, plaintiff filed a single-count complaint against the hospital in the Wayne Circuit Court; however, pursuant to a stipulated order, venue was transferred to the Oakland Circuit Court. In the complaint, under a count titled "Medical Negligence," plaintiff alleged that on February 11, 2011, she was admitted to the hospital after having suffered a stroke caused by an aneurysm. Plaintiff asserted that she subsequently went into cardiac arrest and that she was placed in the hospital's intensive care unit (ICU). Plaintiff alleged in the complaint that she had been advised that two nurses needed to assist her whenever she went to the bathroom, yet "on several occasions" the hospital only employed one nurse to assist plaintiff to the bathroom. She additionally contended that, on one particular occasion, an unassisted female nurse's aide[1] was tasked with helping plaintiff to the bathroom and that she "dropped" plaintiff, causing her to hit her

[1] Although the complaint referred to this person as a nurse, it was later revealed that this employee was a patient-care technician, essentially a nurse's aide, and not a nurse. We shall refer to her for the remainder of this opinion as the "nurse's aide" or simply the "aide."

head on a wheelchair. According to the complaint, when the nurse's aide attempted to assist plaintiff after dropping her, the aide "dropped [p]laintiff a second time." Plaintiff alleged that as a result of the falls, she suffered a torn rotator cuff, which required multiple surgeries and ongoing treatment, as well as "bleeding on the brain."

Plaintiff alleged that the hospital "had a duty to ensure that [she] received proper assistance while a patient, including assistance ambulating to and from the bathroom while she was in the ICU." The complaint further set forth the following allegations:

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:
>
> a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;
>
> b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;
>
> c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;
>
> d. Failure to properly train [the nurse's aide] and other[s] . . . in how to properly handle patients such as Plaintiff;
>
> e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital[.]

Plaintiff additionally alleged that the "hospital was negligent through its agents, employees, and staff in failing to ensure the safety of" plaintiff and that the negligence of the hospital "and its agents, employees and staff was the proximate [cause] of" plaintiff's alleged damages. In her prayer for relief, plaintiff sought a judgment awarding her economic damages for lost wages and earning capacity, noneconomic damages in the amount of $2.5 million, and costs.

The hospital filed an answer to the complaint and affirmative defenses, indicating, in part, that plaintiff's suit was time-barred and that she had failed to serve a notice of intent and file an affidavit of merit as required in medical malpractice actions. Subsequently, the hospital filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff's complaint sounded in medical malpractice and not ordinary negligence; that the suit was barred by the two-year period of limitations applicable to medical malpractice actions; that plaintiff had failed to serve a notice of intent, which meant that no tolling of the limitations period had occurred; and that plaintiff had failed to file an affidavit of merit. The hospital maintained that plaintiff's suit sounded in medical malpractice because a professional relationship had existed between plaintiff and the hospital and because the alleged acts of negligence raised questions of medical judgment that were not within the common knowledge and experience of laypersons. The latter proposition forms the heart of this appeal.

In response to the hospital's motion for summary disposition, plaintiff contended that the issues concerning the two-year period of limitations, a notice of intent, and an affidavit of merit were all irrelevant because plaintiff's "claim was not filed as a medical malpractice action." Plaintiff argued that medical expertise was not necessary "in order for a jury to decide whether a[n] [aide] dropping someone is negligence" and that a juror would be able to discern, absent medical testimony, that plaintiff had not been handled properly. Plaintiff further maintained that her suit and the alleged breach of duty did not entail the aide's administration of any medical care or treatment or the exercise of medical judgment, that the nurse's aide was simply assisting plaintiff in using the bathroom, that

being dropped by an aide who was unassisted constituted clear negligence, and that the issue of the hospital's alleged failure to prevent plaintiff's injury could be answered without any specialized knowledge. Finally, plaintiff argued that summary disposition was premature because discovery had not yet been completed.[2]

After reviewing the factual and procedural history of the case and reciting the two-part test enunciated in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich

[2] Pursuant to a second amended scheduling order, the discovery deadline was April 22, 2015, which was two weeks after the trial court granted the hospital's motion for summary disposition on April 8, 2015. The record reflects that the parties had served and answered some interrogatories and document-production requests. In February 2015, plaintiff served a deposition notice and subpoena duces tecum on the hospital designated for the nurse's aide. At this point, plaintiff did not know the aide's full name or address. The nurse's aide no longer worked for the hospital, and per order dated March 4, 2015, the trial court directed the hospital's attorney to provide plaintiff's counsel with the last known address of the nurse's aide. The address was provided, and plaintiff again served a deposition notice and subpoena duces tecum, scheduling the deposition for March 31, 2015. The hospital then filed a motion to quash the subpoena, challenging some of the document requests identified in the subpoena as having to be produced by the aide at her deposition. The trial court granted the motion on March 27, 2015, finding that the subpoena was "overbroad." Plaintiff then renewed her efforts by serving yet another deposition notice and subpoena duces tecum, setting a deposition date of April 9, 2015—the day after summary disposition was entered in favor of the hospital. The hospital had also filed a motion to quash the most recent subpoena, which motion was never decided in light of the summary disposition ruling. In sum, a deposition of the nurse's aide was never conducted. At the hearing on summary disposition, plaintiff's counsel acknowledged that she had pleaded multiple possible theories of negligence or liability, and she expressed that she had not yet settled on any particular theory because discovery was ongoing and because the aide had yet to be deposed. Plaintiff's counsel explained, "They don't know if it was because two nurses were supposed to have assisted, whether the [aide] in question just wasn't able to physically assist her, [or] what the circumstances were that caused her to drop [plaintiff]."

411, 422; 684 NW2d 864 (2004),[3] which test is employed in determining whether a claim sounds in medical malpractice or ordinary negligence, the trial court ruled as follows at the hearing on the hospital's summary disposition motion:

> Here, there's no dispute that the professional relationship requirement is met. At issue is the second element. The [c]ourt finds that plaintiff's allegations sound in medical malpractice . . . . Furthermore, allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. . . . Therefore, [the hospital's] motion for summary disposition is granted.

On April 8, 2015, an order was entered granting the hospital's motion for summary disposition for the reasons stated on the record. Plaintiff then filed a motion for reconsideration and a motion to amend the complaint. On May 4, 2015, the trial court entered two orders. In the first order, the trial court denied plaintiff's motion for reconsideration, concluding that plaintiff had failed to demonstrate palpable error and had merely presented the same issues on which the court had previously ruled. In the second order, the trial court indicated that plaintiff had failed to attach to her motion a proposed amended complaint, depriving the court of the opportunity to engage in meaningful review of her request for leave to file an amended complaint.

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[3] The *Bryant* Court explained that "a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, 471 Mich at 422. There is no dispute in this case that plaintiff's suit concerned an action that took place within the course of a professional relationship.

The trial court directed plaintiff to refile her motion to amend with an attached proposed amended complaint. Plaintiff did so, and her proposed amended complaint again contained a single count, but it was retitled "Negligence." Plaintiff essentially repeated most of the allegations found in the original complaint. Paragraph 15 of the proposed amended complaint, which paragraph in the original complaint we quoted earlier, now simply asserted negligence on the part of the hospital for departing from the standard of care by failing to ensure plaintiff's safety while in the hospital, thereby retaining only Subparagraph (a) from the original Paragraph 15.[4] Plaintiff did repeat the earlier allegations that the "hospital was negligent through its agents, employees, and staff in failing to ensure the safety of" plaintiff and that the negligence of the hospital "and its agents, employees and staff was the proximate [cause] of" plaintiff's alleged damages.

On May 26, 2015, the trial court entered an order denying plaintiff's renewed motion to amend her complaint, ruling that the motion was "essentially a motion for reconsideration," which had already been denied, that the proposed amended complaint still sounded in medical malpractice, and that, therefore, any amendment would be futile. Plaintiff appeals as of right.

II. ANALYSIS

A. OVERVIEW OF APPELLATE ARGUMENTS

On appeal, plaintiff argues that her claims of failure to ensure safety, failure to exercise proper care, failure

[4] It appears that plaintiff deleted Subparagraphs (b) through (e) on the basis that the hospital's motion for summary disposition, for whatever reason, omitted Subparagraph (a) when referring to the complaint. However, the trial court's ruling granting summary disposition clearly encompassed all of plaintiff's claims.

to train, failure to supervise, and failure to provide adequate staff all sounded in ordinary negligence and not medical malpractice. She further maintains that Michigan cases involving "dropped" or "fallen" patients in medical settings have all been held to sound in ordinary negligence. Plaintiff alternatively contends that, even assuming some of her claims sounded in medical malpractice, there still remained viable claims of ordinary negligence. She also asserts that her claims implicated the doctrine of res ipsa loquitur. Finally, plaintiff argues that the trial court erred by denying her motion to amend the complaint.

The hospital argues that the trial court did not err by granting its motion for summary disposition and by denying plaintiff's motion for reconsideration and motion to amend the complaint. The hospital contends that medical knowledge and expertise were necessary to assess plaintiff's fall risk; that plaintiff did not allege a failure to take corrective steps, which was recognized in *Bryant* as a claim sounding in ordinary negligence; that staffing decisions require the exercise of medical judgment; that failure to ensure safety is not a viable, recognizable claim; and that the requirements for the application of res ipsa loquitur were not met. The hospital further maintains that plaintiff's proposed amended complaint also sounded in medical malpractice; therefore, the amendment would have been futile. Finally, the hospital argues that, given the inescapable conclusion that plaintiff's suit sounded entirely in medical malpractice, the suit was not properly commenced in accordance with mandatory procedural steps and was also time-barred.

B. STANDARD OF REVIEW AND SUMMARY DISPOSITION PRINCIPLES

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Elba Twp v*

Gratiot Co Drain Comm'r, 493 Mich 265, 277; 831 NW2d 204 (2013). "We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). This Court likewise reviews for an abuse of discretion a trial court's ruling on a motion to amend a complaint. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 215-216; 859 NW2d 238 (2014). In *Bryant*, 471 Mich at 419, our Supreme Court observed:

> In determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7). We review such claims de novo. In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. [Citations omitted.]

The hospital's motion for summary disposition cited both MCR 2.116(C)(7) and (8), and the hospital's argument focused solely on the allegations in the complaint; no documentary evidence was submitted by either party. The trial court did not identify the particular ground under MCR 2.116(C) that it relied on in making its decision, but the court's ruling from the bench was couched in terms of plaintiff's "allegations." For purposes of MCR 2.116(C)(7), the hospital was permitted, but not required, to submit documentary evidence in support of its motion. MCR 2.116(G)(2) and (3); see *Whitmore v Charlevoix Co Rd Comm*, 490 Mich 964 (2011) (stating that while a party may support a motion brought under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the movant is not required to do so, and the opposing party need not reply with supportive material). In light of the proceedings below, our attention

will be directed solely at the allegations in plaintiff's complaint, which we must accept as true.

C. *BRYANT* AND OTHER PERTINENT CASELAW

In *Bryant*, the Michigan Supreme Court addressed four distinct claims of negligence brought against a nursing facility that arose out of a death from positional asphyxiation while the decedent was in the facility's care. The Court was "required . . . to determine whether each claim sound[ed] in medical malpractice or ordinary negligence." *Bryant*, 471 Mich at 414. Pertinent here, the *Bryant* Court stated:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the fact-finder. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.
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> * * *
>
> After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care pro-

> fessionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. . . .
>
> Contributing to an understanding of what constitutes a "medical judgment" is *Adkins v Annapolis Hosp*, 116 Mich App 558[, 564]; 323 NW2d 482 (1982), in which the Court of Appeals held:
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> > Medical malpractice . . . has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. [*Bryant*, 471 Mich at 422-424 (citations, quotation marks, and brackets omitted).][5]

The *Bryant* Court cautioned that "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly*

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[5] The *Bryant* Court also alluded to a preliminary issue concerning whether an action is being commenced "against someone who, or an entity that, is capable of malpractice." *Bryant*, 471 Mich at 420. The hospital, as an entity, is plainly capable of malpractice. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) ("A hospital may be . . . directly liable for malpractice . . . ."). And, to the extent that plaintiff's suit is based on the hospital's vicarious liability for the alleged negligence of the nurse's aide, see *id*. (stating that a hospital can be held "vicariously liable for the negligence of its agents"), *Bryant* itself concerned, in part, claims associated with the conduct and training of certified nursing assistants, implicitly concluding that such employees are capable of malpractice, *Bryant*, 471 Mich at 420-421 & n 8, citing MCL 600.5838a. The parties did not address this issue in the trial court, nor do they on appeal, so we shall not explore the matter any further.

sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Id*. at 421.

The physical movement or transfer of a patient by medical staff "may or may not implicate professional judgment." *Id*. at 421 n 9. "The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances—for example, the medical condition of the plaintiff or the sophistication required to safely effect the move—implicate medical judgment . . . ." *Id*.[6] In *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 490-491; 668 NW2d 402 (2003), which opinion predated *Bryant*, the plaintiff sustained a laceration to her right leg when nurses attempted to move the plaintiff from a toilet to her wheelchair. This Court held that the "plaintiff's claim was of medical malpractice because an ordinary layman lacks knowledge regarding the appropriate

[6] In *Gold v Sinai Hosp of Detroit, Inc*, 5 Mich App 368, 369-370; 146 NW2d 723 (1966), this Court, relying on *Fogel v Sinai Hosp of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965) (a case involving a patient who fell and broke her hip while walking with the assistance of a nurse's aide after the patient warned that one aide alone would not be capable of adequately assisting her in walking), ruled:

> In the instant case, the patient warned the nurse who was assisting her onto an examination table that she was nauseated and dizzy and that she "would not be able to make it." With the nurse's assurances that she would brace the plaintiff from behind, plaintiff endeavored to move from a sitting to a prone position. The promised assistance did not materialize and plaintiff fell, sustaining injuries, for which she sought to recover damages. This appeal followed the directed verdict for defendant below.
>
> Neither *Fogel* nor the instant case present a malpractice question but rather a question of ordinary negligence. Defendant attempted to distinguish the two cases on the theory that *Fogel* involved a nonprofessional nurse's aide, whereas the instant case involves a professional nurse. This is a distinction without a difference.

methods and techniques for transferring patients." *Id*. at 510. In *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 497-498; 708 NW2d 453 (2005), a case involving an alleged closed head injury resulting from a fall from a hospital bed, this Court, after reviewing *Bryant*, held:

> Here, plaintiff alleged in the complaint that defendant's nurses were negligent in failing to prevent Walling's fall, in permitting her to arise unassisted, in failing to protect her from falling, and in otherwise failing to exercise such measures when the nurses knew, or should have known, of Walling's risk of falling. The complaint also alleged that, at the time of the fall, Walling was lethargic, in pain, uncooperative, noncompliant, and had labored breathing. There was documentary evidence indicating that Walling was restless, somewhat disoriented, in pain, being medicated with morphine for pain, and instructed not to get out of bed.
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> At the depositions of various nurses involved in Walling's treatment, plaintiff's counsel continually focused his questioning on risk assessment with respect to falling out of bed and the various factors taken into consideration when making an assessment, including the medications being prescribed to the patient and the patient's state of mind. It is clear from the deposition testimony that a nursing background and nursing experience are at least somewhat necessary to render a risk assessment and to make a determination regarding which safety or monitoring precautions to utilize when faced with a patient who is at risk of falling. While, at first glance, one might believe that medical judgment beyond the realm of common knowledge and experience is not necessary when considering Walling's troubled physical and mental state, the question becomes entangled in issues concerning Walling's medications, the nature and seriousness of the closed-head injury, the degree of disorientation, and the various methods at a nurse's disposal in confronting a situation where a patient is at risk of falling. The deposition testimony indicates that there are numerous ways in

> which to address the risk, including the use of bedrails, bed alarms, and restraints, all of which entail some degree of nursing or medical knowledge. Even in regard to bedrails, the evidence reflects that hospital bedrails are not quite as simple as bedrails one might find at home. In sum, we find that, although some matters within the ordinary negligence count might arguably be within the knowledge of a layperson, medical judgment beyond the realm of common knowledge and experience would ultimately serve a role in resolving the allegations contained in this complaint. Accordingly, we find that the trial court did not err in dismissing the ordinary negligence claim.

D. DISCUSSION—APPLICATION OF LAW TO THE FACTS

As explained earlier, we are confined to examining the allegations in plaintiff's complaint. One of the difficulties in this case is that the complaint is fairly vague and lacks elaboration in terms of describing and factually supporting the particular theories of negligence it sets forth, ostensibly because plaintiff was short on information concerning details of the incident and intended to rely on discovery to elicit specifics. The record is unclear regarding the nature, clarity, and extent of any memories that plaintiff herself has of the incident given her condition while in the ICU. The gravamen of a lawsuit is determined by reading the complaint as a whole and by looking beyond the labels attached by a party. *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006). In resolving whether claims alleged medical malpractice or ordinary negligence, "we disregard the label . . . applied to the[] claims." *Id*.[7] A complaint cannot avoid the appli-

[7] For this reason, we give little consideration to the fact that plaintiff's complaint referred to "medical" negligence. Further, although the complaint alluded to the hospital "departing from the standard of care in the community," negligence actions in general entail an alleged breach of

cation of procedural requirements associated with a medical malpractice action by couching the cause of action in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999).

A fair reading of the complaint reveals that plaintiff is alleging that the hospital is directly liable for negligence relative to training, supervision, staffing, monitoring, and oversight as well as vicariously liable for the aide's negligence and the negligence of other employees possibly involved in plaintiff's care if it had a bearing on causation. With respect to an ordinary negligence action in an employment setting, an employer is generally subject to direct liability for its negligence in hiring, training, and supervising employees. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006) (case involving sexual assault by hospital employee). An employer can also be held vicariously liable for the wrongful acts of its employees that are committed while performing some duty within the scope of their employment. *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). Similarly, as mentioned earlier, in the context of medical malpractice actions, "[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision[,] . . . selection[,] and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002).

As best we can glean from plaintiff's complaint, the claims of direct and vicarious liability are ultimately predicated on a negligence theory pertaining to (1) the use of one nurse's aide to assist plaintiff and not two

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the standard of care, not just medical malpractice suits. See *Moning v Alfono*, 400 Mich 425, 437, 442-449; 254 NW2d 759 (1977).

aides or nurses and (2) the manner in which the nurse's aide physically handled plaintiff when providing assistance, regardless of the number of hospital personnel involved. Stated otherwise, plaintiff is alleging that the nurse's aide was negligent for attempting to assist plaintiff without help or for improperly handling plaintiff, or both, and that the hospital was negligent for training, supervision, staffing, monitoring, and oversight decisions tied to the number of aides or nurses needed, available, and employed to assist plaintiff or in regard to proper patient-handling techniques when moving a patient, or both. We must assess whether these liability claims sounded in medical malpractice or ordinary negligence.

1. ONE VERSUS TWO AIDES OR NURSES

With respect to the claim of negligence pertaining to the number of aides or nurses used to assist plaintiff in accessing the ICU bathroom, medical judgment, knowledge, and expertise could certainly play an integral role in determining whether one person or two persons should assist a patient in walking or moving.[8] A patient's physical and mental state or condition, as affected by illness, surgery, anesthesia, medications, and the like, may very well dictate the number of hospital employees needed to safely escort or move the patient from one location to another and may require testimony from medical experts.

[8] Although plaintiff's complaint alleges that "she [presumably, plaintiff] had been advised that two nurses needed to assist Plaintiff to the bathroom," it does not elaborate on who provided that advice or the circumstances under which it was provided. The development of an evidentiary record in that regard conceivably may affect the analysis of whether the use of only one aide constituted, allegedly, medical malpractice or, alternatively, ordinary negligence.

However, we can also envision a situation in which the determination regarding whether it was negligent to employ just one worker to assist a patient can be made by a jury on the basis of the jurors' common knowledge and experience. For example, if the weight differential between the nurse's aide at issue here and plaintiff was significant, or if the nurse's aide had some type of handicap or a recent injury bearing on her ability to provide assistance, a layperson, absent expert medical testimony, might be able to easily and properly evaluate the reasonableness of the decision not to seek a second aide or nurse to assist in moving or escorting plaintiff. By way of a somewhat extreme yet pertinent and plausible hypothetical, if an aide weighed 90 pounds soaking wet and a patient weighed 500 pounds, a layperson would be capable of assessing, on the basis of common knowledge and experience, whether it was negligent for the aide to attempt moving or handling the patient without help.

We recognize that in certain cases it may be necessary to consider matters that implicate medical judgment *in conjunction with matters that do not implicate medical judgment* relative to evaluating whether negligence occurred in moving or handling a patient, which would effectively make the case a medical malpractice action. See *Sturgis Bank & Trust*, 268 Mich App at 497-498.[9] However, in other cases, factors not requiring or implicating medical judgment may be fully sufficient in and of themselves to properly assess the reasonableness of conduct; such factors fall within

[9] One of the features that distinguishes *Sturgis Bank & Trust* from the instant case is that here we only have the allegations in the complaint to guide our analysis, whereas in *Sturgis Bank & Trust* the panel extensively discussed the documentary evidence in resolving whether the suit sounded in medical malpractice or ordinary negligence. *Sturgis Bank & Trust*, 268 Mich App at 497-498.

the realm of common knowledge and experience. Absent documentary evidence and illumination from the complaint, we simply cannot ascertain whether the instant case is such a case or whether medical expertise and judgment must be contemplated relative to the question of the number of aides or nurses that should have been employed to safely assist plaintiff. The allegations in the complaint alone were inadequate to serve as a basis to summarily dismiss plaintiff's action, and plaintiff was not obligated to submit documentary evidence when the hospital chose not to do so in support of its motion for summary disposition. *Whitmore*, 490 Mich at 964.[10]

2. ALLEGED NEGLIGENCE IN PHYSICALLY HANDLING PLAINTIFF IRRESPECTIVE OF THE NUMBER OF AIDES OR NURSES EMPLOYED

Comparable to our earlier discussion, medical judgment and experience may or may not be necessary to evaluate whether the nurse's aide was negligent as to the manner in which she physically assisted plaintiff, regardless of the allegation that the aide should have sought help from another aide or nurse. Medical judgment, knowledge, and expertise could certainly be pertinent in determining the proper technique to use when holding and escorting a patient. A patient's physical and mental state or condition, as affected by

[10] We do wish to make clear that simply because a patient's physical or mental condition may be relevant to assessing the level of assistance needed, it does not necessarily mean that medical judgment is implicated; laypersons, relying on common knowledge or experience, may be able to grasp uncomplicated or straightforward medical conditions. See *Bryant*, 471 Mich at 421 n 9 ("The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances—for example, the medical condition of the plaintiff or the sophistication required to safely effect the move—implicate medical judgment . . . ."). This proposition applies equally to our later discussion regarding patient-handling techniques.

illness, surgery, anesthesia, medications, and the like, may very well dictate how a patient should be physically handled when being moved. However, in any given case and on the basis of common knowledge and experience, lay jurors could evaluate whether negligence was involved in assisting a patient if the nature of the assistance was so plainly unreasonable that evidence of medical judgment and knowledge was simply rendered immaterial. For example, accepting as true, as we must do, the allegation that the nurse's aide dropped plaintiff, if evidence was developed showing that the aide dropped her because the aide decided to answer a cell phone call or because the aide held plaintiff with an extremely and ridiculously loose grip, a jury could likely utilize common knowledge and experience to evaluate the reasonableness of the aide's act without having to resort to medical judgment. Again, we recognize that in certain cases it may be necessary to examine matters that implicate medical judgment in conjunction with matters that do not implicate medical judgment relative to evaluating whether negligence occurred in handling a patient. But we cannot determine solely from the allegations in plaintiff's complaint whether this case falls into that category, thereby implicating medical judgment, or whether medical judgment is simply not relevant in assessing whether the nurse's aide acted reasonably.[11]

[11] To the extent that the issue arises following remand, plaintiff's argument regarding the doctrine of res ipsa loquitur (the thing speaks for itself) is misplaced and lacks merit. We initially note that she did not allege the application of the doctrine in her complaint, nor was the doctrine argued in connection with the hospital's motion for summary disposition. Accordingly, the argument was unpreserved for purposes of appeal and need not be reviewed. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Nevertheless, we shall briefly address the issue. The doctrine of res ipsa loquitur, which, when applicable, creates an inference of negli-

3. THE SECOND "DROPPING"

Even if medical judgment was implicated with respect to the allegation that the nurse's aide dropped plaintiff the first time, the alleged subsequent or second "dropping" requires some additional thought. When medical personnel have knowledge of a particular hazard confronting a patient and no corrective action is taken to reduce the risk presented, a claim of failure to take steps or respond generally sounds in ordinary negligence. *Bryant*, 471 Mich at 430-431. The *Bryant* Court observed:

> Suppose, for example, that two CENAs [nursing assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
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> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the [legal] standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that

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gence on the basis of circumstantial evidence, requires a showing that the incident was of a kind that ordinarily does not occur in the absence of negligence. *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005). We cannot conclude that this case presents such a scenario. Regardless, while a medical malpractice case may proceed to a jury absent expert testimony if the requirements of the doctrine of res ipsa loquitur are satisfied, *id*. at 6, the case nevertheless remains a medical malpractice action subject to the applicable statute of limitations for medical malpractice suits as well as to the "notice of intent" and "affidavit of merit" requirements. The doctrine does not convert or transform a medical malpractice action into an ordinary negligence suit.

> the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Id*. at 431.]

By analogy, and accepting the complaint's allegations as true, after plaintiff was dropped the first time and hit her head on a wheelchair, it is possible that lay jurors, on the basis of common knowledge and experience and absent consideration of medical judgment, could readily determine that it was unreasonable for the nurse's aide to simply and immediately continue her effort to get plaintiff to the bathroom without seeking help from other hospital personnel. Although we are not ruling out the possibility that medical judgment was implicated with regard to the second dropping given the complete lack of documentary evidence, if the trial court eventually returns to the issue of whether plaintiff's action sounded in medical malpractice or ordinary negligence, the court must keep in mind that the first and second "droppings" may be distinguishable under *Bryant*.

III. CONCLUSION

We cannot conclude solely on the basis of the allegations in the complaint, which is all that can be considered given the procedural posture of the case, that plaintiff's claims sounded in medical malpractice. Accordingly, the trial court erred by summarily dismissing plaintiff's lawsuit. Further factual development is required to properly ascertain whether plaintiff's claims sounded in medical malpractice or ordinary negligence, and perhaps the suit presents a mix of such claims. Testimony by the nurse's aide

would appear to be a key factor in answering the question.[12]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

STEPHENS and BOONSTRA, JJ., concurred with MURPHY, P.J.

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[12] With respect to plaintiff's argument challenging the denial of her motion to amend the complaint, under MCR 2.118, leave to amend a pleading must be freely given when justice so demands, and a motion to amend should ordinarily be granted unless there exists undue delay, bad faith or a dilatory motive, repeated failures to cure deficiencies with prior amendments, undue and actual prejudice, or futility. *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997). In light of our ruling, we need not reach this issue. We do note, however, that had the original complaint failed, the proposed amended complaint would likely have been futile because it essentially mimicked the original complaint, but contained even *fewer* allegations or claims of negligence.

PEOPLE v LOPEZ

Docket No. 327208. Submitted July 12, 2016, at Lansing. Decided August 18, 2016, at 9:00 a.m. Leave to appeal sought.

Devaun L. Lopez was convicted in the Saginaw Circuit Court of first-degree premeditated murder, conspiracy, and several weapons-related charges after a joint jury trial of Lopez and his codefendant, Jarriel Reed. Lopez's convictions arose from the shooting death of Terry Johnson as Johnson stood on a sidewalk in Saginaw. The primary witness against Lopez was Dennis Hoskins, who testified at Lopez's preliminary examination that Lopez had admitted to shooting Johnson and that Lopez and Reed had openly discussed some details of the shooting, including the type of gun used to kill Johnson. One week before trial, the prosecutor moved to declare Hoskins unavailable as a witness because the prosecutor had received a call from Hoskins's attorney indicating that Hoskins was no longer willing to testify. On the day before trial, the court heard the prosecutor's motion. At the hearing, Hoskins said he wished to testify at trial. On the day of trial, the prosecutor told the court that he had become aware that as Hoskins left the courtroom after the previous day's hearing, he commented to Lopez and Reed that he had them "covered." The prosecutor stated that his interpretation of the comment was that Hoskins may have been implying that he would perjure himself at trial or that his testimony at trial would be inconsistent with his testimony at Lopez's preliminary examination. Reed's attorney informed the court that the prosecutor had threatened Hoskins with perjury charges and life imprisonment if Hoskins's trial testimony was inconsistent with his preliminary-examination testimony. Lopez's counsel confirmed the interaction between the prosecutor and Hoskins, adding that the prosecutor's approach was threatening and aggressive. On the third day of trial, Hoskins's counsel informed the court that Hoskins intended to invoke his Fifth Amendment right against self-incrimination if called to testify. Hoskins told the court that he had been threatened with life in prison if convicted of perjury and had decided to not testify. The prosecutor renewed his motion to have Hoskins declared unavailable. Because Hoskins was unavailable to testify, the court allowed the use of his testimony

from Lopez's preliminary examination to be played at trial. Reed's counsel moved to strike Hoskins's testimony because MRE 804(a) expressly says that a witness is not unavailable when that witness's refusal to testify has been procured by the proponent of a statement in order to prevent the witness from testifying. According to Reed's counsel, the hearsay exception in MRE 804(b)(1) did not apply when the witness was not unavailable and when the witness refused to testify because of the proponent's procurement or wrongdoing. The court, Darnell Jackson, J., agreed that Hoskins had been threatened and refused to testify because of the threat of life imprisonment, but the court did not strike Hoskins's testimony from the record. Lopez was ultimately convicted of first-degree premeditated murder, conspiracy, and several weapons-related charges. Lopez appealed.

The Court of Appeals *held*:

Under MRE 804, a witness is not unavailable and the witness's former testimony made under oath and subject to cross-examination is not admissible as an exception to the rule against hearsay when the proponent of the statement has procured the witness's refusal to testify. In this case, Hoskins invoked his Fifth Amendment privilege against self-incrimination because the prosecutor threatened him with a perjury charge and the prosecutor said that conviction of perjury would result in life imprisonment if Hoskins was convicted. MRE 804(a)(1) defines a person who invokes a privilege to avoid testifying as an unavailable witness. MRE 804(b)(1) excepts from the rule against hearsay a previous statement given by a now unavailable witness when the previous statement was given under oath and was subject to cross-examination by the opponent of the statement. However, under MRE 804(a), a witness is not unavailable, and the exception does not apply, when the witness refuses to testify due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying. In this case, the prosecutor procured Hoskins's refusal to testify by threatening him with perjury charges and a sentence of life imprisonment if convicted because the prosecutor suspected that Hoskins's trial testimony would be inconsistent with his testimony at Lopez's preliminary examination. The prosecutor was a proponent of Hoskins's prior statement because it supported Lopez's culpability. The threat of life imprisonment prompted Hoskins to refuse to testify, and the prosecutor could not be permitted to benefit from his wrongdoing.

Vacated and remanded.

EVIDENCE — UNAVAILABLE WITNESSES — ADMISSION OF FORMER TESTIMONY — PROHIBITED WHEN PROPONENT OF THE FORMER TESTIMONY PROCURED THE WITNESS'S UNAVAILABILITY.

Under MRE 804(b)(1), the admission of an unavailable witness's former testimony, made under oath and subject to cross-examination, is an exception to the rule against hearsay; under MRE 804(a)(1), a witness is unavailable when the witness decides to not testify and instead invokes his or her Fifth Amendment right against self-incrimination; a witness is not unavailable when the witness's refusal to testify is a result of the procurement or wrongdoing of the proponent of the former testimony; threatening perjury charges and a sentence of life imprisonment on conviction of perjury resulting in the witness's decision to invoke his or her Fifth Amendment right against self-incrimination disallows application of MRE 804(b)(1) because the threat likely procured the witness's refusal to testify; this rule applies equally to defense witnesses and prosecution witnesses.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Nathan J. Collison*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for Devaun L. Lopez.

Before: STEPHENS, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM. The Due Process Clause of the Fourteenth Amendment affords an accused a constitutional right to present witnesses in his own defense. Substantial government interference with a defense witness's choice to testify violates this right.

Here, the interference involved a *prosecution* witness, Dennis Hoskins. Minutes after Hoskins agreed to testify at defendant Devaun Lopez's trial, the prosecutor threatened Hoskins that deviation from his preliminary-examination testimony would result in prosecution for perjury and life imprisonment on conviction. Hoskins subsequently invoked his Fifth

Amendment privilege, and his preliminary-examination testimony was presented to the jury. The trial court acknowledged that Hoskins refused to testify because he felt "threatened" by the prosecutor. Lopez contends that because the prosecutor's conduct procured Hoskins's unavailability, the prosecutor was precluded from relying on an exception to the hearsay rule, MRE 804(b)(1), to support the introduction of Hoskins's former testimony.

Our Supreme Court has forcefully condemned prosecutorial intimidation of witnesses, *People v Pena*, 383 Mich 402; 175 NW2d 767 (1970), and so has this Court, *People v McIntosh*, 142 Mich App 314; 370 NW2d 337 (1985). No principled basis exists for distinguishing between the intimidation of defense witnesses and the silencing of prosecution witnesses. Because the prosecutor's threat procured Hoskins's unavailability, the trial court erred by admitting Hoskins's recorded testimony. We vacate and remand for a new trial.

I

Lopez and his codefendant, Jarriel Reed, stood trial for the shooting death of Terry Johnson. Johnson was gunned down as he stood on a Saginaw sidewalk. He had just finished a trip to a nearby market. He was accompanied on the walk by his mother, Diane Austin, and a friend.

Austin immediately deduced that Johnson's ex-girlfriend, Dominique Williams, had fired the fatal shots, as Johnson and Williams had engaged in "[a] real raging argument" earlier that day. Following the argument, Williams had threatened to kill Johnson and brandished a knife to validate her intentions. The police cleared Williams after interviewing her and conducting a comprehensive investigation. The inves-

tigation unearthed several pieces of evidence tying Lopez and Reed to the shooting.

The investigating officers found fresh, spent .380-caliber shell casings approximately one block from the scene. One officer recognized the casings as identical in caliber, color, and brand to those found near a drive-by shooting committed eight days earlier. The police suspected that Hoskins had been the shooter in that case, accompanied by Reed and Lopez. Information obtained from a resident in the neighborhood of Johnson's shooting sharpened the focus on Lopez. The witness reported seeing a man run down the sidewalk after the gunfire. During a photo show-up, she picked out Lopez as appearing "most like the runner," but she could not make a definitive identification. Adding to the data pointing to Reed's involvement, a friend of his told the police that Reed had admitted to killing Johnson, confessing, "I did it, I did it, I got the wrong one."

Dennis Hoskins supplied the core evidence tying Lopez to Johnson's murder. During his preliminary examination, Hoskins conceded that he faced a charge of assault with intent to commit murder arising from the drive-by shooting, and that Lopez had testified against him during the preliminary examination in that case. Several months after Johnson's shooting, Hoskins agreed to provide information to the police and prosecutor incriminating Reed and Lopez. He testified that both had admitted to participating in Johnson's murder, with Lopez acting as the trigger-man. According to Hoskins, Reed initially believed that Johnson was a man called "Zeke" who had shot and wounded Reed's brother some years earlier. Hoskins claimed that Reed and Lopez had openly discussed various details of Johnson's killing, including that the gun involved was a .380 caliber.

One week before the joint trial of Reed and Lopez was scheduled to begin, the prosecutor filed a motion to declare Hoskins "unavailable" as a witness and to admit his preliminary-examination testimony pursuant to MRE 804(b)(1). The motion was based on a voicemail the prosecutor received from Hoskins's attorney, Robert Dunn, advising that Hoskins was no longer willing to testify.

The Court considered the prosecutor's motion on the day before trial. Hoskins asserted at this hearing, "I wish to testify at trial." A court officer then guided Hoskins from the courtroom.

The following morning, before jury selection, the prosecutor referenced an issue that had been discussed in chambers and off the record. He advised the court, "[I]t was brought to my attention, that as Mr. Hoskins was leaving the courtroom and after we had the hearing on the motion to declare him unavailable, that he made comments to Mr. Lopez and Mr. Reed to the effect that, 'I've got you covered, bro.' " The prosecutor explained that he had interpreted this statement to mean that Hoskins "may intend to perjure himself during this trial, or give testimony that's inconsistent with his testimony at the preliminary examination." Citing an unpublished opinion issued by this Court in 1997, the prosecutor requested that the court summon Hoskins and advise him, outside the presence of the jury, "of his Fifth Amendment right if he does intend to give perjured testimony, to make sure he is aware of his rights, and then determine what if anything he decides to do at that point."[1]

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[1] The case referred to was *People v Daniels*, unpublished opinion per curiam of the Court of Appeals, issued July 11, 1997 (Docket No. 184692).

The prosecutor then brought to the trial court's attention that Reed's counsel, Edwin Johnson III, had accused the prosecutor of "threatening or intimidating Mr. Hoskins during our colloquy with him yesterday morning." According to the prosecutor, attorney Johnson had been the first to advise Hoskins that he could face perjury charges. The prosecutor continued, "I did follow that up with I'm not going to threaten you, but we will -- we could possibly charge you with perjury if you do say something that's inconsistent with what you testified to at the preliminary examination." The prosecutor urged that this Court's unpublished 1997 case supported that "if I did in fact, I suppose, quote-unquote, threaten him, . . . the court says that's not a threat. That's just the reality. If you do provide perjured testimony, you could in fact be charged with perjury."

Attorney Johnson took issue with the prosecutor's reprise of the interaction. "It's not just that the prosecutor, in my view, threatened the witness," Johnson urged, "but he also stated to the witness that if he were convicted, he would be facing life in prison, which is a misstatement of the law."

Lopez's attorney interjected that he witnessed the interaction with Hoskins. He described that the prosecutor

> did in fact tell the witness that he would be looking at life. And the manner in which [the prosecutor] spoke was not as he spoke here; it was more of a threatening, kind of an aggressive statement to this young man. It wasn't just, well, these are your rights, young man. You know, just the tone of his voice, it sounded like a threat to me.

One of the investigating officers was also in the room during the discussion with Hoskins. She reported, "I didn't hear any threats or anything. [The attorneys]

spoke to Mr. Hoskins just as they spoke to you . . . . I didn't hear any threatening from either one of them."

The court noted that Hoskins consulted with his own attorney before agreeing to testify. As neither Hoskins nor his counsel was present, the court indicated it would revisit the issue outside the presence of the jury when Hoskins took the stand.

Hoskins and his counsel, Dunn, were present on the third day of the trial. Attorney Dunn indicated that he and Hoskins had discussed the issue further. The following colloquy ensued:

> *Mr. Dunn*: I believe at this point, after considering the matter again, he wishes to exercise his Constitutional right under the Fifth Amendment of the United States Constitution and refuse to answer questions which could subject him, possibly, to a charge of perjury if he were to answer them.
>
> *The Court*: Mr. Hoskins, did you hear and understand what [your attorney] has stated to the Court?
>
> [*Hoskins*]: Yes. The prosecutor's told me -- they threatened me with life in prison.
>
> *The Court*: Okay. With regard to your right to testify or not testify, do you wish to exercise your Fifth Amendment privilege and not testify at this time?
>
> [*Hoskins*]: Yes, sir.

After Hoskins was escorted from the courtroom, the prosecutor renewed his motion to declare Hoskins unavailable and to admit his preliminary-examination testimony pursuant to MRE 804(b)(1). Reed's counsel asked that "the record . . . reflect" that Hoskins had elected against testifying because he had been threatened with life imprisonment if his testimony differed from that given at the preliminary exam. Counsel requested that the jury be instructed that it was the prosecutor's duty to produce this witness who was

rendered unavailable by the prosecution itself, and that the jury could "infer that his testimony would have been damaging to their case had he appeared."

Reed's counsel also objected to the admission of the preliminary-examination testimony "because I can't cross-examine a transcript" and "there was evidence produced after the preliminary exam that would impeach his testimony during the preliminary exam." But counsel "reluctantly underst[oo]d that" the exam could be placed into evidence under the circumstances. Lopez's attorney further requested that the jury be advised of Hoskins's recent conviction, and the court agreed.

The court proceeded to play the recording of Hoskins's preliminary-examination testimony into the record. No explanation was given to the jury at that time regarding this procedure.

The following day, the prosecutor called attorney Dunn to the stand. Reed's counsel elicited the following information:

> *Q*. And isn't it true that [Hoskins] came in and put a statement on the record as it relates to whether he was going to testify in this trial or not?
>
> *A*. Just before the start of this trial, that's correct.
>
> *Q*. And isn't it true that, in his statement, he said that he was taking the Fifth Amendment?
>
> *A*. That's right. He was exercising his constitutional right not to testify.
>
> *Q*. And isn't it true that he unsolicited -- in an unsolicited manner added to that that the reason that he was taking the Fifth Amendment is because he felt he had been threatened by the prosecution with life imprisonment?
>
> *A*. Yes. I believe the prosecutor had told him that the penalty for perjury in a murder trial is up to life in prison, which is correct.

Q. Mm-hmm. But the penalty for perjury in a preliminary exam of a murder trial is not life imprisonment; is it?

A. No, it's 15 years. I don't know of anybody that would want to do 15 years in a Michigan prison.

Q. That wasn't the question I asked you. I asked you, isn't it true that wasn't -- that the penalty for telling an untruth in a preliminary exam is not life imprisonment?

A. I believe that's correct.

Q. And isn't it true that his statement was that he wasn't testifying because he felt as though the prosecution threatened him with life imprisonment?

A. No, that was an add-on, as you say, unsolicited statement, was not in response to the question. He did not want to take the chance that possibly he could be charged with perjury and face up to life in prison, so he exercised his Fifth Amendment right.

Q. Sir, is it not the truth that he sat on that stand, and in an unsolicited statement, under oath, stated that the reason he was taking the Fifth was because he felt threatened by the prosecutor, who had threatened him with life imprisonment? Isn't that what he said?

A. That's not exactly what he said.

Lopez's counsel then secured testimony that Hoskins had been charged with three counts of assault with intent to murder, which came with a possible life sentence. Hoskins ultimately pleaded to lesser counts of felonious assault, a four-year felony, Dunn testified.

On redirect, the prosecutor presented Hoskins's plea agreement in which he agreed to testify against Lopez and Reed. The document gave Hoskins advance warning of the consequences of perjury. The prosecutor also elicited that Hoskins did not tell Dunn that the prosecutor had threatened him before taking the stand and invoking his Fifth Amendment privilege.

On the final day of trial, Reed's counsel moved to strike Hoskins's testimony under MRE 804(a), which defines when a witness may be deemed unavailable. Counsel asserted that the prosecutor caused Hoskins's absence through his threats, vitiating the applicability of the MRE 804(b) hearsay exceptions.

The prosecutor denied making any threats and reiterated that Reed's counsel actually broached the subject with Hoskins. The prosecutor emphasized attorney Dunn's testimony regarding Hoskins's motivations. Moreover, the prosecutor argued that defense counsel had ample opportunity to cross-examine Hoskins at the preliminary examination.

The court ultimately ruled:

> Well, this is all very interesting and we've made a clear record of your positions. I'm going to deny the motion itself.
>
> The witness himself indicated he felt threatened; that's why he wasn't testifying. Mr. Dunn could say what he wanted to say, but I'm not going to take his testimony over the witness's testimony himself.

The jury subsequently convicted Lopez of first-degree premeditated murder, conspiracy, and several weapons-related charges. Lopez now appeals, challenging only the admission of Hoskins's preliminary-examination testimony.

II. ANALYSIS

MRE 804(b)(1) excepts from the rule against hearsay a witness's prior testimony given under oath and subject to cross-examination by the opposing party if, as contemplated in MRE 804(a)(1), the witness is unavailable to testify because he or she has invoked a privilege. *People v Meredith*, 459 Mich 62, 65-67; 586

NW2d 538 (1998). The admission of former testimony tested by cross-examination generally comports with the requirements of the Confrontation Clause. See *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). However, MRE 804(a) posits that "[a] declarant is not unavailable as a witness if" his or her refusal to testify "is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." Lopez contends that Hoskins could not be deemed unavailable because the prosecutor procured his absence by threatening him with a charge of perjury and lifetime imprisonment.

Lopez presents two closely interrelated arguments: that the prosecutor behaved wrongly in "threatening" Hoskins with a perjury prosecution, and that the prosecutor "procured" Hoskins's unavailability by virtue of the threats. We examine each in turn.

In *Webb v Texas*, 409 US 95, 95-96; 93 S Ct 351; 34 L Ed 2d 330 (1972), the United States Supreme Court reversed a defendant's conviction based on the conduct of the trial judge, who "on his own initiative, undertook to admonish" the sole defense witness that he would be prosecuted for perjury if he took "the witness stand and lie[d] under oath." (Quotation marks omitted.) The witness was serving a prison sentence at the time. *Id*. at 95. "It will also be held against you in the penitentiary when you're up for parole," the judge declared, "and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath." *Id*. at 96 (quotation marks omitted).

The Supreme Court observed that the judge had not only "gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury," but had also

> implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. [*Id*. at 97.]

This conduct "effectively drove that witness off the stand," the Court held, "and thus deprived the petitioner of due process of law under the Fourteenth Amendment." *Id*. at 98.

Our Supreme Court had confronted a somewhat analogous factual scenario two years before *Webb* was decided, and reached essentially the same conclusion. In *Pena*, 383 Mich 402, the threat of perjury was made by a prosecutor rather than a judge. The prosecutor sent a letter to three defense witnesses, on official stationery, that simply quoted verbatim the statute punishing perjury.[2] Defense counsel moved to dismiss the charges "on the ground that the prosecutor's 'letter' violated the Fourteenth Amendment of the United

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[2] The letters read:

> Dear Madam:
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> In the interests of justice I am quoting Michigan Statutes Annotated 28.644, which provides as follows:
>
> "Any person who, being lawfully required to depose truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison for not more than fifteen (15) years."
>
> Very truly yours,
>
> G. E. Thick
>
> Assistant Prosecuting Attorney [*Id*. at 405 (opinion by T. G. KAVANAGH, J.).]

States Constitution by intentionally intimidating the defense witnesses." *Id*. at 405 (opinion by T. G. KAVANAGH, J.). The trial court denied the motion. Two of the witnesses subsequently testified for the defense, while one called as a prosecution witness claimed to have forgotten her whereabouts at the relevant time. *Id*. at 407 (DETHMERS, J., dissenting).

Three justices of the Supreme Court determined that a new trial was required, pithily observing:

> The Constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. The manner of testifying is often more persuasive than the testimony itself.
>
> A prosecutor may impeach a witness in court but he may not intimidate him—in or out of court. [*Id*. at 406 (opinion by T. G. KAVANAGH, J.).]

Justices ADAMS and BRENNAN concurred, opining that they

> would remand to the trial court for a determination by that court as to whether or not the prosecutor's letter did intimidate the witnesses. If the court finds it did, the court should grant a new trial and the court's efforts to undo the damage upon such retrial should appear of record. If the court finds that no intimidation took place, the court should so find, stating its reasons for the finding, and a new trial should be denied. [*Id*. at 407 (opinion by ADAMS, J.).]

Thus, a plurality of the Court held in *Pena* that the prosecutor's conduct had been wrongfully threatening, but that remand was required to determine whether the threats had actually intimidated the witnesses.

This Court weighed in on the subject in *McIntosh*, 142 Mich App 314. *McIntosh* focused on the prosecution's conduct regarding witness Beverly Alexander, who testified against the defendant at his preliminary

examination regarding charges of armed robbery, assault, and felony murder. *Id*. at 322. Alexander subsequently informed the police "that she had changed her mind and would refuse to testify at trial." *Id*. at 323. Shortly thereafter the prosecutor charged her with conspiracy to commit armed robbery and felony murder. *Id*. At McIntosh's trial, Alexander invoked the Fifth Amendment. *Id*. Over a defense objection, the court declared Alexander unavailable and allowed the use of her preliminary-examination testimony pursuant to MRE 804(a)(2). *Id*. "In so ruling," this Court recounted, "the court placed the burden of proving why Alexander was unavailable on defendant and refused to let the defense ask Alexander why she was pleading the Fifth Amendment because the question was 'irrelevant.' " *Id*.

This Court framed the appellate question presented as follows: "May a prosecutor, as the proponent of prior recorded testimony, induce the declarant to invoke her privilege against self-incrimination and still satisfy the 'unavailability' requirements of both the Confrontation Clause and MRE 804?" *Id*. at 324. We began our analysis by reciting the pertinent language of MRE 804(a): " '[A] declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.' " *McIntosh*, 142 Mich App at 324. Given this language, we concluded that "if the prosecution brought about Alexander's failure to testify by prosecuting her with the intent of preventing her testimony, Alexander was not 'unavailable' and the trial court erred in admitting her preliminary examination testimony." *Id*.

The *McIntosh* Court then turned to caselaw centering on alleged violations of the Confrontation Clause stemming from prosecutorial conduct *unintentionally* resulting in a witness's unavailability. *Id*. at 324-326. In several of those cases, courts required the prosecutor to demonstrate that the witness's unavailability "[was] not chargeable to them." *Id*. at 326 (citation omitted). This Court concluded that when the prosecution offers prior recorded testimony based on a witness's unavailability, "the burden is on the prosecution to establish that the witness . . . is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id*. at 327. As to witness Alexander, the Court held that because the trial court had "improperly placed the burden of proving why Alexander was unavailable on defendant and precluded inquiry into why Alexander was pleading the Fifth Amendment, we are unable to determine whether or not the prosecution was intentionally or negligently responsible for Alexander's becoming unavailable." *Id*. The Court remanded the case to the trial court for an evidentiary hearing at which the prosecution would bear the burden of showing "that it was not intentionally or negligently responsible for Alexander's refusal to testify." *Id*. at 328.

In both *Pena* and *McIntosh*, the Supreme Court and the Court of Appeals, respectively, ordered remands for the collection of evidence regarding the cause of each unavailable witness's refusal to appear. In the case before us, remand for an evidentiary hearing is unnecessary, as the trial court has already made the requisite finding. Based on Hoskins's and the lawyers' recapitulations of what occurred after Hoskins indicated his willingness to testify, the trial court determined that Hoskins invoked the Fifth Amendment

because "he felt threatened; that's why he wasn't testifying." And because the prosecutor's threats procured Hoskins's unavailability, we hold that a new trial is required.

We begin by addressing the prosecution's argument that Hoskins was merely "advised" of the possibility of prosecution for perjury and not "threatened" with such a charge. The record refutes this characterization. Despite that Hoskins was represented by counsel, the prosecutor not only invoked the specter of prosecution for perjury, he informed Hoskins that he risked incarceration "for life" if convicted. The prosecutor's statements exceeded mere advisement and crossed into the realm of threat and intimidation.

While a prosecutor may inform a witness that false testimony may result in a perjury charge, the circumstances surrounding the prosecutor's intervention following Hoskins's declaration demonstrate that the prosecutor went well beyond merely "advising." Hoskins had not yet *offered* any testimony, and whether he planned to recant his preliminary-examination statements or testify falsely was unknown. Moreover, this Court has emphasized that when a prosecutor suspects that a witness may perjure himself,

> it is a better practice for the prosecutor to inform the court, in the appropriate case, out of the presence of the witness, of the possible need for a witness to be informed of his or her rights under the Fifth Amendment. The prosecutor should further state the basis for such a request and the trial judge shall exercise his discretion in determining whether such warnings should issue. If the trial judge determines that such warnings are appropriate under the facts presented then the court shall inform the witness of his rights under the Fifth Amendment on the record out of the presence of the jury, if that be the case. [*People v Callington*, 123 Mich App 301, 307; 333 NW2d 260 (1983).]

Because Hoskins was represented by counsel, the prosecutor was under no obligation to warn Hoskins of a risk of committing perjury. Nor did the situation merit a warning, particularly as to the potential of life imprisonment, given that the prosecutor had only a hunch that Hoskins would deviate from his preliminary-examination statements. Regardless of the prosecutor's "tone of voice," we find it difficult to justify the prosecutor's "warning" given *Pena*'s condemnation of a letter written in the most sterile of terms relaying precisely the same information. In *Pena*, as in this case, the information was conveyed to coerce or intimidate rather than merely to "inform." In *Pena*, an evidentiary hearing was required because the record did not reveal whether the witnesses were actually intimidated. Here, the trial court explicitly found that Hoskins refused to testify because he felt "threatened," obviating the need for additional fact-finding.

We draw additional support for our conclusion from the New Jersey Supreme Court's opinion in *State v Feaster*, 184 NJ 235; 877 A2d 229 (2005). In *Feaster*, a "key" prosecution witness scheduled to testify at the defendant's postconviction relief hearing recanted his trial testimony in an affidavit provided to the defendant's attorney. *Id*. at 240. Before the witness could testify, the prosecutor advised the witness's attorney "that there would be 'considerations' if he testified consistent with his recantation statement." *Id*. At the hearing, the witness withdrew his affidavit and invoked his Fifth Amendment privilege. *Id*. The New Jersey Supreme Court held that the prosecution had "substantially interfered" with the witness's decision to testify, violating the defendant's state constitutional rights. *Id*.

Feaster is instructive for several reasons. First, the prosecutor in that case, as here, insisted that his warning of "considerations" did not amount to a "threat" and was not "inappropriate." *Id*. at 246-247. The New Jersey Supreme Court forcefully rejected the notion that the prosecutor's behavior was appropriate:

> The State has no affirmative duty to tell a witness, subpoenaed by the defense, that he could be prosecuted if his testimony is different from his previously sworn testimony and inconsistent with the State's theory of the case. We do not find that such warnings by the State are a pre-condition to a perjury or false swearing prosecution. In other words, a witness does not have to be told that if he testifies falsely he will be subject to prosecution.
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> * * *
>
> . . . Whether the threat of a perjury prosecution is delivered conversationally, in transparently coded language, or loudly, in pointedly brash language, the effect is likely to be the same on the witness, even if the conduit is his attorney. The message to [the witness] was clear enough. We accept for the purpose of this discussion that the . . . prosecutor acted in good faith. Even crediting the . . . prosecutor with the best possible motives, defendant nonetheless was deprived of his most essential witness at the . . . hearing.
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> . . . [I]t is not the function of the State to save a defense witness from himself or to spare the court a supposed falsehood, at the expense of denying the court critical testimony. To the extent possible, the . . . court was entitled to the testimony of every witness. The State may think that it alone knows the truth, but it is for the court to decide the truth, after both sides have presented their cases. If falsehood is to be exposed, the State has a fair opportunity to do so on cross-examination. [*Id*. at 258-260.]

We find this reasoning compelling.

Second, the *Feaster* court emphasized that the prosecutor's "good faith" in expressing the warning did not determine whether the words were coercive. Even if the motivations of the prosecutor were pure, the court reasoned, such a warning "does not advance the truth-seeking function of a trial[.]" *Id*. at 261. "We have confidence that our courts and juries are capable of detecting falsehoods with the aid of the adversarial process. The State can prosecute those who commit perjury or false swearing; the State simply cannot threaten a defense witness to keep him off the stand." *Id*.

We highlight that in the case before us, the prosecutor lacked any reasonable basis to suspect that Hoskins would lie on the witness stand. The prosecutor himself did not hear Hoskins state "I've got you covered, bro"; rather, the prosecutor quoted some unknown person who allegedly heard the statement ("[I]t was brought to my attention, that as Mr. Hoskins was leaving the courtroom . . . that he made comments to Mr. Lopez and Mr. Reed to the effect that, 'I've got you covered, bro.' "). This hearsay simply does not provide a sufficient basis for suspecting that perjury was in the offing, or for issuing a perjury warning.

MRE 804(a) provides that a witness is not "unavailable" if the party's absence "is due to the procurement or wrongdoing of the proponent" of the testimony. We construe a rule of evidence in the same manner as a court rule or statute. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). "In general, 'or' is a disjunctive term, indicating a choice between two alternatives[.]" *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Accordingly, the definition of "unavailability" set forth in MRE 804(a) precludes a court from finding a witness

unavailable if the witness's absence is "due to" either "the procurement" or the "wrongdoing" of the proponent of the testimony. Our decision rests on the trial court's finding that the perjury warning issued by the prosecutor procured Hoskins's unavailability.

Black's Law Dictionary (10th ed), p 1401, defines "procurement" as "[t]he act of getting or obtaining something or of bringing something about." "Rule 804 provides that if the unavailability was caused by the party offering the hearsay statement, the requirement of unavailability will not be regarded as satisfied." 4 Weinstein & Berger, Evidence, ¶ 804(a)[01], p 804-36 (1985).

The trial court recognized that Hoskins refused to testify due to the prosecutor's threat, yet the court failed to connect its finding with the rule's command that "procurement" of a witness's absence nullifies the witness's unavailability. Because the prosecutor improperly silenced Hoskins, the court was required to exclude Hoskins's preliminary-examination testimony in the first instance, or to strike the testimony from the record thereafter. By admitting prior testimony in clear violation of the evidentiary rules designed in part to protect a defendant's right to confront the witnesses against him, the trial court abused its evidentiary discretion and violated Lopez's fundamental right to a fair trial. This error was far from harmless. The prosecutor asserted during his closing argument, "[W]hat this case boils down to is the testimony of Dennis Hoskins." Our review of the record confirms that aside from Hoskins's testimony, the evidence against Lopez was thin at best. The prosecutor correctly concluded in closing that "[I]t's Mr. Hoskins'[s] testimony that signs, seals, and delivers only one conclusion, and that's that the

defendants who are sitting here today are guilty." Therefore, we must vacate Lopez's convictions and sentences.

On retrial, Hoskins may elect to testify. If he maintains his silence, his preliminary-examination testimony may not be presented to the jury.

We vacate Lopez's convictions and sentences and remand for a new trial at the prosecution's discretion. We do not retain jurisdiction.

STEPHENS, P.J., and SERVITTO and GLEICHER, JJ., concurred.

LASTER v HENRY FORD HEALTH SYSTEM

Docket No. 324739. Submitted February 2, 2016, at Detroit. Decided August 23, 2016, at 9:00 a.m.

Jamie Laster brought a medical malpractice action in the Macomb Circuit Court against Henry Ford Health System, Henry Ford Macomb Hospital Corporation, John J. Lim, and Surgical Associates of Macomb, PLC, alleging that Henry Ford Health System and Henry Ford Macomb Hospital Corporation (collectively, the hospital) were liable for Lim's alleged malpractice when operating on and treating plaintiff at the hospital. Plaintiff had on-call privileges at the hospital when Lim operated on Laster but was employed by Surgical Associates. To maintain his on-call privileges at the hospital, Lim was required to respond to calls from the hospital within 30 minutes, treat all patients assigned to him, and remain on the on-call roster for a certain number of years; while the policy allowed Lim to treat patients at the hospital, Lim billed his patients directly for those services. The on-call policy did not address the manner or methodology an on-call physician must follow when diagnosing or treating an assigned patient at the hospital, and it did not grant the hospital the right to supervise Lim or direct his treatment of a patient. Laster and her mother signed a consent-to-surgery form when Laster was admitted to the hospital, acknowledging that Lim was not an employee of the hospital. The hospital moved for summary disposition, arguing that it was not vicariously liable or ostensibly liable for Lim's alleged malpractice because Lim was an independent contractor, not an agent of the hospital. The court, Diane M. Druzinski, J., granted summary disposition in favor of the hospital on Laster's ostensible-agency claim but denied summary disposition of Laster's vicarious-liability claim, reasoning that there was a factual question whether the hospital had sufficient control over Lim's treatment of patients to create an agency relationship through which vicarious liability could be imposed. The hospital appealed by leave granted.

The Court of Appeals *held*:

1. Under Michigan law, a defendant is generally liable for only his or her own acts of negligence. However, under a theory

of respondeat superior, an employer may be liable for the negligent acts of its employee if the employee was acting within the scope of his or her employment. Absent an employer-employee relationship, a principal may be vicariously liable—indirectly responsible by operation of law—for the negligent acts of his or her agent. In an agency relationship, vicarious liability is imposed when the principal has the power to control the agent. A contractee is generally not liable for the actions of an independent contractor because an independent contractor carries on an independent business, contracts to perform work according to his or her own methods, and accomplishes the contracted-for work without the contractee controlling the means by which the result is accomplished. In Michigan, the test for whether a worker is an independent contractor or an employee is whether the worker has control over the method of his or her work. The labels that the parties use in a work relationship are not dispositive; the person or business hired to perform work is an agent of the principal, not an independent contractor for the contractee, if the employer retains control over how the work is performed.

2. A hospital is not vicariously liable for the negligence of a physician who is an independent contractor unless the hospital assumed control over the physician's treatment or diagnosis of patients. The trial court erred by concluding that a material issue of fact existed regarding whether the hospital had sufficient control over Lim's treatment of Laster that an agency relationship existed. Lim was an independent contractor of the hospital. Under the terms of the on-call policy, Lim could see as many or as few patients as he desired, he billed directly the patients he treated at the hospital, he was part of a separate medical practice, he was not paid by the hospital for his services, and, importantly, the hospital did not control the manner or method he used to diagnose or treat his patients. That he was required to maintain privileges at a hospital and undertake certain on-call responsibilities—respond to calls from the hospital within 30 minutes, treat all patients assigned to him, and remain on the on-call roster for a certain number of years—was not sufficient control under Michigan law to create an agency relationship; those requirements did not give the hospital control over Lim's practice of medicine.

3. Laster did not properly present her ostensible-agency claim for appellate review.

Reversed and remanded.

HOSPITALS — MALPRACTICE — PHYSICIANS AND SURGEONS — VICARIOUS LIABILITY — PRINCIPAL AND AGENT.

A hospital is generally not vicariously liable for the negligence of a physician who is an independent contractor unless the hospital assumed control over the physician's method of patient diagnosis or treatment; that a physician is required to maintain privileges at a hospital and undertake on-call responsibilities is not sufficient control over the physician to create an agency relationship for purposes of imposing vicarious liability on the hospital for the physician's negligence.

Morgan & Meyers, PLC (by *Jeffrey T. Meyers* and *Timothy M. Takala*), for Jamie Laster.

Feikens, Stevens, Kennedy & Galbraith, PC (by *Jeffrey Feikens*), for Henry Ford Health System and Henry Ford Macomb Hospital Corporation.

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

SAAD, J.

I. NATURE OF THE CASE

The narrow but consequential legal question posed by this appeal is whether defendants-appellants, Henry Ford Health System and Henry Ford Macomb Hospital Corporation (collectively, Henry Ford, the hospital, or defendants), are liable for defendant Dr. John J. Lim's alleged malpractice in his treatment of plaintiff, Jamie Laster, at the hospital.[1]

Normally, under Michigan law a defendant is not vicariously liable for the tortious conduct of another unless that other person is an employee or agent of the defendant.

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[1] Dr. Lim, defendant Surgical Associates of Macomb, PLC, and intervening plaintiff Department of Community Health are not involved in this appeal.

Here, Dr. Lim is not on the payroll of the hospital and instead is employed by Surgical Associates of Macomb, PLC. Dr. Lim has on-call privileges at Henry Ford and William Beaumont Hospital, which allows him the opportunity to treat patients at both hospitals' facilities. Consistent with this arrangement, the hospital is not paid by the patient for Dr. Lim's services, nor is Dr. Lim paid by the hospital. Instead, Dr. Lim bills the patient directly, and the patient pays Dr. Lim for his services. Indeed, plaintiff and her mother acknowledged Dr. Lim's employment status when they signed a "consent to surgery" form that expressly stated that Dr. Lim was not an employee of Henry Ford.

In light of these facts, plaintiff acknowledges that Dr. Lim is an independent contractor, but nonetheless argues that under Michigan's control test, the hospital should be vicariously liable for Dr. Lim's medical malpractice in evaluating and treating plaintiff because Henry Ford's extensive on-call requirements constitute sufficient control over Dr. Lim to impose vicarious liability. And while the hospital concedes that its on-call protocols are extensive and comprehensive, it asserts that vicarious liability should not be imposed under Michigan's control test because it exerted no control over the precise matter at issue here—Dr. Lim's diagnosis and treatment of plaintiff. That is, the hospital points out that the extensive nature of the on-call policy deals primarily with qualifications of physicians, availability, and coverage, but does not in any way control the manner or methodology of diagnosis and treatment by the on-call physician of his patient, which is the only issue at bar.

Because plaintiff and her mother signed an agreement that expressly acknowledges that Dr. Lim is not

an employee of the hospital and because plaintiff failed to produce any evidence that the hospital made any representations to the contrary, the trial court ruled that plaintiff failed to prove ostensible agency and dismissed that count of plaintiff's complaint. But the trial court ruled that Henry Ford's comprehensive on-call policy created a question of fact as to whether, under Michigan's control test, the hospital exerted sufficient control over Dr. Lim to make Dr. Lim the hospital's actual agent for the purpose of imposing vicarious liability; the hospital appeals this ruling. While defendants appealed the trial court's denial of their motion on the issue of actual agency, plaintiff failed to appeal the grant of the motion on the issue of ostensible agency.

Because plaintiff failed to appeal the ostensible-agency dismissal, that issue is not before us, and we decline to address it. For the reasons stated below, we reverse the trial court's ruling that denied the hospital's motion for summary disposition on the issue of vicarious liability based on the control test and remand for entry of judgment in favor of Henry Ford.

II. FACTS AND PROCEDURAL HISTORY

Dr. Lim testified that he is a board-certified surgeon employed by Surgical Associates of Macomb, who has privileges at Henry Ford and Beaumont Hospital. At his deposition, Dr. Lim established that he and not the hospital bills for his services and that he is not employed by, nor does he receive any compensation from, the hospital. Dr. Lim also testified that he would bill plaintiff for his services and that plaintiff would pay him, not the hospital.

Henry Ford permitted Dr. Lim to treat plaintiff at its hospital pursuant to its "Unattended Call" policy (on-

call policy). This policy applies to a range of medical providers, not simply to Dr. Lim or his medical group. To be entitled to on-call privileges, a physician must meet certain obligations while on-call, such as responding to a call within 30 minutes, treating all patients assigned to him and remaining on the on-call roster for a certain number of years. Importantly, the requirements of the on-call policy do not address the manner or methodology of an on call doctor's diagnosis or treatment of patients. Nor does the on-call policy give Henry Ford the right to supervise or have any input regarding the physician's treatment of patients.

At 11:40 p.m. on September 3, 2010, plaintiff arrived at the emergency room of Henry Ford and complained of sharp pain in the right-lower quadrant of her abdomen, nausea, vomiting, and a history of Crohn's disease. The emergency room physician and radiologist who reviewed a CT scan of plaintiff's abdomen believed she was suffering from appendicitis. Dr. Lim, who was on call at the time, was called to perform the appendectomy. Before the surgery took place, plaintiff and her mother, who served as a witness, signed a "consent to surgery" form, which stated in pertinent part that "I know my physician, like most physicians, is not a hospital employee."

At around 1:00 a.m. the following morning, plaintiff was taken to an operating room in the hospital, and Dr. Lim performed a laparoscopic appendectomy, which was converted to an open appendectomy with resection of omentum and drainage of abscess. Afterward, plaintiff started suffering complications, which included elevated heart rate, sharp pains, and the presence of a dark brown, foul-smelling liquid from a Jackson-Pratt drain. Five days later, Dr. Lim performed an exploratory laparotomy and ileocecal resection. And five days

after that surgery, Dr. Lim performed another surgery, this time a laparotomy with evacuation of abdominal abscess and end ileostomy. During this surgery, Dr. Lim determined that plaintiff was suffering from a bowel perforation secondary to her Crohn's disease, so he performed an ileocecectomy.

In her complaint, plaintiff alleged that Dr. Lim was negligent in evaluating plaintiff's condition and in performing surgery because he failed to diagnose and treat the perforation of her bowel. Furthermore, plaintiff contended that Henry Ford is vicariously liable for Dr. Lim's negligence because Dr. Lim is an actual agent or an ostensible agent of Henry Ford.

After the close of discovery, Henry Ford moved for summary disposition on the grounds that (1) the hospital did not have sufficient control over Dr. Lim to make Dr. Lim its agent for purposes of vicarious liability and (2) plaintiff's ostensible-agency theory failed because Henry Ford said and did nothing to represent that Dr. Lim was its employee and because plaintiff signed an acknowledgement that Dr. Lim was not Henry Ford's employee. Henry Ford maintained that Dr. Lim is an independent contractor and not its actual agent because it did not have control over him or his methods of diagnosis or treatment of patients, which allowed Dr. Lim to treat patients based on his own professional judgment. And on the basis of the acknowledgement signed by plaintiff, Henry Ford maintained that plaintiff could not establish ostensible liability because plaintiff failed to produce any evidence that Henry Ford said or did anything contrary to the acknowledgement. Plaintiff filed a response and argued that the on-call policy provisions established that the hospital had actual control over Dr. Lim and asserted that an ostensible-agency relationship arose because the acts,

facts, and circumstances led plaintiff to believe that Dr. Lim was an employee of the hospital.

The trial court granted Henry Ford's motion for summary disposition in part and denied it in part. The court granted the motion regarding plaintiff's claim under the ostensible-agency theory.[2] But the court relied on the on-call policy to deny the hospital's motion for summary disposition with respect to the issue of actual agency.[3]

This Court granted Henry Ford's application for leave to appeal "limited to the issues raised in the application and supporting brief." *Laster v Henry Ford Health Sys*, unpublished order of the Court of Appeals, entered December 26, 2014 (Docket No. 324739). Plaintiff did not file a cross-appeal regarding the trial court's grant of summary disposition on the other issues, including the issue of ostensible agency.

III. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Barnard Mfg*

[2] The trial court rejected plaintiff's alternative theory under MCL 333.21513(a), which provides that entities like defendants "[a]re responsible for all phases of the operation of the hospital . . . and quality of care rendered in the hospital." The trial court relied on *Fisher v W A Foote Mem Hosp*, 261 Mich App 727, 730; 683 NW2d 248 (2004), and noted that the statute does not create a cause of action for private plaintiffs.

[3] Each aspect of the motion was addressed separately under different subheadings in Part IV of the trial court's opinion and order. In Part IV(A), the court granted defendants' motion for summary disposition with respect to plaintiff's claims of direct negligence. In Part IV(B), the court granted defendants' motion with respect to plaintiff's claim that defendants were liable because of a nondelegable duty under MCL 333.21513(a). In Part IV(C), the court denied defendant's request for summary disposition with respect to plaintiff's claim that Dr. Lim was an actual agent of defendants. And in Part IV(D), the court granted summary disposition to defendants on the issue of ostensible agency.

Co, Inc v Gates Performance Engineering, Inc, 285 Mich App 362, 369; 775 NW2d 618 (2009). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion to determine whether a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The motion is properly granted "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).

IV. LEGAL PRINCIPLES

Generally, Michigan law will impose liability upon a defendant only for his or her own acts of negligence, not the tortious conduct of others. However, an exception exists under the theory of respondeat superior, wherein an employer may be liable for the negligent acts of its employee if the employee was acting within the scope of his employment. *Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011); *Hekman Biscuit Co v Commercial Credit Co*, 291 Mich 156, 160; 289 NW 113 (1939).[4]

[4] As our Supreme Court stated nearly 150 years ago, "[T]he master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and that he is constructively present at them all." *Smith v Webster*, 23 Mich 298, 299-300 (1871). Although one of the reasons for imposing vicarious liability in this context is because employers typically have a greater ability to pay than an employee, other rationales exist, which include "providing an incentive for employers to attempt to reduce tortious conduct by their employees and the fair distribution of risk associated with activity characteristic of a business or other entity."

Similarly, in the absence of an employer-employee relationship, vicarious liability may also attach through the concept of agency. As this Court has explained:

> A principal may be vicariously liable to a third party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort. Vicarious liability is indirect responsibility imposed by operation of law. Courts impose indirect responsibility on the principal for his or her agent's torts as a matter of public policy, but the principal, having committed no tortious act, is not a "tortfeasor" as that term is commonly defined. Because liability is imputed by law, a plaintiff does not have to prove that the principal acted negligently. Rather, to succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently. Concomitantly, if the agent has not breached a duty owed to the third party, the principal cannot be held vicariously liable for the agent's actions or omissions. [*Bailey v Schaaf (On Remand)*, 304 Mich App 324, 347; 852 NW2d 180 (2014) (quotation marks and citations omitted), vacated in part on other grounds 497 Mich 927 (2014).]

In an agency relationship, it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability. See *Breighner v Mich High Sch Athletic Ass'n, Inc*, 255 Mich App 567, 583; 662 NW2d 413 (2003); *Little v Howard Johnson Co*, 183 Mich App 675, 680; 455 NW2d 390 (1990). Conversely, it is this absence of control that explains why an employer is generally not liable for the actions of an independent contractor. See *Campbell v Kovich*, 273 Mich App 227, 233-234; 731 NW2d 112 (2006). "An independent contractor is one who, carrying on an independent business, contracts to do a piece of work

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Rogers v J B Hunt Transp, Inc, 466 Mich 645, 651-652; 649 NW2d 23 (2002); see also Prosser & Keeton, Torts (5th ed), § 69, pp 500-501.

according to his own methods, and without being subject to control of his employer *as to the means by which the result is to be accomplished*, but only as to the result of the work." *Utley v Taylor & Gaskin, Inc*, 305 Mich 561, 570; 9 NW2d 842 (1943) (quotation marks and citation omitted; emphasis added). The labels that the parties use in such a relationship are not dispositive. Instead,

> [t]he test for whether a worker is an independent contractor or an employee is whether the worker has control *over the method of his or her work*: If the employer of a person or business ostensibly labeled an "independent contractor" retains control *over the method of the work*, there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant. [*Campbell*, 273 Mich App at 234 (quotation marks and citations omitted; emphasis added).]

For this reason, it is clear that not just any type of control will suffice to transform an independent contractor into an employee or agent; rather, the control must relate to the method of the work being done.

With these legal principles in mind, we agree with Henry Ford's contention that it was entitled to judgment as a matter of law because the hospital exerted insufficient control over the acts of Dr. Lim to be held vicariously liable.

V. ANALYSIS

A. CONTROL TEST

Consistent with this caselaw, a hospital will not be held vicariously liable for the negligence of a physician who is an independent contractor, unless the hospital has assumed control over the physician. *Grewe v*

Mount Clemens Gen Hosp, 404 Mich 240, 250; 273 NW2d 429 (1978). Here, the parties do not dispute that Dr. Lim is an independent contractor. Dr. Lim was employed by Surgical Associates of Macomb—not Henry Ford. But plaintiff claims that under the on-call policy, the hospital possessed a sufficient amount of control over Dr. Lim to make him an agent under Michigan's control test. Our review of the record suggests that Dr. Lim is clearly an independent contractor because Henry Ford did not control the manner or method used by on-call doctors, like Dr. Lim, to diagnose or treat their patients.

Henry Ford had very little control over Dr. Lim, and no "control over the method of his . . . work." *Campbell*, 273 Mich App at 234. His on-call responsibilities notwithstanding, Dr. Lim was generally free to see as many or as few patients as he desired, he could generally select his own patients, he did not and was not required to use the administrative machinery of the hospital to bill patients, and he was part of an entirely separate practice with its own staff and employees. Also, the hospital never paid Dr. Lim for his services, and he was free to obtain privileges at other hospitals. The mere fact that a physician is required to maintain privileges at a hospital and undertake on-call responsibilities is not sufficient under Michigan law to constitute control over the physician's professional practice of medicine.

The trial court relied on select provisions of the on-call agreement when it found that a question of fact existed regarding whether Dr. Lim was an actual agent of Henry Ford. The court explained:

> The on-call agreement establishes that the on-call physician's schedule is determined by Defendants, that it must be followed, and scheduling changes are controlled and

> limited by Defendants. The on-call agreement sets forth time standards on responding to a request for an on-call physician, and requires minimum admission levels. The on-call agreement also limits consultations to other on-call physicians, thereby directing the path of a contractual relationship between the patient and physicians selected by Defendants. The on-call agreement further requires acceptance of all patients assigned, and requires at least one office visit after discharge.

We disagree that these aspects of the on-call agreement create a question of fact regarding whether Dr. Lim was an agent of defendants. Notably, none of the above requirements addresses, much less controls, how Dr. Lim is to diagnose patients or how he is to perform surgery while at Henry Ford. The fact that defendants may have required some logistical and quality-assurance measures does not rise to the level of "control over the method of [Dr. Lim's] work," *id*., especially when the work that is alleged to have been negligently performed is not addressed by the on-call agreement. As we explained in *Samodai v Chrysler Corp*, 178 Mich App 252, 256; 443 NW2d 391 (1989), which involved the plaintiff's claim that the employer retained substantial control over the construction work performed by its independent contractor:

> [C]ontractual provisions subjecting the contractor to the contractee's oversight are not enough to retain effective control. The requisite nature of this standard requires that the owner retain at least partial control and direction of *actual* construction work, which is not equivalent to safety inspections and general oversight. [Citation omitted.]

Similar to the defendant in *Samodai*, Henry Ford did not retain any, much less sufficient, control and direction of Dr. Lim's actual work, i.e., his practice of medi-

cine.[5] It is key to our holding that the on-call policy relied on by plaintiff and the trial court does not give Henry Ford the right to address or control how any on-call physician, including Dr. Lim, diagnoses or treats a patient. Importantly, there is no record evidence that Henry Ford directed, supervised, or otherwise had any input on how Dr. Lim made his diagnosis or conducted surgery. Accordingly, because plaintiff's medical malpractice claim is predicated on Dr. Lim's exercise of professional judgment—over which the hospital had no control or influence—we hold that under Michigan's control test, Dr. Lim was not an agent of Henry Ford.

Therefore, the trial court erred when it relied on the on-call policy to find that there was a question of fact regarding whether Dr. Lim was an actual agent of Henry Ford under Michigan's control test and erred when it denied defendant's motion for summary disposition on this issue.

B. OSTENSIBLE AGENCY

In its October 30, 2014, opinion, the trial court found that plaintiff failed to produce sufficient evidence to create a question of fact to support her ostensible-

[5] In our view, the closest defendants come to exerting any amount of control over how Dr. Lim engages in the practice of medicine is found in § 2, ¶ X of the on-call agreement. This section provides that Dr. Lim is "to utilize solely the designated primary care physicians or designated specialists on the Unattended Call lists for all consultative or admitting care provided to the unattended patient, for at least the first 3 days after admission." However, it is clear that to the extent that defendants were exerting control over *this* aspect of Dr. Lim's ability to practice medicine (i.e., requiring him to utilize certain physicians or specialists during a patient's first three days after being admitted to the hospital), no control was exerted over how Dr. Lim performed the alleged negligent acts of misdiagnosis, surgery, etc., in this case. Accordingly, imposing vicarious liability on defendants *when they had no ability to control the alleged negligent acts* would run counter to the supporting rationale behind the imposition of vicarious liability.

agency theory of liability. As noted above, plaintiff's written acknowledgement (and her mother's written acknowledgement, as a witness) that Dr. Lim was an independent contractor and not an employee of Henry Ford, coupled with a failure to produce evidence that the hospital made any representation to the contrary, supported the trial court's ruling. And because plaintiff failed to file a cross-appeal regarding the trial court's dismissal of this theory of liability, this matter is not before us, and we decline to address it. Moreover, in this Court's order that granted leave to appeal, we expressly limited review to "issues raised in the application and supporting brief," and only the issue of actual agency liability was presented. Therefore, we are not at liberty to review this issue.

VI. CONCLUSION

For the foregoing reasons, we reverse the trial court's decision to deny Henry Ford's motion for summary disposition on the issue of actual agency and remand for the trial court to grant summary disposition in favor of defendants. We do not retain jurisdiction. We decline to address the issue of ostensible agency, as it was not properly raised on appeal. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219(A).

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