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COURT OF APPEALS CASES

ASHLEY CAPITAL, LLC v DEPARTMENT OF TREASURY

Docket No. 322386. Submitted November 3, 2015, at Lansing. Decided November 10, 2015. Approved for publication January 5, 2016, at 9:00 a.m.

Ashley Capital, LLC, filed an action in the Court of Claims regarding Ashley Capital's claim that the Department of Treasury (the Department) improperly calculated the 2008, 2009, and 2011 tax refunds to which Ashley Capital was entitled under the then-effective Michigan Business Tax Act (BTA). The BTA replaced the former Single Business Tax Act (SBTA), and although the BTA itself has since been repealed and replaced by the Corporate Income Tax Act, the BTA applied to this case. Ashley Capital alleged that the Department wrongly applied certain carryforward credits from the SBTA; according to Ashley Capital, the Department failed to follow MCL 208.1403(1), which instructed a party to claim compensation and investment credits available under the BTA before claiming any other tax credits available under the BTA, specifically, carryforward credits and brownfield rehabilitation credits. Despite the language of MCL 208.1403(1), the Department developed a form that instructed a party to claim carryforward credits and brownfield rehabilitation credits before other credits under the BTA, an instruction directly contrary to the statutory language in MCL 208.1403(1). Ashley Capital's refund was reduced when the credits were applied as the Department indicated they should be in the form. Ashley Capital challenged the Department's reduction of Ashley Capital's refund, and the Department's hearing referee conducted an informal conference about the matter, after which the referee recommended that Ashley Capital receive a refund. However, the Department issued a decision and order overruling the referee's recommendation. Ashley Capital appealed the Department's decision in the Court of Claims. The Court of Claims, MICHAEL J. TALBOT, C.J., reversed the Department's decision and granted summary disposition to Ashley Capital. The Department appealed.

The Court of Appeals *held*:

The sequence in which tax credits were to be claimed at the time this case was decided was governed by former MCL 208.1403, which stated that compensation credits and investment credits were to be claimed "before any other credit under th[e BTA]." The Court of Claims properly interpreted the reference in MCL 208.1403(1) to "any other credit under the BTA" as including those credits that originated in the SBTA—brownfield rehabilitation credits and carryforward credits—and were carried over to the BTA. Whether the tax credits appearing in the BTA were created under the SBTA or the BTA is irrelevant. The language in MCL 208.1403 made no distinction between credits established under either of the two acts, and some of the credits from the SBTA also appeared in the BTA. The sequence in which the tax credits were to be applied was expressly stated in MCL 208.1403, and the Department was obligated to follow that sequence when creating a form designed to facilitate the process by which tax refunds were determined. In this case, there was an irreconcilable conflict between the language in the Department's form and the statutory language. Ashley Capital properly followed the instructions contained in the statutory language and claimed compensation credits and investment credits before claiming other tax credits that appeared in the BTA.

Affirmed.

TAXATION — BUSINESS — TAX CREDITS — SEQUENCE OF CLAIMED CREDITS.

Compensation credits and investment credits must be claimed before brownfield rehabilitation credits and carryforward credits; the plain language of MCL 208.1403 instructed a taxpayer to claim compensation and investment credits before claiming any other credits described in the Business Tax Act (BTA); "any other credits under the BTA" was not limited to only those credits that were created by the BTA; although compensation and investment credits first appeared in the Single Business Tax Act (SBTA), they were written into the BTA when the SBTA was repealed; while the Department of Treasury has the authority to issue forms aimed at facilitating the process of filing taxes, it does not have the authority to change the sequence of tax credits as it was established by the Legislature.

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin*, *Daniel L. Stanley*, and *Brian T. Quinn*) for Ashley Capital, LLC.

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: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. Plaintiff, Ashley Capital, LLC, filed an action in the Court of Claims, asserting that defendant, Department of Treasury (the Department), improperly calculated the tax owed by Ashley Capital under the former Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., for the tax years 2008, 2009, and 2011.[1] Ashley Capital specifically contested the sequence in which the Department applied certain carryforward credits from the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., when calculating its BTA liability.[2] The Department appeals as of right from an opinion and order that denied its motion under MCR 2.116(C)(8) for summary disposition and granted judgment in favor of Ashley Capital under MCR 2.116(I)(2). Because the Court of Claims correctly determined the sequence in which the credits available to Ashley Capital under the BTA should be applied, we affirm.

This case involves the sequence in which credits should be applied against tax liability under the BTA. In particular, there are four types of credits at issue. They are (1) the "unused carryforward credit" de-

[1] The BTA was repealed by 2011 PA 39; it was replaced with the Corporate Income Tax Act, MCL 206.601 *et seq*. See *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 650, 650 n 23; 852 NW2d 865 (2014) (opinion by VIVIANO, J.).

[2] The SBTA (1975 PA 228; MCL 208.1 to MCL 208.145) was repealed by 2006 PA 325, effective December 31, 2007. Effective January 1, 2008, 2007 PA 36 replaced the SBTA with the now former BTA.

scribed in § 401 of the BTA, MCL 208.1401, (2) the "brownfield rehabilitation credit" referred to in § 437 of the BTA, MCL 208.1437, (3) the "compensation credit" set forth in § 403(2) of the BTA, MCL 208.1403(2), and (4) the "investment tax credit" provided for by § 403(3) of the BTA, MCL 208.1403(3). Two of these credits—the unused carryforward credit and the brownfield rehabilitation credit—were available under the SBTA, and they were carried forward into the BTA. The other credits—the compensation credit and the investment tax credit—were created by the BTA. MCL 208.1403(1) instructed a taxpayer to apply credits in a particular sequence: "Notwithstanding any other provision in this act, the credits provided in this section [i.e., the compensation credits and the investment tax credits] shall be taken *before any other credit under this act*." (Emphasis added.)

Although the language of MCL 208.1403(1) indicates that compensation credits and investment tax credits must be taken "before any other credit under this act," the Department crafted a form that required taxpayers to take carryforward credits and brownfield rehabilitation credits before taking compensation credits and investment credits. In this case, however, when Ashley Capital filed its returns, it did not comply with the sequence indicated by the form. Instead, Ashley Capital claimed its compensation credits and investment tax credits first. The Department then issued Ashley Capital a notice that its refund for the 2008 tax year had been adjusted. The adjustment reduced Ashley Capital's requested refund. Ashley Capital challenged the adjustment, and an informal conference was held with the Department's hearing referee. The hearing referee issued a recommendation that Ashley Capital receive a refund, but the Department over-

ruled the hearing referee and denied Ashley Capital's request for a refund.

Adding claims for the 2009 and 2011 tax years, Ashley Capital appealed the decision in the Court of Claims, and the court reversed the Department's decision. The Court of Claims concluded that MCL 208.1403(1) evinced a legislative intent to "create a 'super' priority for Compensation Credits and Investment Tax Credits." Thus, the Court of Claims reasoned that compensation credits and investment tax credits must be taken first, before *all* credits—those credits that originated under the BTA as well as those credits that were created by the SBTA and carried forward by the BTA. Because Ashley Capital followed the sequence indicated in the statute, the Court of Claims determined that Ashley Capital was entitled to summary disposition under MCR 2.116(I)(2). The Department appealed as of right in this Court.

The issue before this Court is one of statutory interpretation. That is, both parties contest the interpretation of MCL 208.1403(1) and the sequence in which credits under this provision must be claimed. The parties both recognize that compensation credits and investment tax credits must be taken before all other credits under the BTA, but they disagree about what constitutes a "credit under [the BTA]." Specifically, the Department argues that "any other credit under th[e BTA]" means only those credits *created* by the BTA, which would mean that brownfield rehabilitation credits and carryforward credits that originated under the SBTA are not included. In contrast, Ashley Capital argues that brownfield rehabilitation credits and carryforward credits are credits that carried over to the BTA from the SBTA, and thus, under the plain language of MCL 208.1403(1), compensation credits

and investment tax credits must be taken before brownfield rehabilitation credits and carryforward credits.

We review 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). "A court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment." *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 322; 808 NW2d 495 (2010). We review de novo an issue of statutory construction, which is a question of law. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 537; 831 NW2d 255 (2013).

"When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). To this end, we "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. Statutory language must be considered in context, and undefined terms must be given their plain and ordinary meaning. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014) (quotation marks and citation omitted). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, or 'when it is *equally* susceptible to more than a single meaning.' " *In re Application of Indiana Mich Power Co for a Certifi-*

cate of Necessity, 498 Mich 881 (2015), quoting *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted). "When ambiguities exist, tax laws are generally construed in favor of the taxpayer," *Lear Corp*, 299 Mich App at 537, but "tax statutes that grant tax credits or exemptions are to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed," *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). However, "[w]hile tax-exemption statutes are strictly construed in favor of the government, they are to be interpreted according to ordinary rules of statutory construction." *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 223; 668 NW2d 181 (2003). We note as well that an administrative agency's "interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Younkin v Zimmer*, 497 Mich 7, 10; 857 NW2d 244 (2014) (quotation marks and citation omitted).

In this case, the statute at issue is former MCL 208.1403(1), which provided in full:

> Notwithstanding any other provision in this act, *the credits provided in this section shall be taken before any other credit under this act*. Except as otherwise provided in [MCL 208.1403(6)], for the 2008 tax year, the total combined credit allowed under this section shall not exceed 50% of the tax liability imposed under this act before the imposition and levy of the surcharge under section 281. For the 2009 tax year and each tax year after 2009, the total combined credit allowed under this section shall not exceed 52% of the tax liability imposed under this act before the imposition and levy of the surcharge under section 281. [Emphasis added.]

Considering the plain language of the statute, we conclude that the Court of Claims correctly recognized that MCL 208.1403(1) placed compensation credits and investment credits in a " 'super' priority" position relative to all other credits a taxpayer might claim under the BTA. That is, it is unmistakable that the credits described in MCL 208.1403, i.e., compensation credits and investment credits, must have been taken "*before* any other credit under this act." (Emphasis added.) Further, in our judgment it is equally clear that "any other credit under this act" refers to any credit described in a section of the BTA other than MCL 208.1403. The term "this act" obviously denotes the BTA. See MCL 208.1101(1). And, for a credit to be "under" the BTA, it must be "within the group or designation of [the BTA]" or "subject to the authority, control, guidance, or instruction of [the BTA]." See *Merriam-Webster's Collegiate Dictionary* (2014) (defining the word "under"). Given this ordinary understanding of what it means to be "under" the BTA, we agree with the Court of Claims' conclusion that brownfield rehabilitation credits and carryforward credits constituted other credits under the BTA. The BTA expressly provided for carryforward credits under MCL 208.1401 and for brownfield rehabilitation credits under MCL 208.1437. Both MCL 208.1401 and MCL 208.1437 were contained in the BTA and more specifically in the chapter entitled "credits," meaning that, quite simply, these were credits "under" the BTA. As such, it is clear that these credits were also subject to the sequencing provision found in MCL 208.1403(1), because they were included in the phrase "any other credit[s] under [the BTA]." Consequently, Ashley Capital correctly sequenced its credits when it claimed compensation credits and investment credits before brownfield reha-

bilitation credits and carryforward credits. See MCL 208.1403(1).

In contrast to this conclusion, the Department maintains that only a credit created by the BTA qualified as a "credit under this act." However, this interpretation impermissibly reads additional language into the statute, which we will not do. See *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013). Had the Legislature intended to place only compensation credits and investment credits before those credits *created by* the BTA, it would have so specified. Instead, it chose the phrase "under this act," which clearly encompassed all credits provided for under the BTA, including brownfield rehabilitation credits and carryforward credits. Indeed, although it is true that these credits originated under the SBTA, the SBTA has been repealed. See *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 646, 649 n 21; 852 NW2d 865 (2014) (opinion by VIVIANO, J.), citing 2006 PA 325. Consequently, while the credits in question might have originated under the SBTA, as of January 1, 2008, the SBTA no longer existed, and these credits were then governed solely by the BTA. In these circumstances, those credits existed "under" the BTA, and they were covered by the sequencing provision of MCL 208.1403(1).

In a different formulation of essentially the same argument, the Department also argues that the Legislature intended a textual distinction between a "carryforward" from the SBTA and a "credit" under the BTA; that is, those credits carried forward from the SBTA cannot be considered "credits" for purposes of the BTA.[3] This argument from the Department draws a distinc-

[3] For example, regarding carryforward credits, MCL 208.1401 stated that "[e]xcept as otherwise provided under this act, any *unused carryforward for any credit* under former 1975 PA 228 may be applied for the 2008 and 2009 tax years and any unused carryforward after 2009 shall

tion without a difference. Under the BTA, carryforward credits, brownfield rehabilitation credits, investment credits, and compensation credits were all available to offset taxpayer liability under the BTA. The mere fact that some credits were carried forward by the Legislature from the SBTA does not alter the clear fact that such carryforwards are nonetheless credits which, like other credits, may be used under the BTA to offset liability arising under the BTA. Indeed, MCL 208.1403(1) referred broadly to "*any* other credit under this act" (emphasis added), and it made no distinction between those credits carried forward from the SBTA and those originating under the BTA. We decline to read such language into the statute. See *Book-Gilbert*, 302 Mich App at 542. Because brownfield rehabilitation credits and carryforward credits may be used under the BTA to offset liability arising from the BTA, they plainly constituted "credits" under the BTA.

Finally, the Department asserts that its interpretation of MCL 208.1403(1) should prevail because the Department had been delegated the discretionary authority to administer the BTA, which included the authority to prescribe forms for use in effectuating the BTA. In these circumstances, the Department maintains that its interpretation is entitled to respectful consideration and that its forms delineating the sequence of credits should be subjected to a rational-basis review.

It is clear that the Department had authority to administer the tax imposed by the BTA, MCL 208.1513(1), to "prescribe forms for use by taxpayers, [and to] promulgate rules in conformity with [the BTA]." MCL 208.1513(3). Moreover, "[a]gencies have the au-

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be extinguished." The Department asserts that, given this phrasing, there was a distinction between a "credit" and an "unused carryforward for any credit."

thority to interpret the statutes they are bound to administer and enforce." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 46; 703 NW2d 822 (2005). However, the Administrative Procedures Act (APA), MCL 24.201 *et seq*., provides that an administrative agency's "form with instructions, an interpretive statement, a guideline, an informational pamphlet . . . [is not a promulgated rule and] does not have the force and effect of law but is merely explanatory." MCL 24.207(h). Further, although the Department had authority to prescribe forms under the BTA, it did not have the discretion to change the sequence of credits. Forms under the BTA were not subject to rational-basis review because the Legislature expressly established the order of credits in the BTA and did not grant such discretion to the Department. See MCL 208.1403(1). Cf. *Guardian Indus Corp v Dep't of Treasury*, 198 Mich App 363, 381-382; 499 NW2d 349 (1993) (holding that when the statute granted discretion to the commissioner of revenue to require a taxpayer to consolidate tax returns, rational-basis review of decision to not apply decision retroactively was appropriate). Ultimately, while the Department's interpretation of the BTA is entitled to respectful consideration, it is simply not persuasive because it does not comport with the plain language of the statute. See *Younkin*, 497 Mich at 10; *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 651; 770 NW2d 915 (2009). Because there are cogent reasons why the Department's interpretation should not be upheld, the Court of Claims properly applied the plain language of the statute and granted summary disposition to Ashley Capital.

Affirmed.

GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

FARM BUREAU GENERAL INSURANCE COMPANY v
BLUE CROSS BLUE SHIELD OF MICHIGAN

Docket No. 322423. Submitted November 4, 2015, at Lansing. Decided November 17, 2015. Approved for publication January 7, 2016, at 9:00 a.m.

Farm Bureau General Insurance Company of Michigan brought a declaratory action in the Ingham Circuit Court against Blue Cross Blue Shield of Michigan as well as Spectrum Health Continuing Care and Spectrum Health Rehab and Nursing Center (collectively, Spectrum), seeking reimbursement for payments it had made to Spectrum for treatment of its insured, Julie Klein, after she was injured in an automobile accident. Klein had a health insurance policy with Blue Cross and a no-fault coordinated automobile insurance policy with Farm Bureau, which only paid for services not covered by her health insurance policy. Although Blue Cross initially approved and paid for 14 days of Klein's treatment at Spectrum, Blue Cross denied Spectrum's request for additional treatment. Rather than appeal Blue Cross's denial or secure an agreement from Klein to pay for future services, Spectrum continued to treat Klein and submitted a bill for her treatment to Farm Bureau, which paid under protest. All three parties moved for summary disposition. The court, Clinton Canady III, J., granted Spectrum's motion for summary disposition under MCR 2.116(C)(10), granted Farm Bureau's motion for summary disposition with respect to Blue Cross, and denied summary disposition to Blue Cross, ruling that Blue Cross was fully responsible for the payment at issue. Blue Cross appealed, and Farm Bureau cross-appealed.

The Court of Appeals *held*:

The trial court erred by denying Blue Cross's motion for summary disposition and by granting summary disposition in favor of Spectrum. Under the terms of Spectrum's participation agreement with Blue Cross, once its request for preapproval of services had been denied, Spectrum assumed financial responsibility for the services it rendered to Klein, and Blue Cross had no obligation to reimburse Farm Bureau. Although there were mechanisms in place for Klein or Spectrum to contest Blue

Cross's denial of preapproval, no challenge was made. Because Spectrum was contractually responsible for the expense of Klein's treatment, Klein had no legal responsibility for these disputed medical costs. Therefore, those expenses were not incurred by Klein within the meaning of MCL 500.3107(1)(a), and they were not subject to payment by Farm Bureau as the no-fault insurer.

Reversed and remanded for entry of summary disposition in favor of Blue Cross and in favor of Farm Bureau in relation to its claims against Spectrum.

Willingham & Coté, PC (by *Kimberlee A. Hillock* and *Torree J. Breen*), for Farm Bureau General Insurance Company of Michigan.

Jesse A. Zapczynski for Blue Cross Blue Shield of Michigan.

Miller Johnson (by *Richard E. Hillary, II*, and *Robert J. Christians*) for Spectrum Health Continuing Care and Spectrum Health Rehab and Nursing Center.

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. Defendant Blue Cross Blue Shield of Michigan (hereinafter, Blue Cross) appeals as of right the order denying its motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and granting summary disposition under MCR 2.116(C)(10) to plaintiff Farm Bureau General Insurance Company of Michigan (hereinafter, Farm Bureau) against Blue Cross. Farm Bureau cross-appeals that same order, which denied its motion for summary disposition under MCR 2.116(C)(10) against Spectrum Health Continuing Care and Spectrum Health Rehab and Nursing Center (hereinafter, Spectrum) and granted Spectrum's motion for summary disposition under MCR 2.116(C)(10) against Farm Bureau. This

case concerns a payment dispute regarding services that were provided by Spectrum, a skilled nursing facility, to Farm Bureau's and Blue Cross's insured, Julie Klein. Farm Bureau paid the claims under protest and then initiated this declaratory action against Blue Cross and Spectrum. All three parties moved for summary disposition. The trial court determined that Blue Cross was responsible for paying for Spectrum's services. We conclude that, under the terms of Spectrum's skilled-nursing-facility participation agreement with Blue Cross, Spectrum assumed financial responsibility for the services it provided Klein, and Blue Cross has no obligation to reimburse Farm Bureau. Further, because Spectrum is responsible for the expense of Klein's treatment, those treatment costs were not "incurred" by Klein, and thus Farm Bureau is not liable for these amounts under Michigan's no-fault act, MCL 500.3101 *et seq*. Consequently, with respect to Blue Cross's appeal, we reverse, and with respect to Farm Bureau's cross-appeal, we also reverse.

I. FACTS AND PROCEDURAL HISTORY

On October 22, 2011, Julie Klein was in a serious automobile accident and sustained grave injuries. At the time, Klein was covered under a Blue Cross health insurance policy and a no-fault coordinated automobile insurance policy with Farm Bureau that was designated excess and only paid for services not covered by Klein's health insurance policy. Spectrum is a skilled nursing facility, and it is under contract with Blue Cross as an approved facility subject to a participation agreement with Blue Cross. Klein received treatment at Spectrum following her automobile accident. Although Blue Cross initially approved and paid for 14 days of treatment at Spectrum, Blue Cross subse-

quently denied Spectrum's preapproval request for additional time at the facility. Rather than appeal Blue Cross's denial or seek payment from Klein individually, Spectrum submitted Klein's claim to Farm Bureau, which paid under protest. At issue in the present case is whether Blue Cross, Farm Bureau, or Spectrum must bear the costs of Klein's treatment at Spectrum.

Relevant to this dispute, under the terms of Klein's policy, Blue Cross will not pay for "custodial care." However, the policy does provide benefits for "skilled care and related physician services in a skilled nursing facility" at a participating skilled nursing facility, for a period of time that is "necessary for the proper care and treatment of the patient up to a maximum of 120 days per member, per calendar year." The policy also states that a "service must be medically necessary to be covered," and that the medical necessity determination would be made by

> physicians acting for [Blue Cross], based on criteria and guidelines developed by physicians for [Blue Cross] who are acting for their respective provider type or medical specialty, that:
>
> – The covered service is accepted as necessary and appropriate for the patient's condition. It is not mainly for the convenience of the member or physician.

In addition, Klein's policy with Blue Cross states that Blue Cross will not pay for "[t]hose [services] for which you legally do not have to pay . . . ." The policy also contained a limitation on the ability of Klein to bring legal suits against Blue Cross, as follows:

> Legal action against us may not begin later than two years after we have received a complete claim for services. No action or lawsuit may be started until 30 days after you notify us that our decision under the claim review procedure is unacceptable.

Aside from Klein's Blue Cross policy, as noted, Blue Cross also had a contractual agreement with Spectrum in its capacity as a participating skilled nursing facility. Pursuant to this agreement, Spectrum is required to follow Blue Cross's preauthorization requirements, i.e., the process by which the medical provider seeks approval for payment from Blue Cross before rendering the medical service. Under the terms of the agreement, Spectrum can appeal an initial denial of a preauthorization request, but the appeal must be filed within 30 days after the initial decision. Moreover, to obtain payment, Spectrum must submit any claims for services within 180 days of the date of service. In terms of payment for services, the agreement expressly states that "[e]xcept for copayments and deductibles, [Spectrum] will accept the [Blue Cross] payment as full payment for Covered Services, and for any Out-of-Panel Services . . . and agrees not to collect any further payment, except as set forth in Addendum G." Under Addendum G, an insured may be billed for:

> 1. Noncovered services, *unless the service has been deemed a noncovered service solely as a result of a determination by a Physician acting for* [*Blue Cross*] *that the service was not Medically Necessary, in which case, Facility assumes full financial responsibility for the denied claims*. Facility may bill the Member for claims denied as Medically Unnecessary only as stated in paragraph 2., below;
>
> 2. Services determined by [Blue Cross] to be Medically Unnecessary, where the Member acknowledges that [Blue Cross] will not make payment for such services, and the Member has assumed financial responsibility for such services in writing and in advance of the receipt of such services[.] [Italics added.]

In addition, under Addendum F of the agreement, Spectrum agreed to cooperate with Blue Cross in the

coordination of coverage from other sources, and to first bill the entity responsible for providing primary coverage to the patient.

In this case, Klein was admitted to Spectrum's facility on November 28, 2011. Spectrum sought precertification from Blue Cross, and Blue Cross approved Klein's stay at Spectrum's facility for 14 days. However, Blue Cross stated that precertification would again need to be sought for any length of stay at Spectrum's facility beyond 14 days. Near the conclusion of Klein's initial 14-day stay, Spectrum sought further precertification from Blue Cross for an additional 14 days. Blue Cross denied this request after its reviewing physician, Dr. Lopamudra Patel, determined that these services could not be considered medically necessary because Klein was not functioning at a level that would allow her to benefit from skilled nursing services at that time. Patel informed Spectrum that precertification could again be sought in two weeks, and that if Klein's condition had improved, then precertification may again be authorized. Blue Cross sent a letter to Klein's family informing them of its decision and Klein's right to appeal, and Blue Cross also informed Spectrum of its denial.

Neither Klein nor Spectrum sought a review of Blue Cross's decision. Further, no subsequent precertification approvals for Klein's treatment were sought from Blue Cross after the two-week period had elapsed. At no time did Klein acknowledge in writing that she was assuming financial responsibility for continued treatment involving denied claims for noncovered services. Nonetheless, Spectrum continued Klein's treatment, and Spectrum made the decision to simply bill Farm Bureau for the services provided to Klein after December 12, 2011. Farm Bureau paid these claims under

protest to avoid incurring interest and penalty fees under the no-fault act.[1]

After paying these claims, Farm Bureau filed the instant action against Blue Cross and Spectrum. All three parties moved for summary disposition. Relevant to the present appeal, Farm Bureau argued that Blue Cross was responsible for providing primary medical care to Klein, meaning that Spectrum should have looked to Blue Cross, not Farm Bureau, for payment of Klein's medical bills. According to Farm Bureau, it was entitled to a return of sums paid from either Spectrum or Blue Cross. In contrast, among other arguments, Blue Cross maintained that, under the terms of its participating provider agreement, Spectrum had assumed financial responsibility for Klein's treatment so that Klein had no legal responsibility to pay and, under the terms of Klein's policy, Blue Cross could not be held liable for services for which Klein did not have to pay.

The trial court concluded that Spectrum was entitled to payment for services rendered to Klein, and that Blue Cross was responsible for the payment of these bills. The trial court thus granted summary disposition to Spectrum on Farm Bureau's claim, stating that "it appears that the dispute really lies between Blue Cross/Blue Shield and the secondary insurer, Farm Bureau." The trial court then granted Farm Bureau's motion for summary disposition on its claim against Blue Cross and required Blue Cross to reimburse Farm Bureau, ruling that, as the primary in-

[1] Unlike Blue Cross, which has contractual limits on the amount it pays to skilled nursing providers like Spectrum, Farm Bureau paid the full Spectrum rates, meaning that Spectrum received substantially more money for its services from Farm Bureau than it would have received if Blue Cross had paid.

surer, Blue Cross was required to pay for all of Klein's care in 2011 and the first 120 days of 2012.[2]

II. STANDARD OF REVIEW

This Court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. A motion under MCR 2.116(C)(10) is properly granted if the evidence fails to establish a genuine issue of any material fact. *Allison v AEW Capital Mgt LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id*. at 425.

The interpretation of an insurance contract is a question of law that is reviewed de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis omitted). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties[.]" *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003) (quotation marks and citation omitted). Contractual language is given its ordinary and plain meaning, *Royal Prop*

[2] Initially, the trial court stated it would only require Blue Cross to pay Farm Bureau the amount Blue Cross would have paid Spectrum under its participating provider agreement and not the full Spectrum rates that Farm Bureau paid. However, when the trial court released its order, it modified this ruling and required Blue Cross to reimburse Farm Bureau for the full amount that Farm Bureau had paid to Spectrum.

Group, LLC v Prime Ins Syndicate, Inc, 267 Mich App 708, 715; 706 NW2d 426 (2005), and courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory," *Klapp*, 468 Mich at 468, 476. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written[.]" *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

III. ANALYSIS

The present dispute involves the interplay between a health insurance policy and a coordinated no-fault insurance policy. Specifically, the parties agree that, as a general proposition, Blue Cross was primary in terms of liability for Klein's medical expenses. Nonetheless, on appeal, Blue Cross argues that the trial court erred by granting Farm Bureau's motion for summary disposition because Blue Cross had reasonably denied Klein's claims on the basis of Blue Cross's determination of medical necessity in keeping with the plain language of its policy. In contrast, Farm Bureau maintains that Blue Cross, as Klein's health insurer, was primarily responsible for the payment of Klein's medical expenses, including the expenses at issue. Alternatively, both Farm Bureau and Blue Cross also argue that, by virtue of its provider agreement with Blue Cross, Spectrum assumed financial liability for Klein's expenses that were denied by Blue Cross in connection with the preapproval process as not being medically necessary. Accordingly, Blue Cross and Farm Bureau maintain that they have no obligation to pay these medical expenses. For the reasons discussed below, we conclude that Spectrum assumed liability for the expenses at issue and that, in these unique circum-

stances, neither Blue Cross nor Farm Bureau has an obligation to pay Klein's expenses.

Under MCL 500.3109a, when an individual has health insurance, the individual may purchase a coordinated no-fault automobile insurance policy at a reduced premium. *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 749; 514 NW2d 150 (1994). The intent of this provision is to eliminate duplicative recovery for services and to contain insurance and healthcare costs. *Id*. When no-fault coverage and health insurance are coordinated, the health insurer is primarily liable for the insured's medical expenses. *American Med Security, Inc v Allstate Ins Co*, 235 Mich App 301, 304; 597 NW2d 244 (1999). In these circumstances, "the no-fault insurer is not subject to liability for medical expense that the insured's health care insurer is required, under its contract, to pay for or provide." *Tousignant v Allstate Ins Co*, 444 Mich 301, 303; 506 NW2d 844 (1993). It follows that, if an insured chooses to coordinate no-fault and health coverage under MCL 500.3109a, the insured is required "to obtain payment and services from the health insurer to the extent of the health coverage available from the health insurer." *Id*. at 307. Further, when payment for medical services is governed by a contract between a healthcare provider and a health insurer, the provider is bound by the terms of the agreement. See *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 273-275; 362 NW2d 247 (1984). Payment in keeping with the terms of the agreement constitutes payment in full, and neither the insured nor the healthcare provider can seek additional payment from a no-fault insurer for covered services. See *Williams v AAA Mich*, 250 Mich App 249, 269; 646 NW2d 476 (2002); *Dean*, 139 Mich App at 271-275; see also MCL 550.1502(1).

Although an insured with a coordinated no-fault policy must first use healthcare insurance for services offered under the health insurance policy, the insured may seek reimbursement from the no-fault insurer for " 'allowable expenses' that were not contractually required to be provided by the health care provider." *Sprague v Farmers Ins Exch*, 251 Mich App 260, 270; 650 NW2d 374 (2002). The liability of a no-fault insurer for such services is determined under the no-fault act, which 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 . . . ." MCL 500.3105(1). In particular, insurance benefits are payable for "[a]llowable expenses consisting of all reasonable charges *incurred* for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a) (emphasis added). As used in this provision, to " 'incur' means '[t]o become liable or subject to, [especially] because of one's own actions.' " *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003) (alteration in *Proudfoot*); see also *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 638; 552 NW2d 671 (1996). When an insured has no legal responsibility for disputed medical costs, those expenses are not "incurred" by the insured within the meaning of MCL 500.3107(1)(a), and they are not subject to payment by the no-fault insurer. See *Duckworth v Cont'l Nat'l Indem Co*, 268 Mich App 129, 136-137; 706 NW2d 215 (2005); *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536, 543; 637 NW2d 251 (2001).

In this case, it is undisputed that Klein had a coordinated no-fault policy with Farm Bureau and that, as a result of this coordinated policy, Blue Cross

was primary with respect to the payment of Klein's medical bills. See *American Med Security, Inc*, 235 Mich App at 304. Under Klein's policy with Blue Cross, as a general matter, Klein was eligible for up to 120 days a year of care at a skilled nursing facility, provided that care during that period was "necessary for the proper care and treatment of the patient." Given that Blue Cross provided coverage for these services, Klein had an obligation to seek such coverage from Blue Cross before turning to Farm Bureau for payment. See *Tousignant*, 444 Mich at 307-308. Furthermore, by virtue of its participating provider agreement with Blue Cross, Spectrum agreed to accept payment from Blue Cross under the agreement as full payment for its services, Spectrum agreed to abide by Blue Cross's precertification requirements, and, most notably, Spectrum assumed "full financial responsibility" for claims denied as being medically unnecessary, unless the insured "acknowledges that [Blue Cross] will not make payment for such services, and the [insured] has assumed financial responsibility for such services in writing and in advance of the receipt of such services."

In our judgment, these provisions are clear and unambiguous, and they are dispositive with respect to Spectrum's entitlement to payment from both Farm Bureau and Blue Cross. That is, with respect to Farm Bureau, the effect of Spectrum's participating provider agreement is to relieve Klein from responsibility for paying for Spectrum's services, and, because Klein has no legal responsibility for the medical costs, Farm Bureau has no obligation to pay for these expenses under MCL 500.3107(1)(a). Specifically, it is undisputed that Spectrum initially obtained Blue Cross's preapproval for Klein to spend 14 days at Spectrum. After that 14-day period, Blue Cross denied an addi-

tional request for preapproval based on the determination that the services were not medically necessary. Although there were mechanisms in place for Klein or Spectrum to contest Blue Cross's denial, no challenge was made to the denial. Spectrum also wholly failed to seek additional preapproval for the ongoing services it provided to Klein in the coming months, despite Spectrum's contractual obligation to abide by Blue Cross's precertification requirements. Moreover, there is no indication that Klein, or anyone acting on her behalf, agreed, in writing, to assume financial responsibility for the services denied by Blue Cross. Instead, Spectrum simply turned to Farm Bureau for payment.

However, under the terms of Spectrum's provider agreement, once its request for preapproval of these services had been denied as not being medically necessary, Spectrum contractually assumed financial liability for the services rendered, and it was contractually prohibited from attempting to bill Klein individually for these services unless Klein assumed responsibility in writing, which she did not do.[3] Spec-

[3] Spectrum had many options open to it under the participating provider agreement to avoid assuming liability for Klein's expenses. For example, if Spectrum or Klein had reason to dispute Blue Cross's denial, they should have appealed that decision, or, if Klein's condition improved, they could have once again sought preapproval from Blue Cross before providing services. Or, if Spectrum believed Blue Cross's denial on medical necessity grounds to be proper, in keeping with the participating provider agreement, Spectrum should have obtained Klein's written assumption of liability for such services before attempting to submit those bills to Farm Bureau. From the record below, it appears that it was the existence of a secondary insurer, i.e., Farm Bureau, which prompted Spectrum not to take other action or to seek review of Blue Cross's denial. For example, Spectrum's preauthorization manager, Cynthia Ingersoll, testified that, had Farm Bureau not been available as a secondary payer, she would have spoken to Klein's family and likely would have appealed Blue Cross's denial of preauthorization. But, quite simply, the existence of Klein's no-fault policy does not relieve

trum's decision not to contest Blue Cross's medical necessity denial and its decision not to seek preapproval at a later time does not, without the assumption of liability by Klein, render Farm Bureau liable as a secondary payer. Instead, given that the terms of Blue Cross's provider agreement with Spectrum expressly relieved Klein of any legal responsibility for the costs at hand, it follows that these expenses were not "incurred" by Klein, and thus Farm Bureau is not liable for payment of these claims under MCL 500.3107(1)(a). See *Duckworth*, 268 Mich App at 136-137; *Bombalski*, 247 Mich App at 543. Consequently, the trial court erred by granting summary disposition to Spectrum and by denying Farm Bureau's motion for summary disposition against Spectrum.[4]

Spectrum from its obligation to comply with the terms of its participating provider agreement. See *Dean*, 139 Mich App at 274; MCL 550.1502. If Spectrum wanted to avoid liability for providing services which Blue Cross had deemed not medically necessary, it should have taken steps to procure payment from Blue Cross or to have Klein assume liability. Thus, contrary to Spectrum's arguments in its brief on appeal, it did not do everything "right."

[4] Spectrum asserts on appeal that Farm Bureau cannot recoup funds paid to Spectrum because its voluntary payment of Klein's bill precludes recovery. See generally *Montgomery Ward & Co v Williams*, 330 Mich 275, 285; 47 NW2d 607 (1951) ("[W]here money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying.") (quotation marks and citation omitted). Contrary to this argument, and in agreement with Farm Bureau's assertions on appeal, we conclude that Farm Bureau may recover this sum because it made payment based on a mistake of fact, namely based on the mistaken belief that Spectrum was entitled to payment for services rendered to Klein. See *Wilson v Newman*, 463 Mich 435, 441; 617 NW2d 318 (2000). As discussed, this is not the case because Spectrum assumed liability for the cost of Klein's care in accordance with the terms of the participating provider agreement, and thus Farm Bureau's payment of Klein's bills under protest does not preclude its recovery of those funds from Spectrum. See *id*.

For similar reasons, on the facts of this case, we are persuaded that Blue Cross cannot be held liable for Klein's medical bills. That is, Klein's health insurance policy specifically reserves for Blue Cross the right to determine medical necessity by a physician acting for Blue Cross based on standards that have been determined by Blue Cross physicians. In this case, after approving two weeks of care, when Spectrum again sought precertification, Blue Cross's physician made the determination that Blue Cross would not cover the services because they could not be considered medically necessary given Klein's lack of progress to enable her to benefit from skilled therapy. After that denial, Spectrum and Klein failed to challenge Blue Cross's decision, Spectrum did not seek additional preapproval before providing additional services despite its contractual obligation to do so, and Spectrum did not obtain Klein's agreement, in writing, that she would assume responsibility for services that Blue Cross determined not to be medically necessary. Far from contesting Blue Cross's denial of Klein's various claims, Spectrum indicates on appeal that it "ultimately agreed with that decision."[5] In these circumstances, under the terms of its agreement, Spectrum assumed financial responsibility for the services it provided to Klein, and Blue Cross had no obligation to pay Klein's bills,[6] or to reimburse Farm Bureau. Consequently, the trial court erred by denying Blue Cross's motion for summary

[5] Given the opinion of Blue Cross's physician, as well as Blue Cross's ability to deny claims that were not medically necessary, we see no basis for concluding that Blue Cross wrongfully denied Klein's claims, and thus there is no basis to conclude that Blue Cross had an obligation to pay for Klein's services.

[6] Indeed, once Spectrum assumed responsibility, Klein had no legal obligation to pay, and Klein's policy with Blue Cross specifies that Blue Cross will not pay for "[t]hose services which [Klein] legally do[es] not have to pay . . . ."

disposition and by granting summary disposition to Farm Bureau as against Blue Cross.

Reversed and remanded for entry of summary disposition in favor of Blue Cross and for entry of summary disposition in favor of Farm Bureau in relation to its claims against Spectrum. We do not retain jurisdiction.

GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

HUDSON v HUDSON

Docket No. 322257. Submitted October 6, 2015, at Lansing. Decided January 7, 2016, at 9:05 a.m.

Plaintiff and defendant were parties in an action for divorce in the Calhoun Circuit Court. Plaintiff and defendant were married in 1999, and they divorced in 2013. Plaintiff worked as a school teacher; her pension was with the Michigan Public School Employees' Retirement System (MPSERS). Defendant worked at a federal cemetery; his pension was with the Federal Employees Retirement System (FERS). Following entry of the judgment of divorce, defendant submitted to plaintiff an Eligible Domestic Relations Order (EDRO) that required defendant to choose one of three options in Paragraph 7 to establish the terms and conditions that would apply to the single life annuity he would receive from plaintiff's pension. He chose option (b) in Paragraph 7, which provided for the continuation of benefits during his lifetime even after plaintiff's death if payment of benefits had begun before her death. Plaintiff objected to allowing defendant to choose option (b) because she did not have a similar choice concerning her receipt of pension benefits from defendant's pension. According to defendant, he was permitted to choose any option from the EDRO unless the judgment of divorce specifically precluded it, which it did not. The court, Stephen B. Miller, J., agreed with defendant and signed the EDRO. The court later denied plaintiff's motion for reconsideration. Plaintiff appealed.

The Court of Appeals *held*:

The trial court properly enforced the parties' judgment of divorce and the provisions it made for distribution of the parties' pensions, even though the court mistakenly relied on MCL 552.101(5) to support its ruling. MCL 552.101(5) was irrelevant to defendant's decision to select option (b) in Paragraph 7 of the EDRO. The parties' property division agreement was incorporated into the judgment of divorce, and it expressly stated that each party was entitled to the assignment of a specific percentage of the other party's pension. Plaintiff argued that the EDRO unfairly granted defendant rights to plaintiff's pension that were not available to plaintiff with respect to defendant's pension. In

fact, the federal regulation governing defendant's pension, 5 CFR 838.302(b), clearly states that any court order indicating that a party may continue to collect benefits from his or her former spouse's pension even after the former spouse's death is not a court order acceptable for processing. Notably, both parties and their counsel had access to information before the judgment of divorce entered from which they could have readily discovered the disparity between the choices available to defendant and the choices available to plaintiff.

Affirmed.

Law Weathers (by *Stephanie S. Fekkes* and *James H. Fisher*) for plaintiff.

Blake Alan Hudson *in propria persona*.

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

BOONSTRA, P.J. Plaintiff appeals by leave granted[1] the trial court's entry of an Eligible Domestic Relations Order (EDRO) directing the administrator of plaintiff's pension plan, the Michigan Public School Employees' Retirement System (MPSERS), to grant defendant an interest in plaintiff's pension benefits in the form of a single life annuity payable over defendant's lifetime and the trial court's denial of plaintiff's motion for reconsideration of that order. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were married in November 1999. Before and during the marriage, plaintiff worked as a school teacher, and defendant worked at a federal cemetery. Plaintiff filed for divorce on April 17, 2013, and she and defendant were ordered to mediation in November 2013 to address the division of property. The

[1] *Hudson v Hudson*, unpublished order of the Court of Appeals, entered November 19, 2014 (Docket No. 322257).

parties reached an agreement regarding the division of property, and that agreement was incorporated in the judgment of divorce. Relevant to this appeal, the judgment stated the following regarding the division of the parties' respective pensions:

> **IT IS FURTHER ORDERED AND ADJUDGED** that Plaintiff, JEANINE PAULA HUDSON, shall receive as her sole and separate property, free and clear of any claim thereto, or interest therein by Defendant, BLAKE ALAN HUDSON, fifty (50%) percent of the Defendant's F.E.R.S.[2] benefits as of April 23, 2013, pursuant to a Qualifying Court Order.
>
> * * *
>
> IT IS FURTHER ORDERED AND ADJUDGED that Defendant, BLAKE ALAN HUDSON, shall receive as his sole and separate property, free and clear of any claim thereto, or interest therein by Plaintiff, JEANINE PAULA HUDSON, fifty (50%) percent of 79% (*i.e.* 39.50%) of Plaintiff's M.S.E.R.S. [sic] benefits as of April 23, 2013, adjusted for gains and losses thereafter until the date of distribution, pursuant to an Eligible Domestic Relations Order.[3]

Defendant sent to plaintiff a proposed EDRO to be filed with the MPSERS. The document is a standardized form that allows the preparer to select certain options. Paragraph 6 of the EDRO states that "[t]he Participant assigns to the Alternate Payee a portion of the Participant's benefits from the Plan and the Plan will pay benefits to the Alternate Payee according to the following terms and conditions." Following this

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[2] Federal Employees Retirement System.

[3] The record reflects that the parties agreed to different percentages because plaintiff's pension began accruing before the marriage (and therefore, a portion was not marital property), while defendant's pension accrued entirely during the marriage.

heading, defendant filled in a table showing that he, as the alternate payee, would receive 39.5% of plaintiff's allowance, with the years of service included in the calculation identified as March 1, 1997, until April 23, 2013. Neither party disputes that this accurately represents the benefit granted to defendant in the judgment of divorce.

The crux of the dispute between the parties is Paragraph 7 of the EDRO, which introduces three options for the terms and conditions of payment. The parties agree that option (c), a Joint Survivor Option, is not relevant. At issue are options (a) and (b), which state:

> (a) Single Life Annuity – Payable Over Participant's Lifetime
>
> The benefits payable to the Alternate Payee will begin when the Participant begins to receive benefits under the Plan and will be in the form of a single life annuity payable during the lifetime of the Participant. If the Participant elects to receive an early-reduced retirement benefit, the Alternate Payee's benefit shall be reduced by the same factor.
>
> Death of Participant: If the Participant predeceases the Alternate Payee after payments to the Alternate Payee begin, all benefits payable to the Alternate Payee will permanently cease.
>
> Death of Alternate Payee: If the Alternate Payee predeceases the Participant after payments to the Alternate Payee begin, all benefits payable to the Alternate Payee under this EDRO will revert to the Participant.
>
> (b) Single Life Annuity – Payable Over Alternate Payee's Lifetime
>
> The benefits payable to the Alternate Payee will begin when the Participant begins to receive benefits under the

> Plan and will be in the form of a single life annuity payable during the lifetime of the Alternate Payee. (Note: An actuarial adjustment to the Alternate Payee's benefit will be made to reflect the difference in life expectancies.)
>
> Death of Participant: If the Participant predeceases the Alternate Payee once the Alternate Payee has begun receiving payments, benefits will continue for the Alternate Payee's lifetime.
>
> Death of Alternate Payee: Once payment of the Alternate Payee's benefit begins, the Participant's benefit is permanently reduced and the Alternate Payee's benefit will not revert to the Participant if the Alternate Payee predeceases the Participant.

Defendant selected option (b). Plaintiff filed an objection with the trial court, arguing that defendant's selection violated the judgment of divorce. Plaintiff argued that defendant's proposed EDRO unfairly granted defendant rights in plaintiff's pension that were not available to plaintiff with regard to defendant's pension. She asserted that because 5 CFR 838.302(b) does not allow her to obtain benefits from defendant's federal pension in the form of an annuity payable during her lifetime, defendant's proposed EDRO results in a distribution of the parties' pension plans that is contrary to the judgment of divorce, and that defendant therefore should have selected option (a). 5 CFR 838.302(b) provides that

> [a]ny court order directed at employee annuity that expressly provides that the former spouse's portion of the employee annuity may continue after the death of the employee or retiree, such as a court order providing that the former spouse's portion of the employee annuity will continue for the lifetime of the former spouse, is not a court order acceptable for processing.

Thus, plaintiff was prohibited by federal regulation from selecting an option comparable to option (b), i.e., an option that provided for payments from defendant's pension after his death. That federal regulation did not, however, apply to defendant with regard to plaintiff's pension. Defendant responded that, according to MCL 552.101(5), he was allowed to select any option unless the option was specifically precluded by the judgment of divorce. Defendant asserted that nothing could be done about the fact that his federal plan did not allow plaintiff a comparable option, but stated that it did not preclude him from selecting option (b) in Paragraph 7.

The trial court signed defendant's proposed EDRO and later denied plaintiff's motion for reconsideration, reasoning in part that MCL 552.101(5) required that exclusions be spelled out in the judgment of divorce, and that was not done in this case.

This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision interpreting a divorce judgment and a qualifying domestic relations order (QDRO) is reviewed de novo, *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012), as are questions of statutory interpretation, *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

III. ANALYSIS

We conclude that the trial court erred by determining that MCL 552.101(5) required that defendant be allowed to select option (b) in Paragraph 7 of the EDRO. However, the trial court's ultimate conclusion that it was bound by court rule to enforce the terms of

the judgment of divorce, and that the EDRO complied with the judgment, was correct. We therefore affirm.

MCL 552.101(5) states as follows:

> For any divorce or separate maintenance action filed on or after September 1, 2006, if a judgment of divorce or judgment of separate maintenance provides for the assignment of any rights in and to any pension, annuity, or retirement benefits, a proportionate share of all components of the pension, annuity, or retirement benefits shall be included in the assignment unless the judgment of divorce or judgment of separate maintenance expressly excludes 1 or more components. Components include, but are not limited to, supplements, subsidies, early retirement benefits, postretirement benefit increases, surviving spouse benefits, and death benefits. This subsection shall apply regardless of the characterization of the pension, annuity, or retirement benefit as regular retirement, early retirement, disability retirement, death benefit, or any other characterization or classification, unless the judgment of divorce or judgment of separate maintenance expressly excludes a particular characterization or classification.

The "[f]irst and foremost" rule of statutory construction is to "give effect to the Legislature's intent." *Tryc v Mich Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Statutory construction requires that we examine the language of the statute. *AFSCME*, 468 Mich at 399. " 'If the statute's language is clear and unambiguous, [this Court] assume[s] that the Legislature intended its plain meaning . . . .' " *Id*., quoting *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002) (quotation marks and citation omitted). This Court should give meaning to every word and "avoid a construction that would render any part of the statute surplusage or nugatory." *Id*. The statutory definition of a word, if given, controls the meaning of the word. *Tryc*, 451 Mich at 136. Further, "[w]hen a

statute uses a general term followed by specific examples included within the general term, . . . the canon of statutory construction *ejusdem generis* applies." *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718; 629 NW2d 915 (2001) (italics added). Under that rule of statutory construction, "the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Id*. at 718-719.

Parsed down to the language relevant to this case, MCL 552.101(5) states that if the judgment of divorce "provides for the assignment of any rights in and to any pension, . . . a proportionate share of all components of the pension . . . shall be included in the assignment unless the judgment of divorce . . . expressly excludes 1 or more components." In this case, the judgment of divorce clearly provided for the assignment of rights in plaintiff's pension. Therefore, defendant is also assigned "a proportionate share of all components of [plaintiff's] pension," MCL 552.101(5), unless a component has been specifically excluded. The judgment of divorce in this case contained no exclusionary language in the paragraph granting defendant an interest in plaintiff's pension. Rather, in affirmative language, it granted defendant a 39.5% benefit in plaintiff's pension as of April 23, 2013, "free and clear of any claim . . . by [p]laintiff." The dispositive question then became whether the right to select one of the three options in Paragraph 7 was a "component[] of the pension" included in the assignment to defendant.

MCL 552.101(5) states that "[c]omponents include, but are not limited to, supplements, subsidies, early retirement benefits, postretirement benefit increases, surviving spouse benefits, and death benefits." All of

the specific examples listed in the statute are separate benefits typically associated with pension plans, i.e., early retirement, surviving spouse, and death. By contrast, Paragraph 7 concerns the terms and conditions of all benefits to be paid; Paragraph 7 does not contain a distinct benefit conferred by plaintiff's plan, such as an early retirement benefit or a death benefit.[4] Therefore, the option in Paragraph 7 to choose the terms and conditions of payment is not a "component" as that term is defined in MCL 552.101(5). See *Huggett*, 464 Mich at 718-719.

Further, MCL 552.101(5) does not simply state that all components are included. It states that "a proportionate share of all components" is included. The choice under Paragraph 7 is not something that can be divided proportionally. That is, defendant cannot be given 39.5% of the choice to which he is entitled. If the choice of options under Paragraph 7 constitutes a "component," then the words "a proportionate share of" become surplusage and nugatory. See *AFSCME*, 468 Mich at 399.

In sum, MCL 552.101(5) has no applicability to the question whether defendant has the right to elect, under Paragraph 7 of the EDRO, the terms and conditions of the benefits he will receive. The trial court thus erred to the extent that it based its holding on its interpretation of MCL 552.101(5).

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[4] For example, although defendant argued that MCL 552.101(5) granted him the option of choosing either option (a) or (b) in Paragraph 7 of the EDRO—his choice allowed him to receive a "surviving spouse benefit"—the EDRO separately indicates, in Paragraph 11, that defendant may be designated as a surviving spouse for the purposes of receiving certain surviving spouse benefits. Both option (a) and option (b) in Paragraph 7 are designated as "Single Life Annuities."

However, in denying plaintiff's motion for reconsideration, the trial court also stated that its holding was based on a court rule:

> [T]he first [matter of law contributing to the court's ruling] involves the court rule. There was a signed judgment in this case by Ms. Fekkes and her client [plaintiff] as I recall, and so we have an agreed upon judgment that was pursuant to a settlement placed on the record back on December 10th, 2013, and the judgment provided basically for the parties to divide their pensions fifty-fifty. . . . So we have a court rule in regard to what binds parties and attorneys or their signature on a signed document or what they put on the record in the courtroom. . . . The Court is simply bound by the court rule. Then it says the parties bound themselves to the judgment and then you look at the statute and the statute says what it says which involves what would be in the presumably in the judgment, and the parties just did not make those further provisions I guess if you want to put it that way. That could have been put into the judgment. They weren't.

The trial court did not explicitly identify the particular court rule on which it based its decision. However, MCR 3.211(B)(2) states in pertinent part:

> A judgment of divorce, separate maintenance, or annulment must include . . . a determination of the rights of the parties in pension, annuity, and retirement benefits, as required by MCL 552.101(4).

MCL 552.101(4) states as follows:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights, including any contingent rights, of the husband and wife in and to all of the following:
>
> (a) Any vested pension, annuity, or retirement benefits.
>
> (b) Any accumulated contributions in any pension, annuity, or retirement system.

> (c) In accordance with . . . MCL 552.18, any unvested pension, annuity, or retirement benefits.

The trial court stated that the parties were bound by the language of the judgment of divorce, and that the judgment of divorce did not preclude defendant's election. We agree.

The judgment of divorce should be interpreted as a court would interpret a contract, see *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008), i.e., the intent of the parties should be determined from the plain and ordinary meaning of the language used. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010).

In this case, the agreed-on terms of the judgment of divorce, as they concerned defendant's interest in plaintiff's MPSERS pension, clearly stated that defendant was entitled to 39.5% of the benefits plaintiff had accrued as of April 23, 2013, and that those benefits were to be adjusted for gains and losses until the date of distribution. The divorce judgment also explicitly stated that defendant received this benefit "as his sole and separate property, free and clear of any claim thereto, or interest therein by Plaintiff . . . ." The only other provision of the divorce judgment that would have any bearing on this dispute was the provision granting plaintiff 50% of defendant's benefits as of April 23, 2013. Plaintiff was to receive those benefits "as her sole and separate property, free and clear of any claim thereto, or interest therein by Defendant . . . ."

The question thus becomes whether defendant's option of choosing the terms and conditions of payment, combined with plaintiff's inability to select an option similar to the one chosen by defendant, renders the resulting division contrary to the parties' stated intent in the judgment of divorce. We hold that it does

not. The parties expressly agreed to, and the resulting judgment of divorce expressly provided for, specific mathematical divisions of the parties' interests in their respective pension plans. The parties had an opportunity, before the judgment of divorce entered, to fully explore available payment options under the parties' respective pension plans. In addition, the parties could have considered and addressed the impact, if any, of the available options and the apparently asymmetrical nature of the options available under the MPSERS plan and the FERS plan. Finally, the parties had an opportunity in the settlement agreement and in the judgment of divorce to make provision for handling the options in Paragraph 7. For example, the standard EDRO form applicable to plaintiff's MPSERS pension specifically set forth the payment options at issue in this case, and it was available to the parties and their legal counsel before entry of the judgment of divorce. Similarly, the impact of 5 CFR 838.302(b) on the availability of similar options under defendant's FERS plan was readily determinable by the parties and their legal counsel before entry of the judgment of divorce.

It was thus incumbent on the parties and their counsel to determine and to include within the judgment of divorce the rights of each party relative to the other party's pension plan, including any restrictions on a party's selection of an option for receiving payment. The fact that the parties may have neglected to, or may have chosen not to, address this issue in the judgment of divorce does not then permit a party to subsequently question whether selection of an option afforded by the EDRO is contrary to the terms of the judgment of divorce. It is not. Nor does the parties' failure to address the issue support an equitable finding that the issue is somehow resolved by "an implied term of th[e] settlement agreement" (and therefore of

the resulting judgment of divorce). See *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) ("[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions."). The parties are bound by the terms of the agreed-on judgment of divorce. See MCR 2.507(G); see also *Lentz v Lentz*, 271 Mich App 465, 472; 721 NW2d 861 (2006) ("Absent fraud, coercion, or duress, the adults in the marriage have the right and the freedom to decide what is a fair and appropriate division of the marital assets, and our courts should not rewrite such agreements.").

Affirmed.

SAAD and HOEKSTRA, JJ., concurred with BOONSTRA, P.J.

CALHOUN INTERMEDIATE SCHOOL DISTRICT v
CALHOUN INTERMEDIATE EDUCATION ASSOCIATION

Docket No. 323873. Submitted December 3, 2015, at Lansing. Decided January 7, 2016, at 9:10 a.m.

The Calhoun Intermediate School District (the District) charged, in the Michigan Employment Relations Commission (MERC), the Calhoun Intermediate Education Association (the Association) with engaging in unfair labor practices. During negotiations between the parties on the terms of a collective bargaining agreement, the Legislature enacted 2011 PA 103. The act amended the public employment relations act (PERA), MCL 423.201 *et seq*., to make certain matters prohibited subjects of bargaining for public school employers and the unions representing school employees. The parties' previous collective bargaining agreement had included provisions concerning now-prohibited subjects of bargaining. The District and the Association agreed that the provisions would be unenforceable, but disagreed regarding inclusion of those provisions in the new agreement. The District's unfair labor practice charge alleged that the continued insistence by the Association that the language concerning the prohibited subjects of bargaining be included constituted a failure to bargain in good faith. MERC accepted the findings of the administrative law judge and ruled that the Association had breached its duty to bargain in good faith. The Association appealed.

The Court of Appeals *held*:

1. Collective bargaining requires both parties to confer in good faith, meaning they must manifest an attitude and conduct that will be conducive to reaching an agreement. Although the parties may discuss prohibited subjects of collective bargaining, § 15(3), MCL 423.215(3), prohibits them from bargaining over those subjects. Once the District made its position on the prohibited subjects clear, the Association acted in bad faith by continuing to insist that language concerning those subjects be carried forward to the successor collective bargaining agreement. By doing so, the Association crossed the line from discussing prohibited subjects to bargaining over them.

2. Because the provisions at issue concerned prohibited subjects of bargaining, it was not necessary for the parties to bargain to impasse before the District could bring its unfair labor practice charge.

Affirmed.

Thrun Law Firm, PC (by *Roy H. Henley*), for Calhoun Intermediate School District.

White, Schneider, Young & Chiodini, PC (by *Jeffrey S. Donahue* and *Erin M. Hopper*), for Calhoun Intermediate Education Association.

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

PER CURIAM. Respondent, Calhoun Intermediate Education Association (the Association), appeals by right the decision and order of the Michigan Employment Relations Commission (MERC), which granted the motion of charging party, Calhoun Intermediate School District (the District), for summary disposition. For the reasons stated in this opinion, we affirm.

The Association represents a bargaining unit of teachers and other professionals employed by the District. The parties' most recent collective bargaining agreement (CBA) expired on June 30, 2011. The expired CBA included terms that addressed teacher evaluation, teacher discipline, teacher layoff and recall procedures, and the procedure for filling vacancies.

On May 25, 2011, the parties commenced negotiations for a successor CBA. The parties met on two additional occasions before the Legislature enacted 2011 PA 103, which went into effect on July 19, 2011. Act 103 amended § 15(3) of the public employment relations act (PERA)[1] by adding Subdivisions (j)

[1] MCL 423.201 *et seq*.

through (p), which made certain matters prohibited subjects of bargaining for public school employers and the unions representing school employees. MCL 423.215(3). The parties agree that the amended language in § 15(3) affected the enforceability of the disputed provisions of the expired CBA.

On August 15, 2011, the District submitted a revised comprehensive proposal to the Association. The revised proposal limited the applicability of some of the disputed provisions to "non-tenured employees" and "probationary employees (other than probationary employees who are teachers)." The proposal also included language stating:

> Nothing in this proposal should be regarded as indicating that the Board of Education proposes or otherwise intends to continue any provisions of the 2009-2011 Master Agreement which pertain to prohibited subjects of bargaining in the successor collective bargaining agreement, to the extent that such provisions pertain to prohibited subjects of bargaining. Further, the Calhoun Intermediate Education Association is hereby also notified that the Board of Education will not enter into or execute any successor collective bargaining agreement to the 2009-2011 Master Agreement which contains provisions embodying or pertaining to any prohibited subject of bargaining, as are more particularly set forth in Section 15(3) of the Public Employment Relations Act.

The Association responded that the language could not be removed without bargaining and that it would not bargain over prohibited subjects. The Association further stated that any provision in the successor CBA that pertained to a prohibited subject would be unenforceable, and, as a result, those provisions could remain in the contract. The Association further suggested that the disputed provisions be moved to an appendix, but the District rejected that suggestion.

On September 6, 2011, the Association gave the District a package proposal that included provisions pertaining to the prohibited subjects. On October 3, 2011, both parties presented proposals. The District's proposal expressly stated that the District would not enter into a successor CBA that included any provisions pertaining to the prohibited subjects. The Association's package proposal, however, indicated that the provisions governing prohibited subjects of bargaining had been moved from the contract, but were included in a letter of agreement as an appendix to the CBA. The Association stated that the language would be moved back into the contract if 2011 PA 103 was found to be invalid, was repealed, or was modified by the Legislature. The District rejected the proposal, and the Association withdrew it.

After the October 3 bargaining session, the parties entered into mediation through MERC and were able to reach tentative agreements on a number of issues. However, on December 9, 2011, the District gave the Association another comprehensive proposal stating again that it would not enter into a successor CBA that included provisions addressing prohibited subjects. Further, the District warned the Association that further maintenance or presentation of proposals embodying the prohibited subjects would be considered a violation of the duty to bargain in good faith. On January 9, 2012, in spite of the District's warning, the Association presented another package proposal that included the disputed language. Further, on January 18, 2012, Michigan Education Association General Counsel, Arthur Przybylowicz, appeared before the District's board of education and requested that the language concerning prohibited subjects be carried over from the expired CBA into any successor agreement.

On January 24, 2012, the District submitted another comprehensive proposal to the Association. The proposal incorporated the parties' tentative agreements on contract language, but it again stated that the District would not enter into an agreement containing any provisions addressing prohibited subjects.

On February 9, 2012, the parties met with a mediator, but neither had a new proposal to present. At the conclusion of the meeting, the Association filed a petition for fact-finding, indicating that the unresolved issues were "wages, insurance, sick leave, recognition clause, and duration of agreement."

On February 21, 2012, the District filed a charge alleging that the Association committed an unfair labor practice in violation of PERA when it insisted on including unenforceable language in the successor CBA.

On February 29, 2012, shortly after the instant charge was filed, the Association presented another package proposal that retained the disputed language.

On April 26, 2012, the District filed a motion for summary disposition. Oral argument on the motion was held on May 29, 2012. On August 24, 2012, the administrative law judge (ALJ) assigned to hear the charge issued a written decision and recommended order finding that there were no material facts in dispute. She recommended that MERC order the Association to cease and desist from insisting as a condition of its agreement to a successor contract that the District agree to include provisions pertaining to prohibited subjects. She also recommended that the Association be ordered to cease and desist from bargaining in bad faith and obstructing and impeding the bargaining process by making proposals involving the prohib-

ited subjects even after the District unequivocally refused to bargain over those proposals.[2]

The Association filed exceptions, and the District filed a cross-exception. On September 15, 2014, MERC adopted the ALJ's recommendation, finding the Association had committed an unfair labor practice.

The parties agree that the disputed provisions are prohibited subjects of bargaining under § 15(3) of PERA. However, the Association argues that provisions pertaining to the prohibited subjects can be included in the successor CBA. The Association also argues that, because its insistence on maintaining the disputed provisions in the successor CBA did not result in an impasse, MERC could not make a finding that it engaged in an unfair labor practice.

"We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 639; 872 NW2d 710 (2015) (quotation marks and citation omitted). MERC's factual findings are "conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Police Officers Ass'n of Mich v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 586; 599 NW2d 504 (1999) (quotation marks and citation omitted). "MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Van Buren Co Ed Ass'n*, 309 Mich App at 639. We review de novo MERC's legal rulings. *St Clair Co Ed Ass'n v St Clair Intermediate Sch Dist*, 245 Mich App 498, 513; 630 NW2d 909 (2001).

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[2] The ALJ also dismissed an allegation that the Association acted in bad faith by proposing an illegal duration clause in the proposed successor CBA. That decision has not been challenged on appeal.

MERC found that the Association breached the duty to bargain in good faith when it repeatedly insisted on including provisions in a successor CBA that it acknowledged were prohibited under § 15(3) of PERA. In its decision and order, MERC reasoned:

> To determine whether a party has bargained in good faith, we examine the totality of the circumstances to decide whether a party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *Grand Rapids Pub Museum*, 17 MPER 58 (2004); *City of Springfield*, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Sch*, 1988 MERC Lab Op 86; *Kalamazoo Pub Sch*, 1977 MERC Lab Op 771, 776. In the present case, the record establishes that the Union continued to insist, as a condition of its agreement on a successor to the 2009-2011 collective bargaining agreement, that the Employer agree to include provisions on prohibited bargaining subjects. As a result of the Union's continued insistence on including the prohibited subjects in its bargaining proposals, the Employer was unable to assess whether the position the Union took on other issues was sincere or merely an attempt to urge the Employer to bargain over the prohibited topics. The Union's conduct obstructed and impeded the bargaining process and made resolution of the parties' dispute more difficult than it otherwise would be.
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> * * *
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> In conclusion, we agree with the ALJ that the Union violated its duty to bargain in good faith by unlawfully insisting as a condition of agreement that the Employer agree to include provisions on prohibited topics in the contract. We further agree with the ALJ that the Union violated its duty to bargain in good faith, and obstructed and impeded the bargaining process, by continuing to make proposals dealing with prohibited subjects after the Employer unequivocally refused to bargain over these proposals.

After review of the record, and giving due deference to the findings of fact by MERC, see *Police Officers Ass'n of Mich*, 235 Mich App at 586, we affirm.

"Collective bargaining as a process requires both parties to confer in good faith—to listen to each other." *Mich State AFL-CIO v Employment Relations Comm*, 453 Mich 362, 380; 551 NW2d 165 (1996) (opinion by BRICKLEY, C.J.), citing MCL 423.215(1).[3] "In essence the requirements of good faith bargaining [are] simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54; 214 NW2d 803 (1974). In *Detroit Police Officers*, our Supreme Court explained that the subjects of a collective bargaining agreement can be classified as mandatory, i.e., subjects that the parties are required to bargain over; permissive, i.e., subjects that the parties may bargain over; and illegal or prohibited,[4] i.e., subjects that the parties may discuss but that are unenforceable if included in a contract. *Id*. at 54-55 n 6.

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[3] MCL 423.215(1) provides:

> A public employer shall bargain collectively with the representatives of its employees as described in [MCL 423.211] and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

[4] Illegal subjects are synonymous with prohibited subjects. See *Mich State AFL-CIO*, 453 Mich at 380 (opinion by BRICKLEY, C.J.).

Although the parties may "discuss" prohibited subjects, § 15(3) of PERA prohibits them from "bargaining" over them. Further, MCL 423.215(4) provides:

> Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, *are within the sole authority of the public school employer to decide*. [Emphasis added.]

Thus, although the Association was free to "discuss" the prohibited subjects in this case, once the District made it clear that it did not want any provisions pertaining to the prohibited subjects to be included in the successor CBA, the Association had no authority to continue to insist that the language or any modification of it was maintained in the successor CBA. The District made its position clear on August 15, 2011, when it submitted a revised comprehensive proposal removing the provisions pertaining to prohibited subjects from the CBA and providing express notice that it would not sign a successor agreement containing provisions pertaining to the prohibited subjects. Thereafter, the Association presented package proposals containing the disputed language on September 6, 2011, October 3, 2011, January 9, 2012, and February 29, 2012.[5] In doing so, the Association crossed the line from

[5] The Association argues that not all provisions in a successor CBA are necessarily bargained-for provisions. It asserts that once a CBA exists, the parties need not start from scratch in crafting a new CBA. Instead, the parties may "generally determine which provisions will be bargained for in the successor agreement," and then the provisions that are not going to be bargained over are simply "rolled over" into the new agreement. However, given that the District in this case wants the disputed provisions removed and the Association wants the disputed provisions to be maintained, we are at a loss to understand how this provision can simply be "rolled over" into the new agreement without the parties agreeing on it. Further, the Association fails to explain how,

discussing a prohibited subject, which it is allowed to do, and began bargaining over it in spite of the District's clear statements that it would not include such language in the successor CBA. We conclude, as did MERC, that the Association's insistence on maintaining prohibited language in the successor CBA is an act of bad faith.

Finally, we reject the Association's assertion that the District was barred from filing an unfair labor practice complaint until an impasse was reached. This argument puts the cart before the horse. The issue was not a mandatory subject of bargaining—indeed, it was a prohibited subject of bargaining—so there is no basis to require that the parties bargain to impasse concerning it. Demanding that the right to discuss a prohibited subject of bargaining extend to a requirement that the discussion continue until it results in a bargaining impasse is fundamentally a demand for bargaining. Therefore, the District did not have to wait for an impasse to bring its claim.

We affirm MERC's decision that the Association committed an unfair labor practice.

SHAPIRO, P.J., and O'CONNELL and WILDER, JJ., concurred.

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after a party with sole authority as to a particular issue repeatedly declines to change its decision, the other party's further insistence on that change as part of the bargaining process does not become a demand to bargain on that issue.

In re SCHWEIN ESTATE

Docket No. 324305. Submitted January 6, 2016, at Lansing. Decided January 12, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 887.

Sandy Mead, personal representative of the estate of David Schwein, filed a claim in the Ingham County Probate Court against the estate for reimbursement of attendant care services she had provided to Schwein before his death. Respondents Donna Rogers, Phillip Barton, Kevin Barton, Terri Anderson, and Meredith Barton objected to the claim. Before his death, Schwein initiated a lawsuit against State Farm Mutual Automobile Insurance Company, seeking payment of personal protection insurance benefits. After Schwein's death, the estate settled his claims against State Farm for $962,530. The estate's assets totaled $1,043,355.56. Mead alleged that she was owed $1.5 million for the attendant care services she provided for Schwein over a 15-year period. She asserted that as the only remaining creditor of the estate, she was entitled to priority distribution over decedent's other heirs. Mead asked the court to approve a distribution of the settlement award, granting her $608,711.47 for the services she provided and granting a law firm $353,818.53 for representing Schwein and the estate in the State Farm action. Respondents objected to Mead's petition, arguing, in part, that Mead's claim against the estate was barred because she failed to comply with the timing requirements of MCL 700.3803(1), MCL 700.3804(3), and MCR 5.307(D) for presenting a claim against the estate. The probate court, Richard J. Garcia, J., ruled that Mead's claim was not barred by the court rules or the statutory time limits governing the presentation of claims against an estate. Accordingly, the court allowed Mead's claim and granted her request to distribute the assets of the estate. Respondents appealed. The Court of Appeals subsequently granted motions by Donna Rogers and Phillip Barton to dismiss them as appellants.

The Court of Appeals *held*:

A personal representative of an estate is not precluded by his or her official status from being a creditor of the deceased or asserting a claim against the estate. However, a personal representative owes a fiduciary duty to the heirs of the estate and may

not take advantage of his or her office to procure unfair advantage or influence because of the fiduciary relationship between a personal representative and the decedent's heirs. Once a personal representative provides notice to creditors of an estate under MCL 700.3801, MCL 700.3803(1) governs the time limits in which a creditor must present a claim that arose before the decedent's death in order to prevent the claim from being barred, and MCL 700.3804 governs how a creditor must present a claim. In this case, Mead argued that she was a known creditor and that because she did not send herself notice in compliance with MCL 700.3801(1), she had three years to assert her claim against the estate under MCL 700.3803(1)(c). Under this interpretation, Mead would have derived a benefit, i.e., having three years to present her claim against the estate under MCL 700.3803(1)(c)—rather than four months under MCL 700.3803(1)(a) or (b)—as a result of her own failure to provide proper notice to herself as a known creditor. Further, in order to provide proper notice under this interpretation, in accordance with MCR 5.208(B)(1), Mead would have been required to mail or personally serve herself with a copy of the notice that she drafted and then published as a general notice to creditors of the estate. Considering the statutory scheme as a whole, Mead's interpretation had to be rejected and her claim treated the same as those of every other general creditor of the estate. Therefore, in accordance with MCL 700.3801(1), she was required to present her claim within four months after the date of publication of the notice or be forever barred from asserting the claim. MCL 700.3804(3) and MCR 5.307(D) govern claims by a personal representative against the estate. In this case, Mead's contract claim against the estate was a claim by the personal representative because Mead was the personal representative at the time she asserted her claim against the estate. Accordingly, contrary to the decision of the probate court, Mead was also required to follow the additional procedures outlined in MCL 700.3804(3) and MCR 5.307(D) to bring her claim. MCL 700.3804(4) does state that the requirements of that subsection do not apply to a claim for compensation for services rendered or for reimbursement of expenses advanced by the personal representative. But that language is designed to exclude from the subsection's timing requirements only claims by a personal representative for reimbursement of expenses advanced or services rendered in the personal representative's official capacity as personal representative of the estate. The requirements of that subsection apply to claims by a personal representative that arose before the decedent's death. Mead published the notice to creditors on October 15, 2013, so the presentation period for her claim

expired on February 15, 2014, and Mead was required to give a copy of her claim to all interested persons by February 22, 2014. However, she did not file her request to allow the claim until July 31, 2014, several months after the statutory presentation period had expired. The probate court erred by allowing Mead's claim because she failed to provide the interested persons with notice of the claim not later than seven days after the time for the claim's original presentation expired.

Reversed and remanded.

1. EXECUTORS AND ADMINISTRATORS — PERSONAL REPRESENTATIVES — CLAIMS AGAINST THE ESTATE — LIMITATIONS PERIOD.

A personal representative of an estate who has a claim against the estate that arose before the decedent's death must present the claim within four months after the date of publication of the notice required by MCL 700.3801(1).

2. EXECUTORS AND ADMINISTRATORS — PERSONAL REPRESENTATIVES — CLAIMS AGAINST THE ESTATE.

MCL 700.3804(4) states that the requirements of that subsection do not apply to a claim for compensation for services rendered or for reimbursement of expenses advanced by the personal representative, but that language is designed to exclude from the subsection's timing requirements only claims by a personal representative for reimbursement of expenses advanced or services rendered in the personal representative's official capacity as personal representative of the estate; the requirements of that subsection apply to claims by a personal representative that arose before the decedent's death.

Molosky & Co (by *Donald J. Molosky* and *Jennifer J. Schafer*) for Sandy Mead.

The Darren Findling Law Firm, PLC (by *Darren M. Findling* and *Andrew J. Black*), for Kevin Barton, Terri Anderson, and Meredith Barton.

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

GADOLA, J. This case implicates the procedural requirements under the Estates and Protected Individu-

als Code (EPIC), MCL 700.1101 *et seq*., and the Michigan Court Rules for a personal representative to assert a claim against the estate when the claim arose before the decedent's death. Respondents appeal as of right the probate court's opinion and order concluding that (1) personal representative Sandy Mead's claim against the estate for reimbursement of attendant care services she provided to decedent before his death was not barred by MCL 700.3803(1), MCL 700.3804(3), or MCR 5.307(D), (2) Mead overcame the presumption that she provided the services gratuitously, and (3) the six-year statute of limitations governing contract claims did not bar her claim. We reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Decedent, David Lee Schwein, died on September 10, 2013. Decedent's heirs were his four living daughters—Sandy Mead, Barbara Whatley, Donna Rogers, and Terri Anderson—and the three children—Meredith Barton, Kevin Barton, and Philip Barton—of his predeceased daughter, Gail Barton. After decedent's death, Mead filed a petition asking the court to appoint her as personal representative of the estate. The probate court granted Mead's request and issued letters of authority on September 27, 2013. On October 15, 2013, Mead published a notice to creditors in the Lansing State Journal.

On July 31, 2014, Mead filed a petition asking the court to allow a claim and to grant her authority to distribute the estate's assets, which totaled $1,043,355.56. In her petition, Mead alleged that, in 1980, decedent was catastrophically injured in a motor vehicle accident and suffered a traumatic brain injury. As a result of his injuries, decedent required a wheel-

chair and eventually needed 24/7 attendant care services. Mead alleged that except for limited respite assistance, she provided all of decedent's attendant care services between August 1, 1998, and September 10, 2013. According to Mead, on April 30, 2013, decedent initiated a lawsuit against State Farm Mutual Automobile Insurance Company (State Farm), seeking payment of personal protection insurance (PIP) benefits to reimburse Mead for her services. Mead explained that after decedent's death, the estate settled decedent's claims against State Farm for $962,530. Mead alleged that she was owed $1.5 million for the attendant care services she provided over a 15-year period and that, as the only remaining creditor of the estate, she was entitled to priority distribution over decedent's other heirs. Mead asked the court to approve a distribution of the settlement award, granting her $608,711.47 for the services she provided and granting the law firm Molosky & Co. $353,818.53 for representing decedent and the estate in the State Farm action.

Respondents objected to Mead's petition, arguing that Mead's claim against the estate was barred because she failed to comply with the timing requirements of MCL 700.3803(1), MCL 700.3804(3), and MCR 5.307(D) for presenting a claim against the estate. Respondents also argued that Mead failed to overcome the presumption that she provided the attendant care services gratuitously, that she failed to present evidence that she was owed $1.5 million for the services rendered, and that her claim was partially barred by the six-year statute of limitations governing contract claims.[1]

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[1] Respondents attached a copy of decedent's complaint in the State Farm action to their objection. The State Farm complaint included two

Mead replied that her claim was timely because she provided notice to the interested persons within seven days of the settlement award becoming an asset of the estate. She contended that the entire $962,530 settlement award was intended to cover her attendant care services, which State Farm would not have agreed to pay if there was any plausible defense that she provided the services gratuitously. Finally, Mead argued that the six-year statute of limitations governing contract claims did not apply because she was asserting a claim to recover statutory PIP benefits, rather than asserting a claim for breach of contract.

Respondents replied that in the State Farm action, the United States District Court for the Eastern District of Michigan held that decedent was precluded from seeking statutory PIP benefits from before

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counts: one for breach of contract and one for violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. In the breach of contract claim, decedent alleged that State Farm failed to pay benefits to which he was entitled under his no-fault insurance policy, including, but not limited to, the following:

> a. All reasonable charges for reasonably necessary products, services, and accommodations for his care, recovery, and/or rehabilitation;
>
> b. Reasonably necessary attendant care services . . . ;
>
> c. Reasonably necessary nursing care services performed by family members and friends . . . ;
>
> d. Reasonably necessary transportation benefits . . . ;
>
> e. Reasonably necessary . . . modifications to his residence;
>
> f. Other personal protection benefits in accordance with the applicable No Fault provisions, including but not limited to, mechanisms of assistance;
>
> g. Case management services and appropriate or applicable therapies;
>
> h. Interest on overdue benefits payments.

April 29, 2012, under the one-year-back rule.[2] In light of the federal court's ruling, respondents argued that Mead should be estopped from seeking payment for any services she provided before April 29, 2012. They further argued that Mead admitted in her deposition that State Farm paid for decedent's 24/7 attendant care services between February 2012 and decedent's death in 2013. Respondents argued that Mead had no evidence that the State Farm settlement award was only intended to reimburse Mead for the attendant care services she provided because the federal court also allowed decedent to pursue a claim against State Farm for its potential violations of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., occurring between July 31, 1998 and March 28, 2001.

Respondents attached to their reply a copy of Mead's deposition, in which Mead stated that she began caring for decedent in 1998 when her mother died, but she worked full-time at other employment between 2000 and 2012. Mead explained that decedent had two in-home caregivers who assisted him several hours each day while she was at work. Mead testified that decedent began paying her some money for her services in 2006, but they first talked about formal payment in 2011 when she and decedent discovered that State Farm should have been paying for more attendant care services. Mead admitted that she never had a contract with decedent, and she did not keep a log of any hours worked until February 2012 when State Farm began paying for 24/7 attendant care.

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[2] See MCL 500.3145 (stating that a claimant in an action to recover PIP benefits "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced").

After considering the parties' arguments, the probate court issued an opinion and order on Mead's petition. The probate court first determined that Mead's claim was not barred by the court rules or the statutory time limits governing the presentation of claims against an estate. The court ruled that Mead's claim was not a "claim of the personal representative" because she provided the services "before her official appointment as personal representative." Rather, the court characterized her claim as a known creditor's claim against the estate. The court concluded that because Mead did not send herself written notice as a known creditor, which was required under MCL 700.3801(1) and (2), the period for filing her claim had not expired.

Regarding the presumption of gratuity, the court acknowledged that Mead was decedent's daughter, so the presumption was that she provided the services gratuitously. However, the court found that "[t]he services rendered reached far beyond 'household services' and included services typically performed by someone with at a minimum, nurse training and/or experience." The court stated that decedent's other caregivers were paid, and it appeared that "decedent brought his claim against State Farm to recover benefits he believed he was entitled to, and with the proceeds it is also reasonable to believe that he intended on paying whoever provided those attendant care services," apparently referring to Mead. The court concluded that Mead overcame the presumption of gratuity and found that an implied contract in fact existed between Mead and decedent. Finally, the court held that the six-year statute of limitations governing contract claims did not bar Mead's claim because the implied contract was a contract of continuous performance. Accordingly, the

trial court allowed Mead's claim and granted her request to distribute the assets of the estate.

II. STANDARD OF REVIEW

We review legal questions involving the proper interpretation and application of a statute de novo. *Peterson v Magna Corp*, 484 Mich 300, 306; 773 NW2d 564 (2009) (opinion by KELLY, C.J.). Appellate courts presume that the Legislature intended the meaning expressed by the plain, unambiguous language of a statute. *Id*. at 307. When interpreting statutes, courts should give effect to every phrase, clause, and word included. *Id*. "If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id*. Court rules are subject to the same rules of construction as statutes. *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010).

III. CLAIMS BY A PERSONAL REPRESENTATIVE AGAINST THE ESTATE

Respondents first argue that the probate court erred by concluding that Mead's claim was not barred by the timing requirements set forth in EPIC and the Michigan Court Rules. We agree.

Under Michigan law, a personal representative of an estate is not precluded by his or her official status from being a creditor of the deceased or asserting a claim against the estate. See *Eagen v Brainard*, 231 Mich 481, 482-484; 204 NW 98 (1925). However, a personal representative owes a fiduciary duty to the heirs of the estate. MCL 700.3703(1). "A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary." MCL 700.1212(1).

A personal representative may not take advantage of his or her office to procure unfair advantage or influence because of the fiduciary relationship between a personal representative and the decedent's heirs. See *DeCoo v Woodworth*, 96 Mich 362, 366; 55 NW 987 (1893); see generally *In re Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007), aff'd 480 Mich 915 (2007).[3]

Several different statutory provisions in EPIC are relevant to resolving the issues presented in this case. MCL 700.3801 governs the responsibility of a personal representative to provide creditors with notice of the opportunity to present a claim against the estate, and provides, in pertinent part, the following:

> (1) Unless notice has already been given, upon appointment a personal representative shall publish . . . a notice as provided by supreme court rule notifying estate creditors to present their claims within 4 months after the date of the notice's publication or be forever barred. A personal representative who has published notice shall also send, within the time prescribed in subsection (2), a copy of the notice or a similar notice to each estate creditor whom the personal representative knows at the time of publication or during the 4 months following publication . . . . For purposes of this section, the personal representative knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor's existence is reasonably ascertainable by the personal representative based on an investigation of the decedent's available records for the 2 years immediately preceding death and mail following death.
>
> (2) Notice to a known creditor of the estate shall be given within the following time limits:

[3] The Michigan Supreme Court affirmed the Court of Appeals' judgment in *Baldwin*, but the Supreme Court rejected some of the reasoning used by the Court of Appeals majority.

> (a) Within 4 months after the date of the publication of notice to creditors.
>
> (b) If the personal representative first knows of an estate creditor less than 28 days before the expiration of the time limit in subdivision (a), within 28 days after the personal representative first knows of the creditor.

Once a personal representative provides notice to creditors of an estate under MCL 700.3801, MCL 700.3803(1) governs the time limits in which a creditor must present a claim which arose before the decedent's death in order to prevent the claim from being barred. The statute states the following:

> A claim against a decedent's estate that arose before the decedent's death . . . is barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:
>
> (a) If notice is given in compliance with section 3801 . . . , within 4 months after the date of the publication of notice to creditors . . . .
>
> (b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.
>
> (c) If the notice requirements of section 3801 . . . have not been met, within 3 years after the decedent's death. [MCL 700.3803(1).]

MCL 700.3804 governs how a creditor must present a claim, and provides the following:

> (1) A claimant must present a claim against a decedent's estate in either of the following ways:
>
> (a) By delivering or mailing a written statement to the personal representative indicating the claim's basis, the claimant's name and address, and the amount claimed, or

> by filing with the court a written statement of the claim in the form prescribed by supreme court rule and delivering or mailing a copy of the statement to the personal representative. The claim shall be considered presented on receipt of the claim statement by the personal representative or the filing of the claim statement with the court, whichever occurs first. . . .
>
> (b) By commencing a proceeding to obtain payment of a claim against the estate in a court in which the personal representative may be subjected to jurisdiction. The commencement of the proceeding shall occur within the time limit for presenting the claim. The presentation of a claim is not required in regard to a matter claimed in a proceeding against the decedent that is pending at the time of death.
>
> * * *
>
> (3) A claim by the personal representative against the estate shall be in the form prescribed by supreme court rule. The personal representative must give a copy of the claim to all interested persons not later than 7 days after the time for the claim's original presentation expires. The claim must contain a warning that the personal representative's claim will be allowed unless a notice of objection is delivered or mailed to the personal representative within 63 days after the time for the claim's original presentation expires. This subsection does not apply to a claim for compensation for services rendered or for reimbursement of expenses advanced by the personal representative.

Finally, MCR 5.307(D) provides, "A claim by a personal representative against the estate for an obligation that arose before the death of the decedent shall only be allowed in a formal proceeding by order of the court."

On appeal, respondents argue that the notice requirements of MCL 700.3801 do not apply to Mead because, as the personal representative, she had actual notice of the opportunity to file a claim against the

estate. They argue that the period for presenting her claim should have begun when she published the notice to general creditors, such that she had four months to present her claim after October 15, 2013. See MCL 700.3803(1)(a). In contrast, Mead argues that she was a "known creditor" to herself as the personal representative and that, because she did not "send" herself notice in compliance with MCL 700.3801(1), she had three years to assert her claim against the estate under MCL 700.3803(1)(c). There is no dispute that Mead had actual knowledge of the notice because she posted the notice to general creditors in the Lansing State Journal on October 15, 2013. Rather, the question is whether EPIC requires a personal representative to formally "send" herself notice in order to trigger the time limits for presenting a claim against the estate.

MCL 700.3801 does not specifically address when the period begins to run for presentation of a claim against the estate by a personal representative. EPIC clearly contemplates that there is *some* applicable period that begins to run because MCL 700.3804(3) states that a personal representative "must give a copy of the claim to all interested persons not later than 7 days *after the time for the claim's original presentation expires*." (Emphasis added.) It is also clear that in EPIC, the Legislature imposed specific obligations on personal representatives to faithfully execute their duties for the benefit of the estate's successors[4] and imposed liability and damages when a personal representative fails to perform his or her duties on behalf of the estate.[5]

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[4] MCL 700.1212(1).

[5] See MCL 700.3712 ("If the exercise or the failure to exercise a power concerning the estate is improper, the personal representative is liable

The probate court ruled that Mead was a "known creditor" for purposes of MCL 700.3801(1) because she was aware of the existence of her claim. The court concluded that because Mead did not send herself a copy of the notice to creditors, MCL 700.3803(1)(c) provided that she had three years to present her contract claim against the estate. Under the probate court's interpretation of MCL 700.3801(1), however, Mead would derive a benefit, i.e., having three years to present her claim against the estate under MCL 700.3803(1)(c) rather than four months under MCL 700.3803(1)(a) or (b), as a result of her own failure to provide proper notice to herself as a known creditor. Further, in order to provide proper notice under the probate court's interpretation, Mead would have been required to mail or personally serve herself with a copy of the notice that she drafted and then published as a general notice to creditors of the estate. See MCR 5.208(B)(1) ("Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity . . . is known to . . . the personal representative.").

Statutes should be construed to avoid absurd results. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).[6] We decline to adopt an interpretation of

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to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust."); see also MCL 700.1308.

[6] The absurd results rule "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Pub Citizen v US Dep't of Justice*, 491 US 440, 470; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring). "[A] result is only absurd if it is quite impossible that the Legislature could have intended the result . . . ." *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 346; 791

MCL 700.3801 that would include a personal representative within the definition of "known creditor" because the statutory definition does not plainly apply, and because such an interpretation would either require a personal representative to perform the nonsensical task of mailing or personally serving herself with a copy of the notice that he or she had already published, or allow a personal representative to benefit from his or her own nonfeasance in not serving notice upon herself. Rather, considering the statutory scheme as a whole, we conclude that Mead's claim should be treated the same as that of every other general creditor of the estate, requiring her "to present [her] claims within 4 months after the date of the notice's publication or be forever barred." MCL 700.3801(1).

The probate court further concluded that Mead's claim was not "a 'claim of the personal representative' " because her claim arose before she was issued her letters of authority, so she was not required to follow the additional procedures outlined in MCL 700.3804(3) and MCR 5.307(D) to bring her claim. Neither MCL 700.3804(3) nor MCR 5.307(D) includes the phrase "a claim *of* the personal representative." Instead, those provisions govern claims "*by* the [or a] personal representative against the estate." MCL 700.3804(3) (emphasis added); MCR 5.307(D) (emphasis added). In this case, Mead's contract claim against the estate was a claim *by* the personal representative because Mead was the personal representative at the time she asserted her claim against the estate.

Moreover, MCR 5.307(D) states that it applies to claims "by a personal representative against the estate

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NW2d 897 (2010) (MARKMAN, J., dissenting) (quotation marks, citations, and brackets omitted), overruled by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012).

for an obligation that arose before the death of the decedent . . . ." (Emphasis added.) Under the probate court's interpretation, MCR 5.307(D) would be meaningless. There could be no such thing as a claim by a personal representative that arose before the decedent's death because the letters of authority for a personal representative are not issued until after a decedent's death. See MCL 700.3103. Likewise, the last sentence of MCL 700.3804(3) states that "[t]his subsection does not apply to a claim for compensation for services rendered or for reimbursement of expenses advanced by the personal representative." Reading this sentence in the context of the entire statutory subsection makes clear that the language is designed to exclude from its timing requirements claims by a personal representative for reimbursement of expenses advanced or services rendered in the personal representative's official capacity as personal representative of the estate, while applying those requirements to claims by a personal representative that arose before the decedent's death. Therefore, the preceding language in MCL 700.3804(3) contemplates a claim by a personal representative against the estate other than a claim for services rendered or expenses advanced in the personal representative's official capacity.

In sum, the presentation period for Mead's claim was four months after the notice's publication under MCL 700.3801(1), and MCL 700.3804(3) and MCR 5.307(D) apply to Mead's claim. Mead published the notice to creditors on October 15, 2013, so the presentation period for her claim expired on February 15, 2014, and Mead was required to give a copy of her claim to all interested persons by February 22, 2014. However, she did not file her request to allow the claim until July 31, 2014, several months after the statutory presentation period had expired. The probate court

erred by allowing Mead's claim because she failed to provide the interested persons with notice of the claim not later than seven days after the time for the claim's original presentation expired. Further, by treating Mead as a known creditor, the probate court permitted her to gain an unfair advantage over other potential creditors and the other heirs of the estate by failing to carry out what would have been her own fiduciary duty as personal representative (the act of serving herself with the notice to creditors that she herself crafted and published). It is at best difficult to imagine that the Legislature intended that a personal representative who has actual notice would (1) be required to serve notice upon herself and (2) be in position to give herself up to three years to present a claim by failing to exercise a fiduciary duty, when general creditors, some of whom might never receive actual notice, have only four months to do so.[7]

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

RONAYNE KRAUSE, P.J., and O'BRIEN, J., concurred with GADOLA, J.

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[7] In light of our conclusion that Mead's claim against the estate was barred under EPIC and the Michigan Court Rules, we need not address respondents' remaining arguments that Mead's claim was barred by collateral estoppel, the one-year-back rule, and the six-year statute of limitations governing contract claims, or that Mead failed to overcome the presumption of gratuity or provide adequate evidentiary support to substantiate the amount of her claim.

HOME-OWNERS INSURANCE COMPANY v SMITH

Docket No. 322694. Submitted January 6, 2016, at Grand Rapids. Decided January 12, 2016, at 9:10 a.m.

Home-Owners Insurance Company and Auto-Owners Insurance Company brought a declaratory judgment action in the Kalamazoo Circuit Court against Kirsten Smith (as next friend of AS) and Sherry Gesmundo (as next friend of Allen Dueweke). The declaratory judgment action related to an underlying action brought by Smith in the same court against the Bronson Athletic Club and others (including Joseph Gesmundo, who was Dueweke's next friend at that time, although Sherry Gesmundo was subsequently substituted as his next friend), seeking damages for Dueweke's sexual assault of AS while he was a counselor at a camp run by Bronson. Home-Owners and Auto-Owners had issued policies to Joseph Gesmundo that covered damages for personal or bodily injury but excluded injury reasonably expected or intended by the insured (in the case of the Home-Owners policy) or expected or intended by the insured (in the case of the Auto-Owners policy). Home-Owners had agreed to defend the underlying suit but reserved the right to contest its obligation to do so, leading to the instant action. Home-Owners and Auto-Owners moved for summary disposition, arguing that they had no duty to indemnify or defend with regard to the underlying suit because it was based on Dueweke's sexual misconduct, so the resulting injuries were intended or expected and damages arising from the injuries were not covered under the policies. The court, Alexander C. Lipsey, J., denied the motion, and Home-Owners and Auto-Owners sought leave to appeal. The Court of Appeals denied the application, but the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 498 Mich 864 (2015).

The Court of Appeals *held*:

1. Unless otherwise defined in the policy, the policy's terms will be read and enforced according to their commonly used meaning. Clear and specific exclusions must be enforced as written so that the insurance company is not held liable for a risk

it did not assume. A court must first determine if an insurance policy provides coverage and then determine if coverage is excluded.

2. There was no dispute that Dueweke was an insured under both policies or that the underlying suit alleged bodily injuries as defined under the policies. The Home-Owners policy covered losses resulting from an occurrence, which the policy defined as an accident that results in bodily injury. While the policy did not define "accident," caselaw has held that an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. Accidents must be evaluated from the standpoint of the insured, not the injured party. The appropriate focus of the term "accident" must be on both the injury-causing act or event and its relation to the resulting property damage or personal injury. If the insured intended both the act and the consequences, the act would not be an accident. On the other hand, if the insured intended the act but not the consequences, the act would constitute an accident unless the intended act created a direct risk of harm from which the insured should reasonably have expected the consequences. The question is not whether a reasonable person would have expected the consequences, but whether the insured should reasonably have expected them.

3. Dueweke's deposition testimony established that he reasonably should have expected to injure AS when he committed sexual misconduct against her. He testified that at the time he molested AS, he was aware of what sex was, knew that it was wrong to touch a person in a sexual way without that person's permission, and knew that such nonconsensual touching could harm the other person in significant ways. Although Dueweke also testified that he was not thinking of injuring AS or the possibility of injuring her when he molested her, the fact that he knew that such injury was possible meant that he reasonably should have expected that molesting AS would injure her. Because reasonable minds could not have drawn a different conclusion from this evidence, there was no genuine question of fact that Dueweke's sexual assault did not constitute an accident or an occurrence under the Home-Owners policy, and the policy did not cover damages arising from those actions. Therefore, the trial court erred by not granting Home-Owners summary disposition.

4. Moreover, the exclusionary provision in the Home-Owners policy (which stated that the policy did not apply to bodily injury reasonably expected or intended by the insured) also precluded

coverage. There was no genuine question of fact that Dueweke was aware that harm was likely to follow from his conduct. The Auto-Owners policy also precluded recovery for damage expected or intended by the insured, so the trial court should also have granted summary disposition to Auto-Owners.

Reversed and remanded for entry of an order granting Home-Owners and Auto-Owners summary disposition.

Willingham & Coté, PC (by *Kimberlee A. Hillock* and *John A. Yeager*), for Home-Owners Insurance Company and Auto-Owners Insurance Company.

Miller Johnson (by *Craig H. Lubben* and *Patrick M. Giacomo*) for Sherry Gesmundo.

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

PER CURIAM. Plaintiffs Home-Owners Insurance Company and Auto-Owners Insurance Company appeal the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for entry of an order granting plaintiffs' motions.

On August 20, 2012, 16-year-old Allen Dueweke was employed by the Bronson Athletic Club as a camp counselor. He was supervising a group of young children in a gymnasium. AS, a seven-year-old girl, was among the children Dueweke was supervising. While Dueweke was playing a game of tag with AS, he went into a storage closet connected to the gymnasium. AS followed him, and Dueweke closed the door. While he was alone with AS in the closet, he pulled down her pants and underwear, pulled down his own pants and underwear, and touched AS's vagina. Then, he caused AS to touch his penis. As a result of this incident, Dueweke was charged criminally and pleaded guilty of fourth-degree criminal sexual conduct on March 7,

2013. Defendant Kristen Smith, as next friend of AS, sued Joseph Gesmundo, as next friend of Dueweke, on May 2, 2013. Defendant Sherry Gesmundo was appointed as Dueweke's next friend on July 8, 2013, and was substituted for Joseph. Kristen alleged that Dueweke had committed battery and intentional infliction of emotional distress (IIED) upon AS on August 20, 2012, causing AS to suffer physical pain and mental anguish resulting in costs for medical care and treatment.[1]

Home-Owners and Auto-Owners had each issued an insurance policy to Joseph that was in effect when Dueweke committed the sexual misconduct against AS. The Home-Owners policy stated that Home-Owners would "pay all sums any **insured** becomes legally obligated to pay as damages because of or arising out of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies." The policy defined an "occurrence" as "an accident that results in **bodily injury** or **property damage** and includes, as one **occurrence**, all continuous or repeated exposure to substantially the same generally harmful conditions." The policy further stated that Home-Owners would settle or defend "any claim or suit for damages covered by this policy." The policy contained an exclusionary provision stating that it did not cover bodily injury "reasonably expected or intended by the **insured**." The Auto-Owners policy stated that Auto-Owners would cover "damages be-

[1] Kristen also alleged counts of negligence and willful or wanton misconduct against Bronson Athletic Club and Medsport Athletic Clubs, L.L.C., as the manager of Bronson's operations. The trial court's grant of summary disposition to Bronson and Medsport on May 16, 2014, was affirmed by this Court. *Smith v Bronson Lifestyle Improvement & Research Ctr Co*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 321813).

cause of personal injury or property damage which occurs anywhere in the world." However, it excluded from coverage "[p]ersonal injury or property damage expected or intended by the insured."

Joseph claimed coverage under the policies with regard to the underlying suit. Home-Owners informed Joseph that it would defend the underlying suit but reserved its right to contest its obligation to do so. Plaintiffs brought this suit, requesting a declaratory judgment from the trial court that they had no duty to indemnify or defend with regard to the underlying suit. They argued that because the underlying suit was based on Dueweke's sexual misconduct, the resulting injuries were intended or expected; therefore, damages arising from those injuries were not covered under either the Home-Owners or the Auto-Owners policies. Plaintiffs moved for summary disposition, arguing that Dueweke had intended or expected to injure AS "as a matter of law." They asserted the following for their position: (1) Dueweke's own deposition testimony, (2) the fact that he committed sexual misconduct, and (3) the claims in the underlying suit alleged intentional torts. The trial court denied their motion, holding that Dueweke's deposition testimony did not establish as a matter of law that he intended or expected to injure AS, that because he was a minor such intent could not be inferred as a matter of law, and that the torts of battery and IIED did not require an intent to injure. This Court denied plaintiffs' application for leave to appeal the trial court's denial of their motion for summary disposition, but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Home-Owners Ins Co v Smith*, 498 Mich 864 (2015).

This Court reviews 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). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. Also, "the construction and interpretation of an insurance contract is a question of law" that this Court reviews de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

"An insurance policy is construed in accordance with well-settled principles of contract construction." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). "The goal of contract interpretation is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). Thus, unless otherwise defined in the policy, its terms will be read and enforced according to their " 'commonly used meaning.' " *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002), quoting *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112, 114; 595 NW2d 832 (1999). Clear and specific exclusions must be enforced as written so that the insurance company is not held liable for a risk it did not assume. *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596-597; 489 NW2d 444 (1992). A court must first determine if an insurance policy provides coverage, and then it must determine if coverage is excluded. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

There is no dispute that Dueweke is an insured under the Home-Owners and Auto-Owners policies because he is Sherry's son; Sherry was married to Joseph Dueweke, and all three resided together at the time of the sexual misconduct. There is also no dispute that the underlying suit alleges bodily injuries as defined under the policies. The Home-Owners policy covered loss resulting from an occurrence, which the policy defined as "an accident that results in **bodily injury** . . . ." The policy did not define "accident," but in such cases the Supreme Court has "repeatedly stated that an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *McCarn*, 466 Mich at 281 (quotation marks and citations omitted). "Accidents are evaluated from the standpoint of the insured, not the injured party." *Id*. at 282. " '[T]he appropriate focus of the term "accident" must be on both "the injury-causing *act* or *event* and its relation to the resulting property damage or personal injury." ' " *Id*., quoting *Masters*, 460 Mich at 115 (additional citation omitted).

> [I]f both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured. [*McCarn*, 466 Mich at 282-283.]

"[T]he question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences." *Id*. at 283.

Because there is no evidence that Dueweke intended to harm AS, his actions "constitute[d] an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured." *Id*. We conclude that Dueweke's deposition testimony establishes that he "reasonably should have expected" to injure AS when he committed sexual misconduct against her. *Id*. Dueweke testified that at the time he molested AS, he (1) was aware of what sex was, (2) knew it was wrong to touch a person in a sexual way without asking that person's permission, (3) knew that such nonconsensual touching could harm the other person, (4) knew "that it was as big of a deal as it was" when he was in the closet with AS, (5) knew "the significant impacts" that nonconsensual sexual touching could have on a person, and (6) knew that such touching could cause lifelong problems. Although Dueweke also testified that he was not thinking of injuring AS or the possibility of injuring her at the time he molested her, the fact that he knew that injury was possible meant that he "reasonably should have expected" that molesting her would injure her. *Id*. We conclude that because reasonable minds could not draw a different conclusion from this evidence, *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009), there is no genuine question of fact that Dueweke reasonably should have expected his actions to injure. Therefore, there is no genuine question of fact that Dueweke's sexual assault did not constitute an "accident" or an "occurrence" under the Home-Owners policy. *McCarn*, 466 Mich at 281-283. Because Dueweke's actions did not constitute an "occurrence" under the plain meaning of the policy, the Home-Owners policy did not cover damages arising from those actions. *Id*. Therefore,

summary disposition should have been granted to Home-Owners regarding coverage under its policy. *Latham*, 480 Mich at 111.

Moreover, the exclusionary provision in the Home-Owners policy precludes coverage. That provision stated that the policy did not apply to bodily injury "reasonably expected or intended by the **insured**." The inclusion of the phrase "by the insured" indicates that the exclusion applies only if the insured subjectively reasonably expected or intended injury. *Harrington*, 455 Mich at 383. The counts of battery and IIED against Dueweke in the underlying suit are premised on injuries AS suffered as a result of Dueweke's sexually touching her on August 20, 2012. There is no dispute that Dueweke acted intentionally when he touched her. Moreover, he admitted in his deposition testimony that when he engaged in that touching, he was aware that the conduct could cause injury. Despite the fact that Dueweke also testified that he did not intend to injure AS and was not thinking of injuring her when he engaged in the sexual misconduct, his testimony shows that there is no genuine question of fact that he was aware that "harm was likely to follow from his conduct." *Id*. at 384. Thus, the policy exclusion for bodily injury "reasonably expected or intended by the insured" applies and is another basis for granting Home-Owners summary disposition. See *id*. at 385-386; *Latham*, 480 Mich at 111. Additionally, the Auto-Owners policy also precludes recovery for damage "expected or intended by the insured," *Harrington*, 455 Mich at 385-386, so summary disposition should also have been granted to Auto-Owners, *Latham*, 480 Mich at 111.

Sherry argues that under *Fire Ins Exch v Diehl*, 450 Mich 678, 681, 690; 545 NW2d 602 (1996), overruled in

part on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59, 63; 664 NW2d 776 (2003), this Court cannot conclude as a matter of law that Dueweke reasonably expected to injure AS because Dueweke was a minor at the time he committed sexual misconduct. In *Diehl*, 450 Mich at 681, a boy committed sexual misconduct when he was between seven and nine years old against a girl who was younger than he. The boy testified that he did not intend to injure the girl and that he did not know that his conduct could injure her. *Id*. at 681-682. The girl's mother sued the boy's parents for physical and emotional damages. *Id*. at 682. The plaintiff in that case insured the boy and his parents and sought a declaratory judgment that it was under no obligation to indemnify or defend. *Id*. The plaintiff argued that the policy excluded coverage for intentional acts and that because the damages arose from sexual misconduct, the boy's intent to injure must be inferred as a matter of law. *Id*. Our Supreme Court held that "courts should infer the intent to injure where an adult sexually assaults a child." *Id*. at 689-690. But the Court ruled that inferring intent to injure as a matter of law is inappropriate when a child sexually assaults someone because "[c]hildren, as a group, do not have the capability to understand the consequences of their sexual acts." *Id*. at 690.

Diehl is inapplicable because Dueweke's deposition testimony shows as a matter of undisputed fact that he should have reasonably expected his conduct to injure AS, as discussed above. Therefore, no legal inference is needed to arrive at this conclusion. In other words, *Diehl* held that "courts should infer the intent to injure where an adult sexually assaults a child." *Id*. at 689-690. This is because "certain acts . . . are of such a nature that the insured's intent to injure can be inferred as a matter of law." *State Mut Ins Co v Russell*,

185 Mich App 521, 526; 462 NW2d 785 (1990). Such an inference is improper when a child commits sexual misconduct because children as a group do not understand the consequences of such actions. *Diehl*, 450 Mich at 690. Here, it is not the fact that Dueweke committed sexual misconduct—i.e., it was not his "act" of sexual misconduct—that allows this Court to conclude that there is no dispute of material fact that Dueweke should reasonably have expected or intended injury; rather, it is his own deposition testimony that requires such a conclusion. See *McCarn*, 466 Mich at 285. Because *Diehl* does not apply to this case, we decline to address plaintiffs' arguments about why it compels this Court to infer Dueweke's intent as a matter of law. Further, because summary disposition for plaintiffs is proper for the reasons discussed, this Court does not need to address plaintiffs' remaining arguments.

We reverse the trial court's order denying plaintiffs' motions for summary disposition and remand for the trial court to enter an order granting plaintiffs' motions. We do not retain jurisdiction.

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

CITY OF FRASER v ALMEDA UNIVERSITY

Docket No. 323499. Submitted December 2, 2015, at Detroit. Decided January 14, 2016, at 9:00 a.m.

The city of Fraser brought an action in the Macomb Circuit Court, alleging that Almeda University violated the Authentic Credentials in Education Act, MCL 390.1601 *et seq*. Defendant is an online university, incorporated in the Caribbean island of Nevis, that offers "Life Experience" degrees. Between 2003 and 2009, several of plaintiff's employees, all police officers, obtained degrees from defendant. None was required to complete any classes, coursework, research, or exams to receive the degrees. After obtaining the degrees, 11 of plaintiff's employees used the degrees to increase their salaries and to obtain educational allowance reimbursements. Defendant and plaintiff both moved for summary disposition. The court, John C. Foster, J., ruled in favor of plaintiff and awarded it $600,000 in damages. Defendant appealed.

The Court of Appeals *held*:

1. Courts use a three-part test to determine whether a defendant has minimum contacts with Michigan to the extent that limited personal jurisdiction may be exercised in accordance with due process. First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. In this case, by accepting applications and payments from plaintiff's employees through its website, even after learning that they lived in Michigan—and subsequently continuing to transact business with those employees in Michigan by awarding them degrees, mailing diplomas to Michigan addresses, and offering additional alumni products and services—defendant purposefully availed itself of the privilege of conducting activities in Michigan. Second, the cause of action—the issuance of fraudulent academic credentials in violation of MCL 390.1603—arose directly from defendant's activities in

Michigan, i.e., conducting an academic program and issuing diplomas for a price to Michigan residents. Third, the record clearly indicates that defendant established multiple business relationships with Michigan residents and issued diplomas to customers in Michigan after accepting the customers' applications and fees. Especially given that defendant's business is conducted entirely online, and defendant does not have an actual campus, it is sensible that it should be subject to jurisdiction in the states—including Michigan—where it conducts its business. Therefore, the trial court's exercise of jurisdiction over defendant was reasonable.

2. MCL 390.1603 states that a person shall not knowingly issue or manufacture a false academic credential in this state. Defendant conceded that any academic credential issued by it qualified as a false academic credential under Michigan law. The term "issue" in MCL 390.1603 is not defined by the act. In light of dictionary definitions of the term, "issue" means, in conjunction with "in this state," to put forth or distribute officially in Michigan, such that a false academic credential is "issued" in Michigan if it is distributed to or provided by mail or electronically to an individual in the state of Michigan. This understanding of "issue" is consistent with the purpose of the statute. The trial court correctly ruled that defendant issued fraudulent academic credentials in Michigan in violation of MCL 390.1603.

3. Under MCL 390.1605, a person damaged by a violation of the act may bring a civil action and may recover costs, reasonable attorney fees, and the greater of either the person's actual damages or $100,000. Although defendant was correct that plaintiff's employees were also a cause of plaintiff's loss, defendant points to no requirement under Michigan law that a defendant must be the sole cause of the plaintiff's loss in order for the plaintiff to recover under the act.

4. Defendant argued that it was entitled to assert that plaintiff waived its right to damages because it knowingly accepted the fraudulent degrees from its employees and, therefore, acted with unclean hands. One seeking the protection of an equitable defense must do so with clean hands, and a party who has acted in violation of the law is not before a court of equity with clean hands. Defendant acted in violation of MCL 390.1603. Accordingly, defendant was barred from raising an equitable defense against plaintiff because a defendant with unclean hands may not defend on the ground that the plaintiff has unclean hands as well.

5. Plaintiff's claims were subject to the six-year period of limitations in MCL 600.5813. Plaintiff filed its complaint on January 31, 2013. Therefore, to fall within the limitations period, the degrees in question must have been issued no earlier than January 31, 2007. Plaintiff conceded that only 1 of the 11 degrees in question was issued on or after January 31, 2007. The trial court, however, applied the continuing-violations doctrine to plaintiff's claims, concluding that each of the 11 claims continued to accrue until 2009 when defendant issued the last degree to one of plaintiff's employees. The trial court's application of the continuing-violations doctrine was in error given that the Michigan Supreme Court has held that the continuing-violations doctrine is contrary to Michigan law and has no continued place in the jurisprudence of this state. Accordingly, only one of plaintiff's claims, that which accrued after January 31, 2007, is allowed under the statute of limitations, and the trial court erred by holding otherwise.

6. The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. But the doctrine is only applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party. In this case, defendant was not entitled to assert the equitable defense of laches because it came before the trial court with unclean hands. Defendant also proffered no evidence in the trial court demonstrating prejudice related to the filing of plaintiff's timely filed claim. Accordingly, the trial court correctly rejected defendant's laches argument.

7. The United States Constitution grants Congress the power to regulate commerce with foreign nations and among the states. The dormant Commerce Clause is an extension of the Commerce Clause, and it prohibits state laws that discriminate against or unduly burden interstate commerce. In this case, there was no basis from which to conclude that the act directly controls commerce occurring wholly outside the boundaries of Michigan and exceeds the inherent limits of Michigan's authority. Nor was there a basis from which to conclude that the act facially discriminates against interstate commerce. Rather, the act merely regulates evenhandedly with only incidental effects upon interstate commerce. There was no indication that the burden imposed on interstate commerce was clearly excessive in relation to the putative local benefit.

Affirmed in part, reversed in part, and remanded.

MURRAY, P.J., concurring in part and dissenting in part, joined the majority's decision to affirm the trial court's order denying defendant's motion for summary disposition on the basis of no personal jurisdiction, but dissented from its holding that MCL 390.1603 applied to defendant, and would have reversed the trial court's judgment and remanded for entry of an order granting summary disposition in favor of defendant. Sections 3 and 4 of the act contain the act's prohibitions, and each section addresses a different concern. In § 3, MCL 390.1603, the Legislature prohibits persons (who are not qualified institutions) from issuing or manufacturing false academic credentials in this state. This section prevents diploma mills from operating (issuing or manufacturing academic credentials) in this state. Section 4, MCL 390.1604, focuses on limiting an individual's use of a false academic credential by prohibiting individuals from using false academic credentials in certain circumstances, including in employment situations as was done by the Fraser officers. Section 3 focuses exclusively on the actions of the issuing entity. The credentials issued by defendant were put forth or distributed by defendant outside Michigan. Because defendant did not issue the academic credentials in Michigan, § 3 simply did not apply. Construing "issue" to mean "mailing" or "delivering," which is what the majority opinion essentially does, expands the statute beyond what the Legislature provided for in the words of the statute. Just as importantly, recognizing and enforcing the separate sections of the act and the different issues they address would ensure that the objectives underlying the act were enforced.

ACTIONS — AUTHENTIC CREDENTIALS IN EDUCATION ACT — ISSUING FALSE ACADEMIC CREDENTIALS.

Under MCL 390.1603, a person shall not knowingly issue or manufacture a false academic credential in this state; the term "issue" means, in conjunction with "in this state," to put forth or distribute officially in Michigan, such that a false academic credential is "issued" in Michigan if it is distributed to or provided by mail or electronically to an individual in the state of Michigan.

Foley & Mansfield (*by Gregory M. Meihn*) for city of Fraser.

Bodman PLC (by *Brian C. Summerfield*) and *Alexander Paykin* for Almeda University.

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

RIORDAN, J. Defendant Almeda University appeals as of right the trial court's order granting plaintiff City of Fraser's motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves the Authentic Credentials in Education Act (the Act), MCL 390.1601 *et seq*. Defendant is an online university, incorporated in the Caribbean island of Nevis, that offers "Life Experience" degrees to prospective "students." All interactions with those students take place through defendant's website.

To obtain a degree, an applicant submits an electronic application and a résumé outlining the applicant's "verifiable professional and educational achievements . . . ." If defendant determines that an applicant is eligible to receive the requested degree, the student is required to make an online credit card payment of $499 for a bachelor's degree, $795 for a master's degree, or $1,495 for a doctoral degree. Once the applicant pays the online fee, defendant mails the desired degree directly to the applicant's home. In addition to providing degrees, defendant offers assistance with résumés, job applications, and interviews and markets promotional apparel bearing defendant's name for purchase.

On its website, defendant states that it has "over 26,000 online students in over 7,000 cities worldwide." It is undisputed that some of those students are Michigan residents. At one time, defendant highlighted on its website the success of two Michigan residents who were awarded degrees by defendant.

Plaintiff is a municipality located in Macomb County. Between 2003 and 2009, 16 of its employees, all police officers, obtained degrees from defendant. None of the employees was required to complete any classes, coursework, research, or exams to receive the degrees. At issue in this case are degrees issued to 11 of plaintiff's employees between June 6, 2003, and March 5, 2009. After obtaining these degrees from defendant, the 11 employees used the degrees to increase their salaries between $1,000 and $3,000 per year, depending on the type of degree purchased. Along with increasing those employees' compensation, plaintiff reimbursed 11 of them with educational allowances. Overall, plaintiff paid a total of $143,848 to the employees for the purchase of Almeda degrees.

On January 31, 2013, plaintiff filed a one-count complaint against defendant, alleging that defendant violated the Act by holding itself out as an institution authorized to award academic degrees. Plaintiff sought more than $1 million in damages, $100,000 for each of plaintiff's employees who used Almeda degrees for salary increases and tuition reimbursement.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(1) (court lacks jurisdiction over the party), (5) (party asserting claim lacks legal capacity to sue), and (8) (failure to state a claim). Most relevant to this appeal, defendant argued that the trial court did not have personal jurisdiction over defendant. The trial court disagreed and denied defendant's motion.

Plaintiff subsequently filed its own motion for summary disposition pursuant to MCR 2.116(C)(10), contending that defendant's admissions that it lacked accreditation under state or federal law entitled plaintiff to an order of liability against defendant and damages in plaintiff's favor. In its response, defendant

denied liability on the basis that (1) the Act requires that degrees be issued or manufactured *in* Michigan to prove liability because Michigan cannot control behavior that lawfully occurs outside the state, and (2) since the degrees were only mailed to Michigan residents, defendant did not violate the Act. Defendant also asserted that plaintiff was not damaged by defendant's conduct, but by its own employees who used the degrees to obtain additional pay and tuition reimbursement. Finally, defendant asserted that plaintiff waived its right to sue defendant under the Act because plaintiff, which had known about the situation since at least 2007, inexplicably waited until 2013 to file the action and continued to accept defendant's degrees from its employees and increase their pay after it discovered the details of the way the degrees were earned and defendant's lack of accreditation.

The trial court ruled in plaintiff's favor and awarded it $600,000 ($100,000 each for the six degrees issued by defendant after the Act took effect in 2005).

II. GENERAL STANDARDS OF REVIEW

We review a trial court's decision regarding a motion for summary disposition de novo. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). Defendant's first claim on appeal arises from the trial court's denial of its motion for summary disposition under MCR 2.116(C)(1). "When reviewing a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(1), the trial court and this Court consider the pleadings and documentary evidence submitted by the parties in a light most favorable to the nonmoving party." *Yoost*, 295 Mich App at 221.

The rest of the issues raised on appeal arise from the trial court's grant of summary disposition in favor of

plaintiff under MCR 2.116(C)(10). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties[.]' " *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 11-12; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. PERSONAL JURISDICTION

Defendant first argues that the trial court erred by denying its motion for summary disposition on the ground that the court lacked personal jurisdiction over defendant. We disagree.

A. STANDARD OF REVIEW

We review de novo, as a question of law, "whether a court possesses personal jurisdiction over a party . . . ." *Yoost*, 295 Mich App at 219. We also review de novo whether an exercise of jurisdiction over defendant, a nonresident corporation, is consistent with the notions of fair play and substantial justice under the Due Process Clause of the Fourteenth Amendment. *Id*.

When the defendant has brought a motion for summary disposition pursuant to MCR 2.116(C)(1),

> [t]he plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat [the] motion for summary disposition. The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties. Thus, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. [*Yoost*, 295 Mich App at 221 (quotation marks and citations omitted).]

B. ANALYSIS

In *Yoost*, 295 Mich App at 222-223, we summarized the proper analysis for determining whether a trial court has properly exercised personal jurisdiction over a defendant:

> When examining whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court employs a two-step analysis. First, this Court ascertains whether jurisdiction is authorized by Michigan's long-arm statute. Second, this Court determines if the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. Both prongs of this analysis must be satisfied for a Michigan court to properly exercise limited personal jurisdiction over a nonresident. Long-arm statutes establish the nature, character, and types of contacts that must exist for purposes of exercising personal jurisdiction. Due process, on the other hand, restricts permissible long-arm jurisdiction by defining the quality of contacts necessary to justify personal jurisdiction under the constitution. [Quotation marks and citations omitted.]

Defendant challenges the trial court's exercise of personal jurisdiction. It argues that the court erred by

exercising personal jurisdiction under Michigan's long-arm statute, MCL 600.715, because the exercise of personal jurisdiction was not consistent with constitutional due process.[1] In essence, defendant effectively concedes that, under the first step of the analysis, the trial court properly concluded that it could exercise limited personal jurisdiction over defendant under Michigan's long-arm statute. Accordingly, we focus our analysis on whether the trial court's exercise of jurisdiction over defendant comported with due process.

"The 'constitutional touchstone' of a due process analysis with respect to personal jurisdiction is whether the defendant purposely established the minimum contacts with the forum state necessary to make the exercise of jurisdiction over the defendant fair and reasonable." *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 433; 633 NW2d 408 (2001) (citations omitted).

> Courts employ a three-part test to determine whether a defendant has minimum contacts with Michigan to the extent that limited personal jurisdiction may be exercised in accordance with due process.
>
> > First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. [*Id*. (quotation marks and citations omitted).]

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[1] Defendant states that the trial court concluded that it had limited personal jurisdiction over defendant under MCL 600.715(1). However, the trial court expressly found that it could exercise limited personal jurisdiction over defendant pursuant to MCL 600.715(5).

The record shows that the first prong of the test was met in this case. " '[P]urposeful availment' is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities." *Id*. at 434 (quotation marks and citations omitted). Similarly, when a party "reach[es] out beyond one state and create[s] continuing relationships and obligations with citizens of another state," the party has "availed [it]self of the privilege of conducting business there . . . ." *Burger King Corp v Rudzewicz*, 471 US 462, 473, 476; 105 S Ct 2174; 85 L Ed 2d 528 (1985).

By accepting applications and payments from plaintiff's employees through its website, even after learning that they lived in Michigan—and subsequently continuing to transact business with those employees in Michigan by awarding them degrees, mailing diplomas to Michigan addresses, and offering additional alumni products and services—defendant "purposefully availed itself of the privilege of conducting activities in Michigan . . . ." *Yoost*, 295 Mich App at 223 (quotation marks and citation omitted). The record shows that defendant engaged Michigan customers in a regular and continuing manner. Moreover, defendant highlighted the personal success stories of Michigan residents on its website after they purchased degrees from defendant, thereby advertising the availability, and benefits, of its degrees for Michigan residents.

We find *Neogen Corp v Neo Gen Screening, Inc*, 282 F3d 883 (CA 6, 2002), instructive in this case. In *Neogen Corp*, the United States Court of Appeals for the Sixth Circuit relied on *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp 1119, 1124 (WD Pa, 1997), in

determining whether a company purposefully availed itself of a state through its website, and provided the following summary of the relevant inquiry:

> A defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of the state. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997) (using a "sliding scale" of interactivity to identify Internet activity that constitutes purposeful availment). In *Zippo*, the district court held that the defendant manifested its purposeful availment of the privilege of acting in Pennsylvania when it "repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords," knowing that the result of these Internet contacts would be to perform services for Pennsylvania customers in part through the transmission of electronic messages to Pennsylvania. *Id*. at 1126. Such intentional interaction with the residents of a forum state, the *Zippo* court concluded, is evidence of a conscious choice to transact business with inhabitants of a forum state in a way that the passive posting of information accessible from anywhere in the world is not. *Id*. [*Neogen Corp*, 282 F3d at 890.]

The Sixth Circuit found that it was not clear that the website at issue in *Neogen Corp* necessarily provided a basis for jurisdiction because it "consist[ed] primarily of passively posted information." *Id*. at 890. Nevertheless, it found that the company's 14 annual business transactions with Michigan customers constituted a "purposeful availment." *Id*. at 891-892. Most notably, the court reasoned:

> Although customers from Michigan contacted [the defendant (NGS)], and not the other way around, NGS could not mail test results to and accept payment from customers with Michigan addresses without intentionally choosing to conduct business in Michigan. This establishes that

> NGS chose to contract with customers from Michigan. Additionally, a part of NGS's service is the packaging of the results of the tests that it performs. When NGS mails these test results to its Michigan customers, or sends them a password to be used interactively on its website, NGS reaches out to Michigan to perform its services there. Neogen has therefore alleged facts which, when viewed in the light most favorable to Neogen, support a finding that NGS purposefully availed itself of the privilege of doing business in Michigan. [*Id*. at 892.]

In this case, defendant's conduct through its website was more similar to the company in *Zippo* than in *Neogen Corp*. Defendant consciously transacted business with Michigan residents. Further, we conclude that defendant, like the defendant in *Neogen*, could not mail diplomas to, and accept payments from, students "with Michigan addresses without intentionally choosing to conduct business in Michigan." *Id*. at 892. Thus, it is clear that defendant's conduct constituted more than "merely 'random,' 'fortuitous,' or 'attenuated' " contacts with Michigan. *Oberlies*, 246 Mich App at 434, quoting *Burger King*, 471 US at 475.

Second, contrary to defendant's claims on appeal, it is evident that the cause of action, i.e., the issuance of fraudulent academic credentials in violation of MCL 390.1603, arose directly from defendant's activities in Michigan—conducting an academic program and issuing diplomas for a price to Michigan residents. We reject defendant's argument that "there is a complete lack of privity between [defendant] and [plaintiff]," as privity is not a requirement to exercise personal jurisdiction under Michigan law. Likewise, given defendant's clear conduct in this case, we reject defendant's claim that jurisdiction is improper based on the ways in which the actions of plaintiff's employees or the terms of its union contracts may have injured plaintiff.

Finally, under the third prong of the test, "defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable." *Oberlies*, 246 Mich App at 433 (quotation marks and citations omitted). We reject defendant's claim that it was impossible for defendant to foresee liability in Michigan for its conduct. Again, the record clearly indicates that defendant established multiple business relationships with Michigan residents and issued diplomas to customers in Michigan after accepting the customers' applications and fees. Especially given that defendant's business is conducted entirely online, and defendant does not have an actual campus, it is sensible that it should be subject to jurisdiction in the states—including Michigan—where it conducts its business. Therefore, we conclude that the trial court's exercise of jurisdiction over defendant was reasonable.

IV. APPLICABILITY OF MCL 390.1603

Defendant next argues that the trial court improperly concluded that MCL 390.1603 applied to defendant. We disagree.

A. STANDARD OF REVIEW

As stated earlier in this opinion, this Court reviews a trial court's grant or denial of summary disposition de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

"Matters of statutory interpretation are questions of law, which we review under a de novo standard of review." *Shorecrest Lanes & Lounge, Inc v Liquor Control Comm*, 252 Mich App 456, 460; 652 NW2d 493 (2002). We restated the following principles of statu-

tory interpretation in *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013):

> The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. . . . The courts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. [Quotation marks and citations omitted; alteration in original.]

Additionally,

> [w]e may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. When reasonable minds may differ with regard to the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. [*Oberlies*, 246 Mich App at 429-430 (citation omitted).]

B. ANALYSIS

MCL 390.1603 provides, "A person shall not knowingly issue or manufacture a false academic credential in this state." Defendant conceded in the trial court

that any academic credential issued or manufactured by it qualifies as a "false academic credential" under Michigan law. Both parties also agree that defendant does not "manufacture" false academic credentials in Michigan. Accordingly, defendant's only argument on appeal is that the statute is not applicable to its conduct because it did not "issue" false academic credentials "in this state." In particular, defendant asserts that the statute only applies to false academic credentials that *originate* in Michigan. We reject defendant's claim.

The term "issue" in MCL 390.1603 is not defined by the Act. "When the Legislature has not defined a statute's terms, we may consider dictionary definitions to aid our interpretation." *Autodie LLC v Grand Rapids*, 305 Mich App 423, 434; 852 NW2d 650 (2014). We find the following definitions of "issue" in *Merriam-Webster's Collegiate Dictionary* (11th ed) relevant here: "to appear or become available through being officially put forth or distributed," "to cause to come forth : DISCHARGE, EMIT," "to put forth or distribute [usually] officially," and "to send out for sale or circulation : PUBLISH." Similarly, *Black's Law Dictionary* (10th ed) defines "issue" as "**1.** To accrue <rents issuing from land> **2.** To be put forth officially <without probable cause, the search warrant will not issue> **3.** To send out or distribute officially <issue process> <issue stock>."

In light of these definitions, "issue" and "in this state" for purposes of MCL 390.1603 mean to put forth or distribute officially in Michigan, such that a false academic credential is "issued" in Michigan if it is distributed to or provided by mail or electronically to an individual in the state of Michigan. This definition of "issue" is consistent with the Act's title, which describes the purpose of the Act as being "to prohibit the issuance or manufacture of false academic creden-

tials; and to provide remedies" for such issuance.[2] See *Oberlies*, 246 Mich App at 429-430.

"[T]he resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose."[3] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 56. However, the purpose (1) must be discerned from the text of the statute itself, not from an external source, such as legislative history; (2) must be defined in a precise manner, not in a way that allows one to "smuggle[] in" a given interpretation; (3) must be delineated as concretely as possible, not in an abstract manner; and (4) may not be used to contradict or supplement the statutory text, except in the rare circumstance of a glaring scrivener's error. *Id*. at 56-57. See also *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 682-683; 252 NW2d 747 (1977); *Oberlies*, 246 Mich App at 429-430.

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[2] The title states in full: "AN ACT to prohibit the issuance or manufacture of false academic credentials; and to provide remedies." 2005 PA 100, title. See *King v Ford Motor Credit Co*, 257 Mich App 303, 311-312; 668 NW2d 357 (2003) ("A [Michigan statute's title] is not to be considered authority for construing an act, but it is useful for interpreting statutory purpose and scope.").

[3] In his partial dissent, Judge MURRAY correctly notes that we agree on the most relevant definition of the term "issue." However, like the parties, we apparently disagree on the meaning of "issue" given its modification by the phrase "in this state" in MCL 390.1603. A statutory provision is ambiguous if "it is equally susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007), citing *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (quotation marks and emphasis omitted); see also *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008) ("A provision in a statute is ambiguous only if it irreconcilably conflicts with another provision, or when it is *equally* susceptible to more than a single meaning.") (quotation marks and citation omitted).

We conclude that narrowly construing the word "issue" in the manner advocated by defendant would thwart the purpose of the statute, which clearly seeks to address the problem of *all* false academic credentials that affect the state of Michigan and its residents, not just the academic credentials that are produced and physically sent out from a location in Michigan. Defendant has misinterpreted the plain meaning of "issue," in conjunction with "in this state," because of its reliance on statutes and court rules that are unrelated to the Act and the circumstances of this case. See *Book-Gilbert*, 302 Mich App at 541-542.

Additionally, we are unpersuaded by defendant's citation of other states' statutes that regulate similar conduct but include language that is distinct from that in MCL 390.1603 because these statutes are inapposite and simply inapplicable in this case. However, we do note that the statute cited by defendant with the language most similar to MCL 390.1603—Wash Rev Code 9A.60.070(1)—defines "issuing" in a manner that encompasses our construction of "issue" in this case. In relevant part, that statute provides:

> A person is guilty of issuing a false academic credential if the person knowingly:
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> (a) Grants or awards a false academic credential or offers to grant or award a false academic credential in violation of this section;
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> (b) Represents that a credit earned or granted by the person in violation of this section can be applied toward a credential offered by another person;
>
> (c) Grants or offers to grant a credit for which a representation as described in (b) of this subsection is made; or
>
> (d) Solicits another person to seek a credential or to earn a credit the person knows is offered in violation of this section. [Wash Rev Code 9A.60.070(1).]

Furthermore, defendant relies on a legislative analysis of the bill written before it was signed into law, see House Legislative Analysis, SB 136, June 15, 2005, in order to argue that "[t]he purpose of [MCL 390.1603] is to prohibit the formation of 'diploma mills' in the State of Michigan." "[L]egislative analyses are of very little value in reading a statute, [but] they have some value to courts as casting light on the reasons that the Legislature may have had and the meaning they intended for an act." *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 81; 858 NW2d 751 (2014). However, "the language of the statute is the best source for determining legislative intent." *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

While we look only to the language of a statute to determine legislative intent, it is noteworthy that, contrary to defendant's portrayal, the legislative analysis of the statute at issue clearly indicates that the purpose of the Act is to prevent the existence and use of false academic credentials in the state of Michigan. The analysis states that false academic credentials tend to mislead the general public, jeopardize employers or other individuals who may rely on an individual's false credentials, and may threaten the viability of legitimate distance-learning institutions. See House Legislative Analysis, SB 136, June 15, 2005. Moreover, contrary to defendant's contention, the analysis specifically refers to the lack of federal regulation and leniency of other states' laws that allow diploma mills to flourish, and it emphasizes the proliferation of substandard or fraudulent institutions with the rise of the Internet. This supports the conclusion that the bill was intended to address the effects *in Michigan* of false academic credentials that are pre-

pared by institutions outside Michigan and issued in this state.

Therefore, we agree with the trial court that defendant issued fraudulent educational credentials in Michigan and violated MCL 390.1603 when it distributed false academic credentials by mail to individuals in Michigan.

V. APPLICABILITY OF MCL 390.1605

Defendant next argues that the trial court erred by finding that plaintiff suffered damages as a result of defendant's actions. We disagree.

A. DAMAGE REQUIREMENT

MCL 390.1605 provides, "A person damaged by a violation of this act may bring a civil action and may recover costs, reasonable attorney fees, and the greater of either the person's actual damages or $100,000.00." As discussed earlier in this opinion, defendant's conduct constituted the issuance of false academic credentials under the Act. Likewise, plaintiff demonstrated that it was damaged by defendant's acts because it paid for fraudulent academic credentials and, based upon those credentials, increased employee salaries.

Although defendant is correct that plaintiff's employees are also a cause of plaintiff's loss, defendant points to no requirement under Michigan law that defendant must be the sole cause of plaintiff's loss in order for plaintiff to recover under the Act. Instead, the plain language of MCL 390.1605 requires only that the plaintiff be "damaged by a violation of this act . . . ." Cf. *Bobbitt v Academy of Court Reporting, Inc*, 252 FRD 327, 341 (ED Mich, 2008) (concluding that proof of reliance was not required to prove a

claim under MCL 390.1603 because such an element was not apparent from the text of the statute); see also Michigan Nonstandard Jury Instructions Civil (2015), § 18:2. "[C]ourts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Book-Gilbert*, 302 Mich App at 542 (quotation marks and citations omitted). Moreover, an individual's act in using a false academic credential to gain a promotion is governed by a separate statutory provision, MCL 390.1604, and there is no indication that both provisions cannot function harmoniously or cannot both apply to a given situation. Accordingly, we find no basis for concluding that the role of any other actor in damaging plaintiff precludes a finding of liability in this case.

Thus, we reject defendant's claim that the trial court erred when it concluded that plaintiff was damaged by defendant's violation of the Act.[4]

B. UNCLEAN HANDS

Defendant also asserts that the trial court erroneously applied the doctrine of unclean hands. In particular, defendant argues that it was entitled to assert that plaintiff waived its right to damages because it

[4] We decline to address the additional issue raised by defendant regarding whether the trial court erroneously granted summary disposition before discovery was completed because this issue was not raised in the statement of questions presented. See MCR 7.212(C)(5) (requiring an appellant to provide a concise statement of the questions involved in the appeal); *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001) ("Independent issues not raised in the statement of questions presented are not properly presented for appellate review.").

knowingly accepted the fraudulent degrees from its employees and, therefore, acted with unclean hands. We disagree.

One seeking the protection of an equitable defense must do so with clean hands, and "a party who has acted in violation of the law is not before a court of equity with clean hands . . . ." *Attorney General v PowerPick Players Club*, 287 Mich App 13, 52; 783 NW2d 515 (2010) (quotation marks and citation omitted). In this case, defendant acted in violation of MCL 390.1603. Accordingly, defendant was barred from raising an equitable defense against plaintiff because "[a] defendant with unclean hands may not defend on the ground that the plaintiff has unclean hands as well." *Id*. at 53.

VI. STATUTE OF LIMITATIONS

Defendant next argues that plaintiff's claim is barred by the statute of limitations and doctrine of laches. We agree that the statute of limitations bars all but one of plaintiff's claims.

A. STANDARD OF REVIEW

We "review de novo the question whether a claim is barred by the statute of limitations and the issue of the proper interpretation and applicability of the limitations periods." *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227; 859 NW2d 723 (2014). Likewise, we review de novo a trial court's decision regarding whether to apply an equitable doctrine, such as laches. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

B. ANALYSIS

The Act does not contain its own statute of limita-

tions. Therefore, plaintiff's claims are subject to the six-year period of limitations found in MCL 600.5813. See *Attorney General v Harkins*, 257 Mich App 564, 569-570; 669 NW2d 296 (2003).

Defendant contends that all of the violations of the Act except for one fall outside the applicable six-year period of limitations. Plaintiff filed its complaint on January 31, 2013. Therefore, to fall within the limitations period, the degrees in question must have been issued no earlier than January 31, 2007. Plaintiff appears to concede that only 1 of the 11 degrees in question was issued on or after January 31, 2007. The trial court, however, applied the continuing-violations doctrine to plaintiff's claims, concluding that *each* of the 11 claims continued to accrue until 2009 when defendant issued the last degree to one of plaintiff's employees. The trial court's application of the continuing-violations doctrine was error.

Under the doctrine, "[w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortious conduct continues." *Harkins*, 257 Mich App at 572 (quotation marks and citation omitted; alteration in original). However, the Michigan Supreme Court has held that the continuing-violations doctrine is contrary to Michigan law and "has no continued place in the jurisprudence of this state." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284, 290; 696 NW2d 646 (2005). While *Garg* was a discrimination case involving a three-year period of limitations, "[t]he holding of *Garg* does not appear limited to discrimination cases; rather, the Court applied the plain text of the limitations and

accrual statutes" in this state. *Terlecki v Stewart*, 278 Mich App 644, 655; 754 NW2d 899 (2008).

Accordingly, only one of plaintiff's claims, that which accrued after January 31, 2007, is allowed under the statute of limitations, and the trial court erred by holding otherwise.

However, contrary to defendant's position, the doctrine of laches does not bar this claim. "The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time." *PowerPick Club*, 287 Mich App at 51. But the doctrine only is "applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Pub Health Dep't v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996); see also *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) ("For laches to apply, inexcusable delay in bringing suit must have resulted in prejudice."). "The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004). The Michigan Supreme Court previously stated that when a party files their claim within the relevant period of limitation, "any delay in the filing of the complaint was presumptively reasonable, and the doctrine of laches is simply inapplicable." *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 200; 596 NW2d 142 (1999). However, this Court has held that courts may apply the doctrine of laches to bar actions at law, even when the statute of limitations established by the Legislature has not expired. *Tenneco*, 281 Mich App at 457.

In this case, defendant is not entitled to assert the equitable defense of laches because it came before the trial court with unclean hands. *PowerPick Club*, 287 Mich App at 50-52. Furthermore, defendant proffered no evidence in the trial court demonstrating prejudice related to any delay in the filing of plaintiff's remaining claim. See *Rivergate Manor*, 452 Mich at 507. Defendant argues that it was prejudiced because plaintiff was in the best position to inform defendant that its degrees constituted false academic credentials under the Act after it was passed in 2005. Accordingly, defendant asserts that plaintiff's failure to bring the issue to its attention and plaintiff's continued acceptance of its degrees prevented defendant from taking action to prevent its alleged violations of MCL 390.1603. However, defendant has cited no authority indicating that plaintiff had an obligation to inform defendant that its conduct was illegal, and defendant's arguments do not demonstrate that plaintiff's delay caused "a corresponding *change of material condition* that result[ed] in prejudice to [defendant]." *Rivergate Manor*, 452 Mich at 507 (emphasis added); see also *Yankee Springs*, 264 Mich App at 612. Plaintiff's delay in filing the claim in no way prevented defendant from ceasing its illegal conduct or otherwise realizing that its issuance of diplomas in Michigan violated the Act.

Therefore, the trial court properly concluded that the doctrine of laches does not bar plaintiff's claim in this case.

VII. DORMANT COMMERCE CLAUSE

Defendant also asserts that MCL 390.1603, as applied, constitutes a violation of the dormant Commerce

Clause.[5] Because defendant failed to raise this issue in the trial court, it is not preserved for appeal. *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007). Accordingly, we could decline to review this issue. See *id*.; *Gilson v Dep't of Treasury*, 215 Mich App 43, 52; 544 NW2d 673 (1996) (declining to review the plaintiffs' unpreserved dormant Commerce Clause claim).

Nonetheless, defendant's argument has no merit. Contrary to its speculative hypotheticals, we find no basis for defendant's conclusion that the statute "directly controls commerce occurring wholly outside the boundaries of a State [and] exceeds the inherent limits of the enacting State's authority." *American Beverage Ass'n v Snyder*, 735 F3d 362, 373 (CA 6, 2013) (quotation marks omitted; alteration in original), quoting *Healy v Beer Institute*, 491 US 324, 336; 109 S Ct 2491; 105 L Ed 2d 275 (1989). Additionally, under the relevant two-part inquiry, defendant does not assert, and we discern no indication, that the statute "facially discriminates against interstate commerce." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 668; 697 NW2d 180 (2005). Finally, despite defendant's tenuous speculation, we conclude that the statute "merely regulates evenhandedly with only incidental effects upon interstate commerce," and that there is no indication that "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefit." *Id*. at 669 (quotation marks and citations omitted).

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[5] The United States Constitution grants Congress the power to regulate commerce with foreign nations and among the states. US Const, art I, § 8, cl 3. The dormant Commerce Clause is an extension of the Commerce Clause, and it "prohibits state laws that discriminate against or unduly burden interstate commerce." *Nat'l Wine & Spirits, Inc v Michigan*, 477 Mich 1088, 1089 (2007) (MARKMAN, J., concurring).

VIII. CONCLUSION

Defendant has failed to establish that the trial court's exercise of jurisdiction was erroneous. Additionally, the trial court properly concluded that defendant's conduct constituted the issuance of false academic credentials in violation of the Act. However, the trial court erred by holding defendant liable for the issuance of false academic credentials before January 31, 2007. Finally, we reject defendant's argument that the Act violates the dormant Commerce Clause.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion concerning the damages owed to plaintiff. We do not retain jurisdiction.

METER, J., concurred with RIORDAN, J.

MURRAY, P.J. (*concurring in part and dissenting in part*). I join the majority's decision to affirm the trial court's order denying defendant Almeda University's motion for summary disposition on the basis of no personal jurisdiction, but dissent from its holding that MCL 390.1603 applies to Almeda. As a result, I would reverse the trial court's judgment and remand for entry of an order granting summary disposition to Almeda.

The Authentic Credentials in Education Act, MCL 390.1601 *et seq*., is a short, concise act containing only five sections, with only four substantive sections.[1] Section 2, MCL 390.1602, contains definitions for some of the critical terms used in the act. Specifically, it provides:

> As used in this act:

[1] Section 1 simply declares the name of the act. MCL 390.1601.

(a) "Academic credential" means a degree or a diploma, transcript, educational or completion certificate, or *similar document* that indicates completion of a program of study or instruction or completion of 1 or more courses at an institution of higher education or the grant of an associate, bachelor, master, or doctoral degree.

(b) "False academic credential" means an academic credential issued or manufactured by a person that is not a qualified institution.

(c) "Qualified institution" means any of the following:

(*i*) An institution of higher education, as that term is defined in 20 USC 1001, located in the United States.

(*ii*) Any other institution of higher education authorized to do business in this state. [Emphasis added.]

The parties agree that the diplomas issued by Almeda were "false academic credentials," which means that under the statute the diplomas provided to the Fraser police officers were *written* diplomas issued by an institution that was neither (1) one of higher education within the United States as defined in federal law, nor (2) one authorized to do business in this state.

Sections 3 and 4 contain the act's prohibitions, and each section addresses a different concern. In § 3, MCL 390.1603, the Legislature prohibits persons (who are not qualified institutions) from issuing or manufacturing false academic credentials in this state. It specifically states that "[a] person shall not knowingly issue or manufacture a false academic credential in this state." This section prevents diploma mills from operating (issuing or manufacturing academic credentials) "in this state." *Id*.[2] Section 4, MCL 390.1604, focuses on limiting an individual's use of a false academic creden-

[2] A "diploma mill" is generally regarded as an unregulated institution that awards degrees or diplomas with few or no academic requirements and that typically have no real value in the marketplace. See *HEB*

tial by prohibiting individuals from utilizing false academic credentials in certain circumstances, including in employment situations as was done by the Fraser officers:

> (1) An individual shall not knowingly use a false academic credential to obtain employment; to obtain a promotion or higher compensation in employment; to obtain admission to a qualified institution; or in connection with any loan, business, trade, profession, or occupation.
>
> (2) An individual who does not have an academic credential shall not knowingly use or claim to have that academic credential to obtain employment or a promotion or higher compensation in employment; to obtain admission to a qualified institution; or in connection with any loan, business, trade, profession, or occupation. [MCL 390.1604.]

Finally, § 5, MCL 390.1605, provides a cause of action for violation of the act, as well as for damages, costs, and attorney fees.

As the majority states, the pivotal question is whether, under § 3, the false academic credentials were issued in this state. MCL 390.1603. The majority properly looks to dictionaries in its attempt to discern the meaning of an undefined word, *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 40; 869 NW2d 810 (2015), and the definition that it develops for "issue" from both legal and lay dictionaries is a reasonable one.[3] But the majority fails to apply the remainder of

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Ministries, Inc v Texas Higher Ed Coordinating Bd, 235 SW3d 627, 631 (Tex, 2007), and *Merriam-Webster's Collegiate Dictionary* (11th ed).

[3] The majority refers to a canon of statutory construction set forth in a book co-authored by United States Supreme Court Justice Antonin Scalia, but no provision of this act is ambiguous. Consequently, we cannot (as there is no need to) resort to tools of statutory construction to resolve this case. See *Ashley Ann Arbor, LLC v Pittsfield Charter Twp*, 299 Mich App 138, 147; 829 NW2d 299 (2012), and *Exxon Mobil Corp v*

what is contained in MCL 390.1603 (particularly the "in this state" portion), and to recognize how an academic credential is issued. When that context is considered, the conclusion must be that MCL 390.1603 does not apply to a person issuing false academic credentials in another state or locale.

As mentioned, § 3 of the statute focuses exclusively upon the actions of the issuing entity, and precludes a person from issuing a false academic credential in this state.[4] Using the most relevant definition of "issue" from *Merriam-Webster's Collegiate Dictionary* (11th ed), "issue" means "to put forth or distribute," with the example being the "government *issued* a new airmail stamp." Here, the diplomas or other academic credentials were put forth or distributed by Almeda in the Caribbean, where the academic credentials were awarded. The credentials were not put forth or distributed in Michigan, any more than a degree from the University of Montana is "issued" in Michigan when a Michigan resident graduates from that university after taking online courses. In other words, once a decision is made that a student or applicant should be awarded a degree, the "person" then puts forth or distributes *from*

Allapattah Servs, Inc, 545 US 546, 567; 125 S Ct 2611; 162 L Ed 2d 502 (2005). The disagreement reflected by majority and dissenting opinions "does not transform that which is unambiguous into that which is ambiguous." *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). See also *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 247; 801 NW2d 629 (2010) (stating that a reasonable disagreement as to the meaning of the statute does not by itself make the statute ambiguous). And, as I attempt to show, giving effect to all of the words in § 3 does not in any way frustrate the purpose or intent of the act, particularly when considering the prohibitions in both §§ 3 and 4.

[4] As noted, the parties agree that the diplomas are academic credentials, MCL 390.1602(a), that became "false academic credentials" by virtue of Almeda (the "person") not being a qualified institution. MCL 390.1602(b).

that location the academic credential. Once the administrative decision is made to award the degree, the diploma is issued—put forth or distributed—from that administrative office, not in the state where the recipient is located. See, e.g., *Starks v Presque Isle Circuit Judge*, 173 Mich 464, 466; 139 NW 29 (1912) ("When these steps are taken and the license is granted, and the approval of the council is indorsed upon the application, the license is issued . . . ."), and *State ex rel Nelson v Lincoln Med College*, 81 Neb 533; 116 NW 294, 298 (1908) ("The directors, upon recommendation of the faculty, are clothed with power to issue diplomas and grant degrees to the student . . . ."). Because Almeda did not issue the academic credentials in Michigan, § 3 simply does not apply.

The majority concludes otherwise by holding that an academic credential is issued in Michigan when it is mailed or otherwise delivered to an individual in this state. Although this is not an unreasonable interpretation, ultimately it is incorrect. For one thing, the statute says nothing of mailing or delivering into this state. It instead focuses on the issuance of the credential, and for the reasons already explained, that occurs in the locale where the person awarding the credential is located. And as Almeda argues, construing "issue" to mean "mailing" or "delivering," which is what the majority opinion essentially does, expands the statute beyond what the Legislature provided for in the words of the statute. Just as importantly, recognizing and enforcing the separate sections of the act and the different issues they address ensures that the objectives underlying the act are enforced.

In sum, the act provides several prohibitions in an attempt to reduce or eliminate the in-state impact of diploma mills. Section 3 prevents persons (the institu-

tion or persons running them) from issuing or manufacturing false academic credentials in this state, while § 4 prohibits individuals that have obtained false academic credentials from using them to their advantage in many different circumstances, and in particular in their employment. The act does not, however, stretch itself so far as to regulate diploma mills outside this state's borders; instead, it prohibits their operation in this state and prevents the use of false academic credentials in numerous instances no matter from where they are issued.

In re YARBROUGH MINORS

Docket Nos. 326170 and 326171. Submitted December 8, 2015, at Detroit. Decided January 19, 2016, at 9:00 a.m. Leave to appeal denied 499 Mich 898 (2016).

The Department of Human Services filed petitions against respondents in the Wayne Circuit Court, Family Division, to terminate their parental rights to their two children for allegedly physically abusing one of the children, JPY, then five months old. Respondents denied hurting JPY. Petitioner presented expert testimony from several medical professionals to explain that the injuries appearing in JPY's MRI and CT scan were the result of Shaken Baby Syndrome. Mother took JPY to his pediatrician on June 11 because she noticed that one of JPY's eyes was not tracking and had a red spot in it. JPY's pediatrician ordered an MRI, and mother immediately took JPY to St. John Emergency Room for the test. No abnormalities were noted on the St. John MRI. The next day, June 12, father noticed milky bubbles coming from JPY's nose and mouth. Shortly afterwards, JPY took three breaths and then collapsed. Father called 911, mother assisted with CPR, and JPY was eventually resuscitated at St. John Hospital thirty minutes later. According to St. John Hospital, there were no acute findings in the CT scan performed that evening, and there was nothing to suggest a traumatic brain injury. JPY remained in a coma, and a St. John social worker evaluated respondents and found no evidence to suspect child abuse. The next evening, JPY was transferred to Children's Hospital for continuing intensive care. Children's Hospital physicians examined the MRI and the CT scan done at St. John and concluded that the tests revealed significant abnormalities and that JPY was a severely injured child. Petitioner filed a permanent custody petition on June 18, 2014; it was authorized on June 30, 2014. On September 22, 2014, mother filed a motion for the appointment of an expert witness at public expense. Mother asserted that she had to be permitted to hire an expert to review all the evidence and to identify alternative causes of JPY's condition. Father filed a pleading concurring with mother's motion. The chief judge, the only judge in the Wayne Circuit Court permitted to authorize funding for extraordinary fees in family division cases, denied respondents' requests. After the

termination hearing concluded, the court, Karen Y. Braxton, J., ordered that respondents' parental rights to JPY and respondents' other child be terminated. Both respondents appealed, and the cases were consolidated.

The Court of Appeals *held*:

1. Respondents in termination proceedings must be fairly equipped to defend against termination of their parental rights. The chief judge abused his discretion and deprived respondents of their right to due process when he denied respondents' requests to provide them with funds to hire an expert witness or a consultant to assist respondents' counsel with the evaluation, preparation, and presentation of evidence, including assistance with developing a meaningful cross-examination of petitioner's witnesses. Petitioner's case rested entirely on its expert witnesses' testimony about the complex and controversial medical issues. Because petitioner intended to establish that respondents abused JPY by presenting evidence of JPY's head injuries, retinal hemorrhages, and other fractures, it was imperative that respondents have an expert witness to help them understand the evidence and structure an effective defense. Respondents were entitled to funds to hire an expert witness because they established a reasonable probability that an expert would have been of meaningful assistance.

2. Whether a court must authorize payment for a respondent to hire an expert witness in a termination proceeding depends on an analysis of three factors introduced in *Mathews v Eldridge*, 424 US 319 (1976): (1) the private interest at stake, (2) the extent to which otherwise available procedures are present to safeguard the process, and (3) the fiscal and administrative burden on the state of providing the expert funding. First, a parent's fundamental right to direct his or her child's care requires that respondents be given the financial resources to hire an expert. The consequences of a termination proceeding are too severe to not provide a respondent with adequate tools to conduct his or her defense. The state's interest in the safety and welfare of its children must yield to its interest in a process that protects a parent's constitutional rights and that results in an accurate and just decision. Second, termination proceedings are primarily adversarial and do not contain the checks and balances that accompany the more administrative-like decisions the government must make (e.g., disability benefit determinations, etc.). Finally, whether a court authorizes payment for an expert witness or a consultant depends on the financial and administrative burden imposed on the court

if it were to provide funds for an expert. Determining whether the amount of money requested is reasonable requires a court to weigh an indigent respondent's interest in retaining care and control of his or her child against the cost of paying for an expert witness or consultant.

Vacated and remanded.

JANSEN, P.J., concurred, emphasizing that the outcome of this case was inherently fact-specific and that the holding does not require that a trial court grant every indigent respondent's request for funds to hire an expert witness or a consultant to assist with defending the respondent's parental rights.

1. CHILD PROTECTIVE PROCEEDINGS — TERMINATION HEARING — INDIGENT RESPONDENT — EXPERT WITNESS FEES.

Due process requires that an indigent respondent in a termination case be properly equipped to defend against the petitioner's allegations when the petitioner's case depends wholly on the testimony of the petitioner's expert witnesses about complex and controversial medical evidence; under these circumstances, if a respondent requests it, the court should award him or her a reasonable amount of money to hire an expert witness or a consultant to assist with the evaluation, preparation, and presentation of a defense.

2. CHILD PROTECTIVE PROCEEDINGS — TERMINATION HEARING — INDIGENT RESPONDENT'S REQUEST FOR EXPERT WITNESS FEES — DUE-PROCESS ANALYSIS.

When a respondent requests funds to hire an expert witness or an expert consultant, the court must conduct an analysis under the framework of *Mathews v Eldridge*, 424 US 319 (1976), to determine whether to award the respondent the cost of obtaining an expert; the analysis in *Eldridge* considers (1) the private interest at stake, (2) the extent to which otherwise available procedures are present to safeguard the process, and (3) the fiscal and administrative burden on the state of providing expert funding.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jennifer L. Gordon*, Assistant Attorney General, for the Department of Human Services.

Rodney Williams for Catrice Wright.

Law Office of Steven M. Gilbert, PLLC (by *Steven M. Gilbert*), for Jerome Yarbrough.

Michigan Children's Law Center (by *William E. Ladd*) for the minor children.

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

GLEICHER, J. The Department of Human Services filed a petition alleging that one or both respondents-parents physically abused their five-month-old son, JPY. Respondents denied hurting their child and sought funds for consultation with a medical expert regarding alternate causes for his injuries. The circuit court rejected their request, ruling that respondents had not established a reasonable probability that an expert would assist their defense. The issue presented is whether this decision denied respondents due process of law.

We conclude that the circuit court applied an incorrect standard for determining respondents' entitlement to expert assistance funding. Because a parent's interest in the accuracy of a decision to terminate his or her parental rights is "commanding," *Lassiter v Dep't of Social Servs of Durham Co, North Carolina*, 452 US 18, 27; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the proper inquiry weighs the interests at stake under the due process framework established in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). Application of the *Eldridge* factors necessitated affording respondents with reasonable funds for expert consultation. We vacate the order terminating respondents' parental rights and remand for further proceedings.

I

Respondents are the parents of JPY and a three-and-a-half-year-old daughter. On June 11, 2014,

mother noticed that JPY's left eye appeared to deviate and had a "red dot" in it. Mother took the child to his pediatrician, who performed an examination and ordered an MRI. The order recited, "[B]aby not moving his left eye, please evaluate for mass or space occupying lesion or reason for [abducens] nerve dysfunction." Mother brought JPY directly to St. John Hospital for the procedure. The child was assessed in the St. John Hospital Emergency Room that afternoon, and no abnormalities were noted other than a "crossed eye." According to St. John Hospital, the MRI, performed with and without contrast, revealed a normal, uninjured brain:

> There is nothing to indicate an abnormal fluid collection, space-occupying mass, focal signal abnormality, or focal enhancing lesion. There is no mass or abnormal signal involving the brainstem, and no space-occupying process within the prepontine or interpeduncular cisterns, nor suprasellar or cavernous sinus regions, on this MRI of the entire brain. No restricted diffusion is demonstrated. The ventricles, basal cisterns, and sulci over the convexities are within normal limits. The midline structures are within normal limits. The myelination pattern is within normal limits.

Mother and JPY left St. John at 7:00 p.m. Mother was instructed to watch JPY "carefully for breathing issues" and to return to the emergency department if any were noted.[1]

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[1] The St. John records do not explain why the child was at risk for "breathing issues." Mother attempted to answer questions on this subject at the termination hearing, but the trial court ruled that "the second [someone] open[s] their mouth" and makes an out-of-court statement, "it would be hearsay" and inadmissible. The trial court's misperception of the hearsay rule permeated the trial; the court ruled virtually every out-of-court statement offered in evidence as automatically and incontrovertibly inadmissible. Of course, an out-of-court statement offered for a purpose other than proving the truth of the

Mother noted that JPY felt a little warm that evening, but he took a bottle and fell asleep. The next day, June 12, JPY continued to seem warm, acted "fussy," and took only four ounces of formula. Father arrived in the late afternoon to care for the children so mother could get something to eat.[2] Within 5 to 10 minutes of mother's departure, father saw "milky" "bubbles" coming from JPY's nose and mouth as the child lay on his back on a bed. JPY took three breaths and slumped "like a rubber doll." Father called 911 and requested an ambulance. The dispatcher instructed him how to perform CPR while awaiting the emergency personnel. Mother returned shortly after JPY's collapse and took over CPR. When eight or nine minutes had elapsed with no sign of an ambulance, respondents drove to St. John Hospital as mother continued CPR in the car.

On arrival at the hospital, JPY was flaccid, unconscious, and had no pulse. He took only intermittent gasping breaths. After prolonged resuscitation, JPY developed a pulse. A physician noted that the infant's estimated "downtime" was approximately 30 minutes, and that the child had been ill with upper respiratory infection symptoms during the preceding week.[3] A CT scan of JPY's brain obtained that evening revealed no acute findings and did not suggest a traumatic injury:

> There is no evidence of acute intracranial hemorrhage. The ventricular system is not dilated. Motion artifact is noted obscuring the left posterior parietal region.

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matter asserted is not automatically hearsay. MRE 801(c). Further, multiple exceptions to the hearsay rule permit the admission of certain out-of-court statements. See MRE 803 and MRE 804.

[2] The parents did not reside in the same home. Father worked during the day and would visit and care for the children in the evening, when mother worked.

[3] A blood test at St. John later proved positive for parainfluenza virus type 3.

> No masses or focal fluid collections are noted. Gray-white matter differentiation is grossly well-maintained given limits of low-dose technique. No sulcal effacement or evidence of mass effect.
>
> The orbits and paranasal sinuses are normal in appearance. The calvarium and overlying soft tissues are unremarkable.

The working diagnosis at St. John was that the child had suffered a prolonged cardiorespiratory arrest. He remained comatose.

A St. John social worker performed an evaluation and found no evidence to suspect child abuse. She noted in relevant part:

> Both parents and maternal grandmother exhibit appropriate concern for the patient. All 3 were tearful and disheartened by the entire event. The consultation for abuse and neglect does not, in the opinion of this worker, appear to be valid and social work sees no evidence of any maltreatment. This worker also spoke with the medical staff, who are in agreement that abuse or neglect does not appear to be the case for this family.

Late the next evening, St. John transferred JPY to Children's Hospital of Michigan for continuing intensive care. The physicians at Children's Hospital reviewed the MRI and the CT scan performed at St. John and concluded that both demonstrated significant abnormalities, in contrast to the entirely normal findings reported by the radiologists at St. John, who interpreted the same images. A Children's Hospital radiologist concluded that the St. John MRI revealed an "[i]nfra and supratentorial bilateral subdural hematoma" suggestive of prior trauma, and that the CT scan reflected the same subdural hematoma, as well as widening of the sutures and a "[r]ight parietal healing fracture with soft tissue swelling over the parietal

convexity." A Children's Hospital ophthalmologist examined JPY and reported that the child had bilateral retinal hemorrhages. Physicians at Children's Hospital concluded that JPY was "a severely injured baby with subdural hemorrhages, bilateral retinal hemorrhages, skull fracture from abusive trauma." Petitioner filed a permanent custody petition on June 18, 2014.[4] The court authorized the petition on June 30, 2014.

On September 22, 2014, mother filed a motion "for appointment of expert witness." The motion set forth the child's medical history and the conflicting diagnoses, asserting:

> In order to adequately rebut the anticipated expert opinion testimony presented by the State, Respondent must be able to retain and call her own expert to review the evidence of medical staff and to present an opinion (i.e., that the type of injuries to the child is not necessarily indicative of abuse by the parent; that there may be other explanations for the injury than abuse), particularly since the Mother adamantly denies any abuse or nonaccidental injury occurred.

The motion stated that mother was without funds to hire an expert, and it urged, "[i]n the interests of fairness, Respondent should be provided the same opportunity as the State to consult with a medical expert and call said expert to the stand to offer an opinion concerning causation of the injury."[5]

Father filed a concurring pleading. He averred that he could obtain a fair and impartial trial "only through

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[4] The Department of Human Services was the original petitioner. That department has since been reconfigured as the Department of Health and Human Services.

[5] The last page or two of the brief accompanying mother's motion is missing from the court record.

the use of an independent, impartial expert . . . [;] the medical records and condition of this child are so involved and so difficult as to render [father's] counsel unable to appropriately cross[-]exam[ine] the expert witnesses which will be provided and presented by the Attorney General's Office."

The family division judge declined to hear respondents' motions, as a Wayne County Local Administrative Order permits only the chief judge to authorize payment of extraordinary fees in family division cases. During oral argument before the chief judge, mother's counsel outlined the medical circumstances of the case and requested funds for "an independent expert." Counsel estimated that "up to [$]2,500" would be needed. Father's lawyer stressed, "We simply do not have the medical skills to be able to properly cross-examine the medical experts from Children's Hospital in a manner in which will provide the Court with sufficient information to reach an independent and informed conclusion." In response to the chief judge's suggestion that counsel arrange to speak to the treating physicians at both hospitals, without payment, mother's counsel stated, "[W]e would certainly prefer an independent expert" due to the implicit criticism of the St. John radiologic diagnoses by the Children's Hospital child abuse unit physicians. "[I]n order to be fair to the parents and the parties in this case . . . and to level the playing field," counsel insisted, respondents were entitled to their own expert.

The chief judge denied the respondents' funding requests, relying on *People v Tanner*, 469 Mich 437, 443-444; 671 NW2d 728 (2003), and *People v Leonard*, 224 Mich App 569, 582-584; 569 NW2d 663 (1997). The court opined that the lawyers needed to learn "how to review medical records" on their own, and

that a request for assistance in going through the records was insufficient to support funding for an expert. "You also have to demonstrate that it would be fundamentally unfair if I didn't appoint an expert," the court continued, "and you haven't demonstrated that to me."

The termination hearing commenced on December 8, 2014. Dr. Conrad Giles, a Children's Hospital ophthalmologist, testified that JPY had retinal hemorrhages apparent in all four quadrants of both eyes, consistent with "a Shaken Baby Syndrome." According to Dr. Giles, JPY had been shaken on "multiple" occasions well before June 14, 2014. Dr. Giles denied that any cause other than severe trauma could explain the hemorrhages, although he admitted that he had not reviewed the St. John records and lacked awareness of anything that had occurred before JPY's arrival at Children's Hospital, including JPY's respiratory and cardiac arrests. Dr. Deniz Altinok, a pediatric neuroradiologist, testified that JPY's St. John MRI revealed a subdural hematoma and that the CT scan showed evidence of prior head trauma. In Dr. Altinok's view, JPY had been severely shaken and his head subjected to an impact. Additional x-rays obtained at Children's Hospital demonstrated rib, leg, and vertebral fractures. Dr. Altinok opined that the fractures resulted from deliberately inflicted trauma. Two additional physicians from Children's Hospital expressed expert opinions that JPY was the victim of severe abuse.

Mother and father denied causing JPY's injuries and offered no explanation for their etiologies. Mother called as a witness Dr. Beata Ruprecht, a St. John Hospital pediatric neurologist who had participated in JPY's evaluation and care. The court prevented

Dr. Ruprecht from offering any opinions concerning the St. John MRI, finding her unqualified to do so.[6]

The court terminated respondents' parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), (k)(*iii*), (k)(*iv*), and (k)(*v*), and found that termination of parental rights served the children's best interests. Both parents now appeal, contending that the chief judge abused his discretion by denying their requests for expert witness funding.

II

In a criminal case, MCL 775.15 provides a judge with the authority to appoint an expert witness at public expense. *Tanner*, 469 Mich at 438. Appellate courts review such decisions for an abuse of discretion. *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). As this is a civil matter, MCL 775.15 does not apply. MRE 706, which permits a court to appoint and compensate an expert witness to assist the court, is likewise inapplicable; counsel sought an expert witness who would consult with and assist respondents, not the court.[7] On appeal, respondent-father has linked his request for funding to respondents' constitutional right to due process of law. We review de novo ques-

[6] As a pediatric neurologist, Dr. Ruprecht testified that she regularly reviewed and interpreted brain imaging studies despite that she is not a radiologist. The trial court ruled that because Dr. Ruprecht was not an expert in radiology, she was unqualified to testify regarding the MRI findings.

[7] MRE 706 is the equivalent of FRE 706. FRE 706 permits a trial court to appoint its own expert, particularly when the parties' retained experts "are in such wild disagreement that the trial court might find it helpful and in furtherance of the search for truth to appoint an independent expert." Saltzburg, Martin, & Capra, 3 Federal Rules of Evidence Manual (10th ed), § 706.02[1], p 706-3. "Quite simply, 'litigant assistance' is not the purpose of Rule 706." *Carranza v Fraas*, 471 F Supp 2d 8, 11 (D DC, 2007).

tions of constitutional law, including whether a child protective proceeding complied with a respondent's right to due process. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

III

Parents possess a fundamental interest in the companionship, custody, care, and management of their children, an element of liberty protected by the due process provisions in the federal and state Constitutions. US Const, Am XIV; 1963 Const, art 1, § 17. Because child protective proceedings implicate "an interest far more precious than any property right," *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982), "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) (quotation marks and citation omitted).

Here, we consider whether the termination proceedings were fundamentally fair despite respondents' inability to retain expert consultation. Our analysis of this question draws on a series of cases addressing the "age-old problem" of "[p]roviding equal justice for poor and rich, weak and powerful alike." *Griffin v Illinois*, 351 US 12, 16; 76 S Ct 585; 100 L Ed 2d 891 (1956). We find one such case, *MLB v SLJ*, 519 US 102; 117 S Ct 555; 136 L Ed 2d 473 (1996), particularly instructive. In *MLB*, the United States Supreme Court held that the state of Mississippi could not constitutionally require indigent parents appealing the termination of their parental rights to pay record and transcript preparation fees. *Id*. at 127-128. In reaching this decision, the Supreme Court majority dubbed *Griffin* "the foundation case." *Id*. at 110.

Griffin struck down a rule that conditioned appeals of criminal convictions on an indigent defendant's procurement of trial transcripts that he or she could not afford. *Id*. Although the *MLB* dissenters argued against extending *Griffin* to civil cases involving the termination of parental rights, the *MLB* majority rejected that argument for reasons that resound here:

> [W]e have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. To recapitulate, termination decrees work a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. Our *Lassiter*[8] and *Santosky*[9] decisions, recognizing that parental termination decrees are among the most severe forms of state action, have not served as precedent in other areas. We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case. [*Id*. at 127-128 (quotation marks and citations omitted).]

In *MLB*, the Court emphasized that proceedings to terminate a parent's relationship with a child implicate rights "of basic importance in our society" and "demand[] the close consideration the Court has long required when a family association so undeniably

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[8] In *Lassiter*, 452 US 18, the Supreme Court analyzed whether the indigent respondent was unconstitutionally denied appointed counsel in a proceeding that terminated her parental rights. The Court's due process determination rested on its application of the factors set forth in *Mathews v Eldridge* to the particular facts of that case.

[9] In *Santosky*, 455 US at 758, the Supreme Court again applied the *Eldridge* factors in a termination of parental rights case, concluding: "Evaluation of the three *Eldridge* factors compels the conclusion that use of a 'fair preponderance of the evidence' standard in such proceedings is inconsistent with due process."

important is at stake." *Id*. at 116-117 (quotation marks and citation omitted). Quoting *Santosky*, the Court highlighted that "[f]ew forms of state action . . . are both so severe and so irreversible." *Id*. at 118. The Court acknowledged that its precedents concerning access to judicial proceedings draw on both equal protection and due process principles, elucidating that "in the Court's *Griffin*-line cases, '[d]ue process and equal protection principles converge.' " *Id*. at 120 (citation omitted; alteration in original). The Court located *MLB* "within the framework established by our past decisions in this area." *Id*. Without identifying the "framework" by name, the Court proceeded to employ the three-part procedural due process analysis formally introduced in *Eldridge*.

In *Eldridge*, 424 US at 323-324, the Supreme Court considered whether a state agency may terminate a recipient's social security disability benefits without affording the recipient the opportunity for an evidentiary hearing. The Court painstakingly described the "elaborate" web of procedures that precedes a final decision terminating disability benefits. *Id*. at 337-339. It then analyzed the constitutional adequacy of those procedures according to a three-factor balancing framework:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id*. at 335.]

Eldridge concluded that the Due Process Clause did not mandate a hearing prior to the initial termination of a claimant's benefits. *Id*. at 349. In large measure, the Supreme Court rested its decision on "the fairness and reliability of the existing predetermination procedures," which entailed a low risk of error. *Id*. at 343-345.

The Court reached a different result when it applied the *Eldridge* framework in *MLB*. Weighing the interests of the petitioner-parent ("forced dissolution of her parental rights") against "[t]he State's pocketbook interest in advance payment for a transcript," *MLB*, 519 US at 121, the Court found the latter interest less compelling. The Court turned to the "risk of error" attending Mississippi's appeal procedures and observed that the Chancellor's opinion terminating MLB's rights consisted merely of statutory language and described no evidence or reasons for the Chancellor's findings. *Id*. at 108. "Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." *Id*. at 121-122. The fiscal obligation imposed by a transcript requirement did not tilt the scale in the Court's view, as in parental termination cases "appeals are few, and not likely to impose an undue burden on the State." *Id*. at 122. "In accord with the substance and sense of our decisions in *Lassiter* and *Santosky*," the Court concluded, "we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.' " *Id*. at 124 (citations omitted).

Our Supreme Court recently employed *Eldridge* to strike down the one-parent doctrine, which permitted courts to obtain jurisdiction over a child and proceed to disposition with respect to both parents based on an

adjudication of only one. *In re Sanders*, 495 Mich 394, 408; 852 NW2d 524 (2014). The Court described that "[i]n essence, the *Eldridge* test balances the costs of certain procedural safeguards . . . against the risks of not adopting such procedures." *Id*. at 411. Tracking the *Eldridge* guideposts, the Supreme Court first considered "the private interest at stake here—a parent's fundamental right to direct the care, custody, and control of his or her child free from governmental interference[, which] cannot be overstated." *Id*. at 415. As to the second and third *Eldridge* factors, the Court continued:

> [I]t is undisputed that the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that the interest will require temporarily placing a child with a nonparent. It is this interest that lies at the heart of the state's *parens patriae* power. But this interest runs parallel with the state's interest in maintaining the integrity of the family unit whenever possible. MCL 712A.1(3) ("This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, *preferably in his or her own home*, conducive to the juvenile's welfare and the best interest of the state.") (emphasis added). . . . When a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest. But when a father or mother is erroneously deprived of his or her fundamental right to parent a child, the state's interest is undermined as well: "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." In other words, the state ordinarily has an equally strong interest in ensuring that a parent's fitness, or lack thereof, is resolved before the state interferes with the parent-child relationship. Thus, the probable value of extending the right to an adjudication to each parent in a child protective proceeding benefits both public and private interests alike. [*Id*. at 415-417 (citations omitted; second alteration in original).]

Although the Court found that an adjudication of each parent would "increase the burden on the state in many cases," the Court held that this process was nevertheless indispensable, as "an adjudication would significantly reduce any risk of a parent's erroneous deprivation of the parent's right to parent his or her children." *Id*. at 417. Guided by the *Eldridge* factors, the Court concluded that the burden of extending the right to an adjudication to all parents did not outweigh the risk that a parent could be deprived of his or her child's custody absent a finding of unfitness. *Id*. at 418-419.[10]

One additional *Eldridge* case informs our decision. Although the case arises from the criminal law, we find its teachings valuable and relevant here.

In *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985), the United States Supreme Court declared, "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." The Court grounded this pronouncement in the Due Process Clause, which guarantees that an indigent defendant facing the judicial power of the State must have "a fair opportunity to present his defense." *Id*. at 76. While this principle does not require a state to "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy," it does obligate the state to provide the defendant with the " 'basic tools of an adequate defense[.]' " *Id*. at 77, quoting *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971).

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[10] *Sanders* was not the first Michigan child protective case to employ *Eldridge*. See *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

In *Ake*, the "basic tool" was the assistance of a consulting psychiatrist. The United States Supreme Court framed the issue presented in that case as "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Ake*, 470 US at 77.[11] The Court analyzed this question by weighing the three guideposts for determining the process due in a particular case set forth in *Eldridge*.

The Supreme Court observed in *Ake*, "The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis." *Id*. at 78. The State's interest is solely economic: husbanding the public fisc. This is so because "[t]he State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." *Id*. at 79. "[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id*. The Supreme Court determined in *Ake* that the first two *Eldridge* criteria weighed heavily in the defendant's favor: "We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in

[11] A number of courts have applied *Ake*'s reasoning to a defendant's requests for expert assistance in areas other than psychiatry. For a list and summary of the cases, see Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L Rev 1305, 1367-1368 (2004), and *Moore v State*, 390 Md 343, 364; 889 A2d 325 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").

light of the compelling interest of both the State and the individual in accurate dispositions." *Id*.

The last *Eldridge* component examines "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id*. at 77. In *Ake*, the Supreme Court's evaluation of this factor centered on the critical role played by a psychiatric expert in a trial involving a defendant's mental condition. The Court elucidated:

> [T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. [*Id*. at 80-81 (citation omitted).]

The Court's meticulous depiction of the function of a psychiatrist appointed to aid the defense in an insanity case bears special significance here. The medical assistance respondents sought parallels that described by the Supreme Court in *Ake*. Just as a "psychiatrist[] can translate a medical diagnosis into language that will assist the trier of fact," a radiologist can decode black and white images on a scan, or analyze tests that have been performed to determine whether the results were normal or abnormal, or if additional medical studies would have provided critical diagnostic information.

We are not the first appellate court to look to *Ake* for guidance in a case involving the termination of parental rights. See *State ex rel Children Youth & Families Dep't v Kathleen DC*, 141 NM 535, 540; 157 P3d 714 (2007) ("[I]n certain circumstances, due process may require the appointment of an expert witness at the State's expense to an indigent parent in a neglect and abuse proceeding."); *In re Shaeffer Children*, 85 Ohio App 3d 683, 691; 621 NE2d 426 (1993) (applying *Eldridge* and *Ake* in holding that due process required the appointment of a psychiatric expert to assist the mother "in the preparation of her defense"). And *Ake* counsels that fulfilment of a respondent's due process rights may sometimes require state-funded access to an expert to assist in the evaluation, preparation, and presentation of a defense.

IV

In this case, petitioner and the children's guardian ad litem assert that the trial court's decision fell within the range of principled outcomes, as respondents failed to identify an actual expert who would likely benefit the defense, and offered only an "amorphous" request rather than a "well-reasoned argument" in support of

their motion for funding an expert witness or consultant. The chief judge reached a similar conclusion in denying respondents' motion. We reject these arguments. Respondents plainly demonstrated that petitioner's case rested exclusively on expert medical testimony involving complex, controversial medical issues, and that respondents' counsel lacked the tools necessary to challenge petitioner's experts. Child abuse science was not collateral or unimportant to these proceedings; expert testimony formed the whole of petitioner's proofs. The record amply supports that petitioner's case rose or fell on the trial court's assessment of the science advocated by petitioner, as no other evidence suggested that respondents had deliberately harmed their son. Without physician-witnesses to translate the medical records and to express expert conclusions, petitioner would have lacked *any* evidence to seek termination of respondents' parental rights. This fact supplied the requisite nexus between respondents' request and the issues presented, and established a reasonable probability that an expert would be of meaningful assistance.

Nor are we persuaded by the two cases cited by the chief judge as authority for denying respondents' motion, *Tanner*, 469 Mich 437, and *Leonard*, 224 Mich App 569. *Tanner* concerned the construction of MCL 775.15, a statute that applies only in criminal cases. We discuss *Tanner* only to explain why it lacks relevance even by way of analogy.

The defendant in *Tanner* sought expert assistance with DNA evidence that actually *excluded* the defendant as the perpetrator of the crime. *Tanner*, 469 Mich at 440. Although serological testing of other samples tended to inculpate the defendant, her counsel did not seek to have the blood retested so that the serology

results could be confirmed. *Id*. at 441. In the trial court, counsel argued that "he wanted an expert to help him better understand the DNA evidence and possibly to testify at trial." *Id*. The trial court denied the request, and the Supreme Court held that the trial court had not abused its discretion. Because the DNA evidence was exculpatory, the defendant failed to show "that she could not safely proceed to trial" without the assistance of a DNA expert. *Id*. at 444. Although the serology evidence linked the defendant to the crime, the Supreme Court determined that the defendant "did not establish that an expert serologist would offer testimony that would 'likely benefit the defense,' " as required by MCL 775.15. *Id*. at 443-444.

Here, respondents amply established that expert consultation was necessary to their defense and would likely benefit them. The medical records confirmed the existence of a profoundly important contradiction. On one hand, St. John physicians determined that JPY's MRI and CT scan showed no evidence of trauma or any other abnormality. On the other hand, the Children's Hospital medical experts determined that the same films demonstrated powerful evidence of abuse. Respondents' counsel were incapable of resolving or understanding this critical evidentiary inconsistency without expert assistance.

While we agree that counsel should strive to read and understand medical records and to conduct independent medical research, it is simply unrealistic to expect that such concerted study will yield the expertise necessary to interpret MRIs or CT scans, or to effectively cross-examine an adversary expert witness steeped in years of medical training, knowledge, and experience. Absent expert assistance, respondents' lawyers could not capably question or undermine the

brain-imaging evidence, which formed an essential part of petitioner's case.[12] Nor could respondents put forth any alternative theories regarding the cause of JPY's retinal hemorrhages, such as prolonged hypoxia followed by resuscitation and ventilation.[13] Realistically, without expert assistance, respondents' counsel had no serviceable tools to assist them in fairly evaluating the strengths and weaknesses of petitioner's medical evidence, or in advancing a different hypothesis.

Nor do we find that the trial court properly relied on *Leonard*. This Court concluded in *Leonard* that the defendant's lack of a DNA expert at trial did not deprive him of due process of law. *Leonard*, 224 Mich App at 583. We further noted that defense counsel neglected to file a formal motion seeking an expert witness, and "did not indicate that he required expert assistance to cross-examine the prosecution's experts." *Id*. at 585. These facts fully distinguish *Leonard* from the case at hand. Moreover, a federal district court ultimately granted Leonard's petition seeking a writ of habeas corpus, finding that "[d]efense counsel's overall ignorance of DNA analysis and lack of preparedness rendered his assistance" constitutionally ineffective. *Leonard v Michigan*, 256 F Supp 2d 723, 728 (WD Mich, 2003). The prosecution did not appeal that ruling to the Sixth Circuit Court of Appeals. Thus, *Leonard*

[12] It is similarly unrealistic to expect counsel to have found an expert willing to review the imaging studies and the voluminous medical records in this case for free, on the "if come" that a court might someday agree to some funding. Such medical volunteers likely are exceedingly rare. We also reject the notion that counsel could and should have presciently ascertained a potential expert's opinions without consulting with an expert.

[13] See Squier, *The "Shaken Baby" Syndrome: Pathology and Mechanisms*, 122 Acta Neuropathol 519, 530 (2011).

provides petitioner with no support for its contention that the chief judge appropriately denied respondents' requests for funding.

V

Respondent-mother's motion for "the appointment of an expert witness" cited no specific statute or court rule, but relied instead on "the interests of fairness." Respondent-father premises his argument in this Court on due process principles. We acknowledge the dearth of published decisions in the child welfare arena regarding the standards a court should apply when considering a request for expert witness funding. At their core, respondents' requests for funding relate to "the essential fairness of the state-ordered proceedings . . . ." *MLB*, 519 US at 120. Accordingly, we follow the lead of the United States and Michigan Supreme Courts and situate our legal analysis within the *Eldridge* framework. In deciding whether the chief judge abused his discretion by denying respondents' funding requests, we examine the private and governmental interests at stake, the extent to which the procedures otherwise available to respondents served their interests, and the burden on the state of providing expert funding. *Eldridge*, 424 US at 335.

We need spend little time on *Eldridge*'s first rung: the private interests at stake. For respondents, their "interest in the accuracy and justice" of a decision terminating their rights to their children is "a commanding one." *Lassiter*, 452 US at 27. As emphasized in *Sanders*, 495 Mich at 415, the importance of the fundamental rights at risk in a termination proceeding "cannot be overstated." Petitioner, too, has a compelling interest in the safety and welfare of children. Importantly, this "*parens patriae* interest favors pres-

ervation, not severance, of natural familial bonds." *Santosky*, 455 US at 766-767. Alternatively stated, "[s]ince the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Lassiter*, 452 US at 27. Petitioner's interest in prevailing at a trial must yield to its interest in a fair proceeding that protects a parent's constitutional rights.

In this case, the private interests strongly favored funding for an expert witness or consultant. As we have stated, the medical evidence conflicted concerning whether JPY sustained trauma to his brain before his respiratory arrest. The science swirling around cases involving "shaken baby syndrome" and other forms of child abuse is "highly contested." *People v Ackley*, 497 Mich 381, 394; 870 NW2d 858 (2015). Dr. Giles's opinion that JPY's retinal and subdural hemorrhages could manifest only as a result of child abuse has been vigorously challenged by scientists worldwide and in courtrooms throughout this country. See Findley et al, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous J Health L & Policy 209 (2012). As the Findley article discusses in detail, many of the conventional assumptions underlying medical opinions that a parent abused a child have proven fundamentally flawed. Recent scientific studies and careful reviews of older studies have called into question the reliability of certain findings, including subdural and retinal hemorrhages, in confirming child abuse. Indeed, even skeletal findings thought to confirm abuse also may be accurately explained by "accidental trauma, metabolic bone disease and/or nutritional deficiencies." *Id*. at 255.[14] Getting it right, medically and

[14] During cross-examination, one of the prosecution's experts (Dr. Mary Lou Angelilli) conceded that no tests were performed to determine whether there were metabolic causes for JPY's fractures.

scientifically, protects the shared interests of petitioner and respondents. Handicapping one side's ability to present relevant evidence hampers, rather than enhances, the search for truth.

Next, we consider whether the nature of the child welfare proceedings adequately safeguarded respondents' interests, absent funding for an independent expert. This inquiry requires us to focus on the due process safeguards incorporated into child protective proceedings. In *Eldridge*, the Supreme Court determined that the procedures governing administrative claims challenging the termination of disability benefits provided "effective process" for asserting a claim, and "also assure[d] a right to an evidentiary hearing, as well as to subsequent judicial review," before the denial of a claim became final. *Eldridge*, 424 US at 349. The interconnected web of state and federal procedures required to terminate social security disability benefits sufficed for due process purposes.

In contrast, a termination of parental rights proceeding is fundamentally adversarial and lacks the "checks and balances" built into the disability benefit process. Thus, when only one side possesses the funds necessary to pay an expert witness, the opposing side must rely on cross-examination to attack the expert's testimony. In a case involving highly technical matters which few laypeople readily understand, the task of cross-examination without expert consultation presents a steep uphill climb. Lacking an expert's guidance, respondents' counsel could not interpret the CT scan or the MRI, or understand whether additional specific laboratory tests should have been ordered or likely would have supplied pertinent clinical information. Furthermore, even when counsel confronted several of the Children's Hospital witnesses with potential

evidentiary contradictions or the existence of other theories regarding child abuse science, counsel were stuck with the answers they elicited. Counsel had no evidence to offer in rebuttal or to employ in establishing a testimonial weakness. We are unconvinced that the availability of cross-examination, uninformed by expert consultation, adequately reduces the risk of error in a termination proceeding engulfed in scientific and medical evidence, as was this one.

Lastly, we look to the government's interest, including the fiscal and administrative burdens that payment for an expert would impose. Here, mother's counsel estimated that respondents needed "up to $2,500" to secure expert consultation. While this sum is not insubstantial, it hardly qualifies as unreasonable. We are unconvinced that the burden of a payment in this range should have outweighed the interests of these indigent parents, who otherwise lacked the financial resources to retain expert medical consultation.

In sum, after weighing the respective private and public interests, we hold that the chief judge abused his discretion by failing to employ the requisite due process analysis under *Eldridge*, and by refusing to authorize reasonable expert witness funding in this case. We highlight the inherently fact-specific inquiry required by the *Eldridge* due process framework: "due process is flexible and calls for such procedural protections as the particular situation demands." *Eldridge*, 424 US at 334 (quotation marks, citation, and alteration omitted). Under the circumstances presented here, no meaningful alternative evidentiary safeguards afforded respondents an opportunity to challenge petitioner's child abuse theory, despite that the St. John evidence clearly called the reliability of that

evidence into question. This abridgment of respondents' due process rights requires a new termination hearing, should respondents elect to request one after they have been afforded a reasonable fee for expert consultation.

We vacate the order terminating respondents' parental rights and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH, J., concurred with GLEICHER, J.

JANSEN, P.J. (*concurring*). I concur in the majority opinion. I write separately to emphasize that the holding in this case is inherently fact-specific and does not require authorization of expert witness funding in every termination case involving allegations of abuse or neglect or in every case in which the respondent cannot afford to consult with an expert witness. Expert witness funding is necessary in this case because there are two conflicting theories regarding the cause of JPY's injuries. The St. John Hospital testing revealed no evidence of injury to the brain, while the Children's Hospital interpretation of the same data revealed severe injuries and abnormalities indicative of abuse. As noted by the majority, the medical records indicated a "profoundly important contradiction," and respondents' attorneys could not resolve or understand the contradiction without expert assistance.

However, the reasoning in this case does not extend to all termination cases in which the petitioner alleges abuse or neglect, or in which the respondent cannot afford to consult an expert witness. Instead, in each case in which a respondent requests expert witness funding, the chief judge must employ the *Eldridge* due-process test to determine whether to authorize

reasonable expert witness funding based on the facts of the case at hand. See *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976) ("[D]ue process is flexible and calls for such procedural protections *as the particular situation demands*.") (emphasis added). I respectfully concur.

PEOPLE v PERKINS

PEOPLE v WILLIAMS

PEOPLE v HYATT

Docket Nos. 323454, 323876, and 325741. Submitted January 5, 2016, at Detroit. Decided January 19, 2016, at 9:10 a.m. Part IV(C) vacated and special panel convened 314 Mich App 801. Opinion in Docket No. 325741 on consideration by the special panel 316 Mich App 368. Leave to appeal sought in Docket No. 325741. Leave to appeal regarding Docket No. 323876 denied 500 Mich ___.

Floyd G. Perkins, Aaron Williams, and Kenya A. Hyatt were charged in the Genesee Circuit Court with felony murder, armed robbery, conspiracy to commit armed robbery, and related firearms charges arising from the death of a security guard at an apartment complex in Flint. The events leading to the security guard's death began when Perkins decided he needed a firearm to protect his family, and the three defendants devised a scheme by which they intended to take the security guard's firearm. Williams borrowed a gun to use when the three of them carried out their plan. Williams pretended to be drunk and disorderly on the grounds of the apartment complex in the early morning hours of August 14, 2010. One of the complex's security guards got out of his car to check out the situation with Williams. Perkins and Hyatt approached the security guard from behind; Hyatt had the gun. According to Perkins and Hyatt, the security guard reached for Hyatt's gun, and it discharged accidentally. Perkins grabbed the security guard's gun, and as he ran away, he heard two more shots. Hyatt claimed he blacked out after the first accidental discharge of the gun and did not recall what happened after that. The security guard died as a result of the gunshot wounds. In statements to the police, each defendant implicated himself in the murder. Defendants were tried jointly before separate juries. Perkins was convicted of first-degree felony murder, conspiracy to commit armed robbery, armed robbery, and carrying a firearm during the commission of a felony (felony-firearm). Williams was convicted of conspiracy to commit armed robbery, armed robbery, felon-in-possession of a firearm, and felony-firearm. The jury could not reach a verdict on Williams's felony-murder charge, and he later pleaded guilty to second-degree murder to avoid a second trial. Hyatt was convicted of first-degree felony murder, conspiracy to commit armed robbery, armed rob-

bery, and felony-firearm. He was 17 years old at the time of the crimes. The court, Judith A. Fullerton, J., sentenced Perkins and Hyatt to life in prison for their felony-murder convictions. Williams was sentenced as a fourth-offense habitual offender to a 35- to 50-year term of imprisonment for his second-degree murder conviction. Sentences for defendants' other convictions were concurrent with these sentences, with the exception of defendants' felony-firearm sentences, which ran consecutively to the sentences imposed for the predicate felonies. Defendants appealed, and the Court of Appeals consolidated the cases on appeal.

The Court of Appeals *held*:

1. Sufficient evidence supported Perkins's felony-murder conviction. Perkins argued that the security guard was not killed during the commission or attempted commission of a robbery because the robbery was complete when Perkins took the security guard's gun and ran away. Perkins did not fire the fatal shots; he was convicted as an aider and abettor. He aided and abetted by participating in the underlying offense—the assault—during which Perkins took the security guard's gun. Evidence established that Perkins (1) performed acts or gave encouragement that assisted in killing a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. Even though Perkins ran from the scene after he grabbed the firearm, at least one gunshot wound occurred while Perkins held the security guard.

2. Perkins's confession was properly admitted at trial even though the statement was elicited when he was in jail for an unrelated offense and was represented by counsel for that offense. The Sixth Amendment right to counsel is offense-specific. That Perkins was represented by counsel for an offense not related to the offense about which he was questioned had no effect on the propriety of the police officer's interrogation of Perkins. The officer was permitted to question Perkins about the security guard's death; the Sixth Amendment right to counsel had not attached to the charges involving the security guard because formal adversarial proceedings had not yet begun.

3. Perkins's statement to the police was not involuntary and was properly admitted against him at trial. The fact that the police officer lied to Perkins about the evidence against him—the officer told Perkins there was video, DNA, and fingerprint evidence—did not automatically render involuntary an otherwise voluntary statement. Whether a statement is voluntary is determined based on the totality of circumstances, and whether the

officer misrepresented the evidence that had been collected is simply one factor to be considered in making this determination.

4. Perkins's felony-firearm sentence was erroneously ordered to be served consecutively to his sentence for conspiracy to commit armed robbery. A sentence for felony-firearm must be imposed consecutively to the predicate felony, and the conspiracy conviction was not the predicate felony in this case. Remand was necessary to correct Perkins's judgment of sentence.

5. Williams was properly ordered to pay restitution in an amount equal to the restitution ordered against his codefendants who were convicted of felony murder, even though Williams was not convicted of felony murder. Williams argued that he was only liable for the effect of his own conduct on the victim and that he was not liable for the criminal acts of others. The Court concluded that Williams waived this issue because Williams's counsel expressly asked the court to make restitution joint and several. Williams may not benefit from an alleged error to which he contributed.

6. Williams's convictions of armed robbery and conspiracy to commit armed robbery were supported by sufficient evidence. Williams claims that no evidence proves that he knew his codefendants intended to commit an armed robbery. However, it was Williams who provided the firearm used in the armed robbery and Williams who created the disturbance that prompted the security guard to get out of his vehicle.

7. The trial court abused its discretion when it allowed a police officer to identify Hyatt in surveillance video introduced at trial. Whether a person in the courtroom is the same person appearing in a surveillance video is a matter properly determined by the jury when the jury is just as capable as anyone else of identifying the person in the video. The error was harmless because Hyatt's identity was not an issue at trial.

8. The trial court properly refused to give Hyatt's jury an instruction on accident. A trial judge must give a jury instruction when it is supported by the evidence, but a trial court need not deliver an instruction that is not supported by the evidence. No evidence indicated that the shooting was accidental. Even if the first shot could be considered an accident, Hyatt shot the security guard two more times. No rational view of the evidence supported an accident instruction.

In Docket No. 323454, Perkins's convictions and sentences affirmed; case remanded for correction of the judgment of sentence.

In Docket No. 323876, Williams's convictions and sentences affirmed.

In Docket No. 325741, Hyatt's convictions affirmed.

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.

Jonathan B. D. Simon for Floyd G. Perkins.

Michael A. Faraone, PC (by *Michael A. Faraone*), for Aaron Williams.

Ronald D. Ambrose for Kenya A. Hyatt.

Before: TALBOT, C.J., and CAVANAGH and K. F. KELLY, JJ.

K. F. KELLY, J. These three defendants were tried jointly before separate juries. A jury convicted defendant Floyd Gene Perkins (Perkins) of first-degree felony murder, MCL 750.316(1)(b); conspiracy to commit armed robbery, MCL 750.157a; armed robbery, MCL 750.529; and felony-firearm, MCL 750.227b(1). Perkins was sentenced to life in prison for the murder conviction, 285 months to 50 years' imprisonment for both the convictions of conspiracy to commit armed robbery and armed robbery, and two years' imprisonment for the felony-firearm conviction. On appeal, Perkins argues: (1) there was insufficient evidence to support his murder conviction; (2) his confession violated the Fifth and Sixth Amendments; and (3) the judgment of sentence must be amended because Perkins's felony-firearm conviction was erroneously ordered to be served consecutively to his conviction for conspiracy to commit armed robbery. We agree that the matter must be remanded for the ministerial task of correcting Perkins's judgment of sentence, but in all other respects we affirm Perkins's convictions and sentences.

A jury convicted defendant Aaron Williams (Williams) of conspiracy to commit armed robbery, armed robbery, felony-firearm, and felon in possession of a firearm, MCL 750.224f. The jury could not reach a verdict on the felony-murder charge. Williams was sentenced as a fourth-offense habitual offender to 25 to 50 years' imprisonment for both the convictions of conspiracy to commit armed robbery and armed robbery, 30 to 60 months' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. In lieu of a retrial on the felony-murder charge, Williams later pleaded no contest to second-degree murder, for which he received a 35- to 50-year prison term. On appeal, Williams argues there was insufficient evidence that he committed armed robbery and the trial court erred in assessing the same amount of restitution against Williams as it had against his more culpable codefendants. We affirm Williams's convictions and sentences.

A jury convicted Kenya Ali Hyatt (Hyatt) of first-degree felony murder, conspiracy to commit armed robbery, armed robbery, and felony-firearm. Because Hyatt was 17 years old when the offense occurred, the trial court held a *Miller*[1] hearing to determine Hyatt's sentence. It ultimately sentenced Hyatt to life imprisonment without the possibility of parole for the murder conviction, 210 months to 40 years' imprisonment for both the convictions of conspiracy to commit armed robbery and armed robbery, and two years' imprisonment for the felony-firearm conviction. On appeal, Hyatt argues: (1) a police officer impermissibly encroached on the province of the jury when he identified Hyatt in a surveillance video, (2) the trial court erred

[1] *Miller v Alabama*, 567 US 460; 132 S Ct 2455, 2457; 183 L Ed 2d 407 (2012).

in failing to instruct the jury on accident, and (3) his sentence must be vacated because whether a juvenile should receive a life sentence without parole must be determined by a jury. In light of this Court's decision in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), Hyatt must be resentenced so that a jury may determine whether he should receive life in prison without the possibility of parole.* We otherwise affirm Hyatt's convictions and sentences. However, were it not for *Skinner*, we would affirm the sentencing court's decision to sentence Hyatt to life imprisonment without the possibility of parole. We therefore declare a conflict with *Skinner* pursuant to MCR 7.215(J)(2).

I. BASIC FACTS

On August 14, 2010, the victim, a security guard at River Village Apartments in Flint, died after being shot multiple times. Perkins, Williams, and Hyatt each gave statements to police officer Terence Green, and each implicated himself in the security guard's murder. The statements revealed that Perkins and his family were in danger because of a dispute Perkins had with an individual. Perkins wanted to obtain a firearm to help him protect his family. Williams and Hyatt were Perkins's cousins, but were not related to one another. The three of them devised a plan by which Perkins could obtain a gun. Williams lived in the apartment complex where the murder took place and knew that the security guards who worked there were armed. Williams borrowed a gun from an individual known as "Chief." The idea was that Perkins, Hyatt, and Williams would use the borrowed gun to rob one of the

* Reporter's Note: The part of this opinion discussing and deciding Hyatt's sentencing situation was vacated in its entirety on February 12, 2016.

security guards of his firearm. On the night of the shooting, Williams acted drunk and disorderly in the apartment complex's parking lot in order to lure the victim out of his security car. When the victim approached Williams, Perkins and Hyatt approached from behind. Perkins grabbed the victim and held him while Hyatt drew the gun he had received from Williams. Both Perkins and Hyatt indicated that the victim reached for Hyatt's gun, and the gun discharged. After that first shot, Perkins grabbed the victim's side arm and ran away. Perkins heard additional shots as he was fleeing. Hyatt maintained that the first shot was accidental and that he subsequently "blacked out" and could not remember what happened afterwards.

An autopsy revealed that the victim had been shot three times, although there were four gunshot wound paths. One bullet entered the back left side of the victim's scalp, exiting near the forehead, grazing the left cheek. This same bullet then entered the top of the left shoulder, with the bullet ending up deep in the muscle on the left side of the back thorax area. Another bullet entered behind the left ear and exited the right cheek. This bullet went through the spine, severing the spinal cord. A third bullet, causing a fourth path, entered the left chest region and was recovered from the lower back. This bullet went through the lung, causing significant injury to the lung and internal bleeding in the left chest area. While all gunshot wounds had the potential to be fatal, the pathologist testified that two were immediately incapacitating—the one that entered behind the left ear and severed the spinal cord, and the one on the left side of the chest that caused significant internal bleeding. There was no way to tell which bullet came first.

As previously indicated, Perkins, Williams, and Hyatt were tried jointly before separate juries. They were convicted and sentenced as outlined above and now appeal as of right.

II. DOCKET NO. 323454 (PERKINS'S APPEAL)

A. SUFFICIENCY OF THE EVIDENCE

Perkins argues that there was insufficient evidence to support his felony-murder conviction. Specifically, Perkins argues that the victim was not killed "while in the perpetration or attempted perpetration of a robbery" because the robbery was complete when Perkins took the victim's gun and fled from the scene.[2] We disagree.

"We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id*. at 428. "The requirements of the aiding and abetting statute are a question of law that this Court reviews de novo." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

In order to be convicted of first-degree felony murder, the prosecution had to prove the following elements:

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[2] Perkins does not challenge his convictions of armed robbery, conspiracy to commit armed robbery, or felony-firearm, and he concedes his participation in the armed robbery.

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b) . . .]. [*People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (quotation marks omitted; alteration in original).]

While Perkins did not fire the fatal shots, the aiding and abetting statute, MCL 767.39, provides that a defendant may be convicted as a principal if he aided or abetted in the commission of a charged crime. The statute reads:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39.]

Therefore, in order to be convicted under an aiding and abetting theory, the prosecution must prove:

> (1) the crime charged was committed by the defendant or some other 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. [*Robinson*, 475 Mich at 6 (quotation marks and citations omitted).]

More specifically to this particular case:

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high

> risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

"The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). "In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime." *Id*. at 71. Whether and to what extent a defendant acts or gives encouragement "must be determined on a case-by-case basis . . . ." *Id*.

The facts in *Robinson* are similar to the case at bar. In *Robinson*, the defendant agreed with his codefendant that they would go to the victim's house and "f*** him up." *Robinson*, 475 Mich at 4, 11. The defendant drove himself and his codefendant to the victim's home, and defendant delivered the first blows to the victim. *Id*. Once the victim was on the ground, the codefendant began to kick the victim. *Id*. The defendant told his codefendant "that was enough" and was back at the car when he heard a single gunshot; the codefendant had shot the victim. *Id*. at 4. The trial court found the defendant guilty of second-degree murder. *Id*. This Court reversed, holding that there was insufficient evidence to support the defendant's conviction because no evidence established that the defendant was aware of his codefendant's intent to kill the victim. *Id*. Our Supreme Court reversed, holding that a natural and probable consequence of aggravated assault was death. *Id*. at 11. While the defendant

may have only intended to assault the victim, it was foreseeable that a plan to assault someone could escalate to murder, and the fact that the defendant "serendipitously left the scene of the crime moments before [the] murder does not under these circumstances exonerate him from responsibility for the crime." *Id*. at 11, 12. The Court explained that "sharing the same intent as the principal allows for accomplice liability. However, sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability . . . ." *Id*. at 14. The Court held:

> [A] defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id*. at 15.]

The prosecution presented sufficient evidence to convict Perkins of felony murder. Perkins, along with Williams and Hyatt, devised a plan to take a gun from a security guard. Perkins grabbed the victim and held him while Hyatt drew his own gun. Hyatt shot the victim while Perkins was holding him. Although Perkins may have fled the scene after the first shot, he is not exonerated from responsibility for Hyatt's subsequent action because the victim's death was a natural and probable consequence of the armed robbery. A reasonable jury could conclude that Perkins disregarded the likelihood that the natural tendency of his

acts was to cause death. Clearly, Perkins (1) performed acts or gave encouragement that assisted in killing a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.

Defendant argues that he had reached temporary safety before the fatal shots. However, the victim was shot multiple times, and one of those shots came when Perkins was still holding the victim. It is unclear which shot actually killed the victim. Therefore, it is conceivable that the shot fired while Perkins held the victim was the one that actually caused the victim's death. At a minimum, the shot contributed to the victim's death. Perkins tries to separate his acts of assistance during the armed robbery from Hyatt's act of shooting the victim, relying heavily on the fact that he was attempting to leave the location. The jury could have inferred from the evidence, however, that Perkins assisted in the murder by actively participating in the underlying offense, i.e., the armed robbery, and that the shooting was a natural and probable result of the armed robbery.

B. ADMISSIBILITY OF PERKINS'S STATEMENT

Perkins next argues that his confession should have been suppressed because the investigating officer, Terence Green, knew that Perkins was in jail on an unrelated offense and that he was represented by counsel, but nevertheless, Green questioned Perkins without his attorney present. Perkins also claims that his confession should have been suppressed because Green lied to him about incriminating physical evidence. We disagree.

> This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker*[3] hearing unless those findings are clearly erroneous. A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake. [*People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003) (quotation marks and citations omitted).]

Perkins argues that the trial court erred by admitting his statement to the police because the statement violated his right to counsel under both the Fifth and the Sixth Amendments. Our Court has explained the interplay between these two amendments:

> The right to counsel is guaranteed by both the Fifth and Sixth Amendments of the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20. However, these constitutional rights are distinct and not necessarily coextensive. The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions, while the Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process. The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment; absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions will be construed to afford the same protections. [*People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998) (citations omitted).]

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to have an attorney assist in his or her defense. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). "The Sixth Amendment

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[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings." *Missouri v Frye*, 566 US 133, 140; 132 S Ct 1399; 182 L Ed 2d 379 (2012) (quotation marks and citations omitted). "[O]nce this right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective." *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991). However, "[t]he Sixth Amendment right . . . is offense-specific and cannot be invoked once for all future prosecutions . . . ." *People v Smielewski*, 214 Mich App 55, 60; 542 NW2d 293 (1995). Instead, it "attaches only at or after adversarial judicial proceedings have been initiated." *Id*. This is because excluding "evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *McNeil*, 501 US at 176 (quotation marks and citation omitted). This Court has explained:

> [O]nce the Sixth Amendment right to counsel has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective with respect to the formal charges filed against the defendant. Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses. Indeed, a defendant's request for court-appointed counsel at an arraignment does not invalidate a waiver of the defendant's right to counsel under *Miranda*[4] during a subsequent police-initiated interrogation concerning a different and unrelated offense. Thus, when a defendant is interrogated after being arraigned and the interrogation involves

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

> charges unrelated to the arraigned charges, the defendant's Sixth Amendment right invoked at arraignment—the initiation of the criminal prosecution—is inapplicable to the interrogation. [*Smielewski*, 214 Mich App at 61 (quotation marks and citations omitted).]

The record reveals that adversarial judicial proceedings for the instant case had not yet begun when Perkins confessed. At the *Walker* hearing, Green testified that he knew that Perkins was in jail on an unrelated home invasion charge. Green never bothered to see whether Perkins had been arraigned on the home invasion charge or whether there was an attorney of record. Because the Sixth Amendment right to counsel is offense-specific, and because adversarial judicial proceedings had not been initiated for the offenses in this case, Perkins's right to counsel under the Sixth Amendment had not yet attached, and the trial court properly denied Perkins's motion to suppress his confession on that basis.

Perkins nevertheless claims that his statement was involuntary. The Michigan Supreme Court has held:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

Perkins claims that his statement was involuntary because Green lied to him about what evidence existed in the case. Green admitted that he told Perkins there was video, DNA, and fingerprint evidence, even after Green assured Perkins at the outset of their conversation that he would "never lie to" Perkins. The fact that the police lie to a suspect about the evidence against him or her does not automatically render an otherwise voluntary statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). Instead, misrepresentation by the police is just one factor to be considered; the focus remains the totality of the circumstances.

Green testified that he questioned Perkins on February 20, 2013, at approximately 4:55 p.m. Perkins was over 21 years old and had both a G.E.D. and a high school diploma. Perkins could read and write the English language. Perkins had previous contact with the police and the criminal justice system and, as previously mentioned, was in jail for home invasion. Perkins was not deprived of food, sleep, or medical attention, and he was not injured, intoxicated, or drugged. There is no evidence that Perkins was physically abused or threatened with abuse. The interview was short, lasting only an hour. Perkins was advised of and waived his *Miranda* rights before speaking with Green, and he never requested an attorney. Therefore, even if Green lied to Perkins regarding the evidence against him, the trial court did not err in determining

that defendant's statement was voluntarily made under the totality of the circumstances.

C. JUDGMENT OF SENTENCE

Finally, Perkins argues that the trial court erred in ordering that Perkins's felony-firearm sentence run consecutively to Perkins's sentence for conspiracy to commit armed robbery. The prosecution concedes error on this point.

At the time of Perkins's sentence, the felony-firearm statute provided, in relevant part:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years . . . .
>
> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony. [MCL 750.227b.]

Our Supreme Court has held:

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony.*" It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense. [*People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).]

Perkins's judgment of sentence should be amended to reflect that his felony-firearm sentence does not run consecutively to his sentence for conspiracy to commit armed robbery.

III. DOCKET NO. 323876 (WILLIAMS'S APPEAL)

A. RESTITUTION

Williams first argues that the trial court erroneously assessed the full amount of restitution against him when he was merely an aider and abettor to crimes less than murder. He points out that he was not convicted of felony murder and was only liable for the impact of *his* conduct on the victim, not the criminal acts of others. This issue is moot and has been waived.

In lieu of a second trial,[5] Williams pleaded no contest to second-degree murder. Notably, the judgment of sentence for the murder conviction included the same order of restitution as did the previous judgment of sentence. Williams tried unsuccessfully to withdraw his guilty plea in the trial court. He sought leave to appeal, which this Court denied. *People v Williams*, unpublished order of the Court of Appeals, entered August 4, 2015 (Docket No. 328103). Therefore, as of now, the judgment of sentence from Williams's murder conviction stands. The restitution order accompanying the murder conviction is the same as the restitution order in this case. Under those circumstances, "this Court is unable to provide a remedy for the alleged error," and the issue is deemed moot. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003).

Moreover, the issue has been waived. "[I]n general, an appellant may not benefit from an alleged error that

[5] The jury could not reach a verdict on the felony-murder charge at Williams's first trial.

the appellant contributed to by plan or negligence." *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003). At Williams's August 11, 2014 sentencing, the following exchange took place:

> *The Court*: Restitution, as previously indicated for the co-defendant in this matter, total[s] $689,688.68; partially los[t] wages, partially funeral bill and partially workers compensation as set forth on page five of this [presentence investigation] report.
>
> *Mr. Cotton* [defense counsel]: Judge, I would just ask that that restitution be joint and severally certain, your Honor.
>
> *The Court*: It is. It's all joint and several.
>
> *Mr. Cotton*: Thank you, your Honor.

"[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Defense counsel seems to have, "undoubtedly inadvertently, created the very error that it wishes to correct on appeal." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). But "a party may not harbor error at trial and then use that error as an appellate parachute." *Id*.

B. SUFFICIENCY OF THE EVIDENCE

Williams argues that there was insufficient evidence to support his convictions of armed robbery and conspiracy to commit armed robbery. Williams writes: "There is no evidence that Williams knew that anyone intended to commit an *armed* robbery that night. . . . The prosecution did not prove that Williams had conspired to be part of anything more than an *unarmed* robbery done to steal a firearm." We disagree.

> [A] prosecutor must . . . prove, in order to establish the elements of armed robbery, that (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (citation omitted).]

"A conspiracy is a partnership in criminal purposes. The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993) (quotation marks and citations omitted).

As previously stated, the aiding and abetting statute, MCL 767.39, states that a defendant may be convicted of a crime if he or she aided or abetted in the commission of the crime. Williams admitted that he, Perkins, and Hyatt discussed the need to rob a security guard in order to obtain a weapon. Williams borrowed a gun for the group. In fact, Williams concedes that the evidence was sufficient to support his convictions for felon-in-possession and felony-firearm based on his admission to Green that he obtained the gun from a man known as "Chief." Not only did Williams provide the weapon, but he acted in a drunk and disorderly way to lure the victim out of his car, making the victim an easier target for Perkins and Hyatt. Hyatt shot the victim with the gun that Williams procured. It is disingenuous for Williams to now argue that he did not expect an armed robbery when, in fact, he provided a gun to accomplish the armed robbery. There was over-

whelming evidence to support Williams's convictions of armed robbery and conspiracy to commit armed robbery.

IV. DOCKET NO. 325741 (HYATT'S APPEAL)

A. IDENTIFICATION TESTIMONY

Hyatt argues that Green invaded the province of the jury by offering his opinion that Hyatt appeared in certain video footage and still frames from the stairwell of the apartment building where the murder occurred. We agree that the trial court abused its discretion when it allowed Green to identify Hyatt in a surveillance video, but we conclude that the error was harmless.

"We review for an abuse of discretion the trial court's evidentiary rulings that have been properly preserved. An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013) (quotation marks and citation omitted).

The following exchange took place while the prosecutor questioned Green:

> *Q*. Camera two. Okay. . . . can you tell us who is coming down these stairs when you can see them?
>
> *Mr. Skinner* [defense counsel]: I'm gonna object to that question.
>
> *By Ms. Hanson* [prosecutor]:
>
> *Q*. Who is that?
>
> *A*. That's Kenya Hyatt.
>
> *Q*. Okay.
>
> *Mr. Skinner*: Judge, can I be heard?
>
> *The Court*: I'm hearing you.

> *Mr. Skinner*: All right. It's too late now for my objection.
>
> *The Court*: Well, I'm gonna overrule the objection. But you can make a separate record at a later time.

Green then testified that, as Hyatt neared the bottom of the stairs, "you can clearly see him make a motion. Left hand crosses the body. Right hand touches the hip." Green believed the motion was an attempt to conceal a weapon.

The testimony at issue constituted lay opinion testimony. See *Fomby*, 300 Mich App at 50. MRE 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." However, Green's testimony invaded the province of the jury. In *Fomby*, this Court cited federal caselaw indicating that "the issue of whether the defendant in the courtroom was the person pictured in a surveillance photo [is] a determination properly left to the jury." *Fomby*, 300 Mich App at 52. In such a situation, there is no reason to believe that the witness who offered the identifying testimony was "more likely to identify correctly the person than is the jury." *Id*. (quotation marks omitted).

Unlike the witness in *Fomby* who testified that the individual in the video footage was the same individual in still images but did not specifically identify the defendant as the individual in the images, Green affirmatively identified Hyatt as the individual in the stairwell. Green could properly comment that, based on his experience, the individual appeared to be concealing a weapon, but Green should not have been allowed to identify Hyatt as that individual. "[W]here a

jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *People v Drossart*, 99 Mich App 66, 80; 297 NW2d 863 (1980). There was nothing about the images (i.e., poor quality of the images, defendant wearing a disguise) that necessitated Green's opinion. This is evidenced by the trial court's own statement during defense counsel's objection that "I would have no trouble making an identification myself."

However, even if the trial court abused its discretion, reversal is not warranted where the error was not outcome-determinative. "Under MCL 769.26, a preserved, nonconstitutional error is not 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. Similarly, MCR 2.613(A) provides that an error is not grounds for disturbing a judgment unless refusal to take this action appears to the court inconsistent with substantial justice." *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009) (quotation marks and citation omitted). "An error is outcome determinative if it undermined the reliability of the verdict[.]" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). When determining whether the verdict has been undermined, an appellate court must "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id*.

Here, evidence of Hyatt's guilt was overwhelming. In fact, the assailants' identities were not reasonably in dispute. Hyatt confessed to helping plan the robbery. He armed himself with a gun that Williams gave him. Although the plan was simply to scare the security

guard and take his weapon, Hyatt shot the victim at least three times. Hyatt clearly admitted that he was the shooter. His identity was not at issue, and therefore, Green's testimony was ultimately of no consequence.

B. JURY INSTRUCTIONS

Hyatt next argues that the trial court erred when it declined Hyatt's request to instruct the jury on accident. We disagree.

"[J]ury instructions that involve questions of law are . . . reviewed de novo. But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted; alteration in original).

"Challenges to jury instructions are considered in their entirety to determine whether the trial court committed error requiring reversal." *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012) (quotation marks and citation omitted). "Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories *if supported by the evidence*." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (citation omitted; emphasis added). Therefore, "when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). However, a trial court is not required to give a requested instruction "where the theory is not supported by evidence." *Id*. Even when a defendant has

been charged with first-degree murder and claims a firearm accidentally discharged, failure to instruct on accident is not subject to automatic reversal but is subject to review for harmless error. See *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006). In the event of an instructional error, "[a] defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included misdemeanor instruction undermined reliability in the verdict." *People v Cornell*, 466 Mich 335, 364; 646 NW2d 127 (2002).

Defense counsel asked that the jury be instructed as to accident under CJI2d 7.1 or self-defense under CJI2d 7.2, in light of the fact that there was record evidence that the gun simply discharged when the victim attempted to grab it from Hyatt. The trial court declined to give either instruction because "I do not think there's any evidence or sufficient evidence . . . that would support the theory that the handgun he was holding discharged accidentally during a struggle with [the victim]."

There was no evidence to support Hyatt's theory that the shooting was accidental. Hyatt did not testify at trial, so the only evidence that the shooting was accidental was Hyatt's statement to Green that the victim grabbed the gun with both hands, and it "just went off," as well as Perkins's statement that the victim reached for the gun and it discharged. Had the victim been shot only once, the record might have supported an accident instruction. However, Hyatt fails to address the fact that the victim was shot at least three times. Even if the first shot was accidental, Hyatt shot the victim at least two additional times. Under those circumstances, no rational view of the evidence would support an accident instruction.

C. SENTENCING*

Finally, Hyatt argues that he was entitled to have a jury determine whether he should receive a sentence of life imprisonment without the possibility of parole. In light of *Skinner*, we are compelled to remand for resentencing. However, we believe that *Skinner* was wrongly decided.

In *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that *mandatory* life imprisonment without the possibility of parole for those under the age of 18 at the time they committed the sentencing offense violated the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution, US Const, Am VIII. The Court concluded that juveniles were different from adults:

> 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 . . . or his incapacity to assist his own attorneys. . . . And finally, this mandatory

* Reporter's Note: Part IV(C) of this opinion was vacated in its entirety by order dated February 12, 2016. That order also convened a special panel to resolve a conflict between this case and *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015). See *People v Perkins*, 314 Mich App 801 (2016).

> punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id*. at 477-478.]

However, the Court stopped short of categorically barring life without parole for juvenile offenders; instead, it held that a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480.

This Court has since struggled with what, exactly, *Miller* requires. See *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013); *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012). In *Eliason*, 300 Mich App at 310, this Court noted that "the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole" guided by "the following nonexclusive list of factors":

> (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Carp*, 298 Mich App at 532, citing *Miller*, 567 US at 477-478 (quotation marks omitted; first and second alterations in original).]

Our Legislature enacted MCL 769.25, effective March 4, 2014. The statute, in relevant part, provides as follows for sentencing select juvenile offenders:

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:

* * *

(b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.16, 750.18, 750.316, 750.436, and 750.543f.

(3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

* * *

(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*, 567 US 460], 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.
>
> * * *
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

Therefore, pursuant to MCL 769.25, juveniles are no longer sentenced under the same fixed sentences as adults, and, absent a motion by the prosecutor seeking a sentence of life imprisonment without the possibility of parole, "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(4) and (9). If the prosecutor files a motion seeking life imprisonment without the possibility of parole for the enumerated offenses, the trial court must hold a hearing at which it must consider the factors listed in *Miller*, and the court shall specify on the record any reasons supporting the sentence imposed. MCL 769.25(6) and (7).

When considering *Eliason* and *Carp*, our Supreme Court determined that a sentencing court was not afforded with only the discretion to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole; a defendant whose case was on direct review at the time *Miller* was decided was entitled to resentencing pursuant to MCL 769.25(1)(b)(*ii*):

> Under MCL 769.25(9), the default sentence for a juvenile convicted of first-degree murder is a *sentence of a term of years* within specific limits rather than life without parole. A juvenile defendant will only face a life-without-parole sentence if the prosecutor files a motion seeking that sentence and the trial court concludes following an individualized sentencing hearing in accordance with *Miller* that such a sentence is appropriate. [*People v Carp*, 496 Mich 440, 527; 852 NW2d 801 (2014) (emphasis added).]

In addition to the changes impacting juvenile sentences, our Supreme Court has recently declared certain features of Michigan's sentencing scheme unconstitutional. In *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), our Supreme Court concluded that

> the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient. That deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the "mandatory minimum" sentence under *Alleyne*. [*Lockridge*, 498 Mich at 364.]

In order to remedy the constitutional deficiency, the Supreme Court "sever[ed] 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." *Id*. The Court struck 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." *Id*. at 364-365. Going forward, the Supreme Court held that "a guidelines minimum sentence range calculated in violation of *Apprendi* and

Alleyne is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id*. at 365.

This Court recently applied *Lockridge* to juvenile sentencing in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), and held that a jury must decide whether a juvenile is to be sentenced to life imprisonment without the possibility of parole because such a sentence increases the maximum penalty in violation of the Sixth Amendment. In finding that portions of MCL 769.25 violated the Sixth Amendment, this Court explained:

> MCL 769.25 contains provisions that establish a default term-of-years prison sentence for a juvenile convicted of first-degree murder. Specifically, the statute provides in pertinent part that "[t]he prosecuting attorney may file a motion under this section to sentence a [juvenile defendant] to imprisonment for life without the possibility of parole if the individual is or was convicted of" first-degree murder. MCL 769.25(2)(b). Absent this motion, "the court *shall sentence the defendant to a term of years*. . . ." MCL 769.25(4) (emphasis added). The effect of this sentencing scheme clearly establishes a default term-of-years sentence for juvenile defendants convicted of first-degree murder. See *Carp*, 496 Mich at 458 (explaining that "MCL 769.25 now *establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age") (emphasis added); MCL 769.25(4) (providing that, absent the prosecution's motion to impose a sentence of life without parole, "*the court shall sentence the defendant to a term of years* as provided in subsection (9)"). [*Skinner*, 312 Mich App at 43-44 (alterations in original).]

Therefore, the *Skinner* Court concluded that: (1) MCL 769.25 makes a term of years the default sentence for juveniles convicted of first-degree murder; (2) a court may sentence a juvenile to life in prison without parole under certain circumstances; and (3) the statute uncon-

stitutionally requires the trial court to make factual findings when increasing the term of years. We disagree with the majority opinion in *Skinner* and would instead adopt Judge SAWYER's well-reasoned dissent.

In *Apprendi*, 530 US at 477, the United States Supreme Court reemphasized that a criminal defendant's entitlement to a jury trial under the Sixth Amendment and the Due Process Clause in the Fourteenth Amendment "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." (Quotation marks and citation omitted; alteration in original.) The Supreme Court summarized: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," or prescribed sentence range, "must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. However, the Supreme Court additionally observed that "judges . . . have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case," including by "taking into consideration various factors relating both to offense and offender . . . ." *Id*. at 481. MCL 769.25 does not violate *Apprendi* because the jury in this case decided each and every element of the crimes for which Hyatt was convicted. His sentence was not an enhancement, but was within the prescribed statutory maximum once the prosecutor filed a proper notice.

In *Ring v Arizona*, 536 US 584, 592; 122 S Ct 2428; 153 L Ed 2d 556 (2002), an Arizona jury convicted the defendant of first-degree felony murder, for which the defendant faced a penalty of either life imprisonment or death. The Court explained:

> Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. . . . [A] cross-referenced section . . . directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed." The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state."
>
> At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances"[6] . . . and any "mitigating circumstances."[7] . . . The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and "there are no mitigat-

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[6] Aggravating circumstances include having another conviction in the United States carrying a penalty of death or life imprisonment in Arizona, or a prior conviction "of a serious offense, whether preparatory or completed"; conduct giving rise to the murder conviction showing that the defendant "knowingly created a grave risk of death to another person or persons in addition to the person murdered during the . . . offense"; "procur[ing] the commission of the offense by payment, or promise of payment, of anything of pecuniary value"; "commi[ssion of] the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"; "commi[ssion of] the offense in an especially heinous, cruel or depraved manner"; "commi[ssion of] the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a . . . jail"; having other homicide convictions that "were committed during the commission of the offense"; standing trial as an adult "and the murdered person was under fifteen years of age or was seventy years of age or older"; and killing "an on duty peace officer . . . in the course of performing his official duties [when] the defendant knew, or should have known, that the murdered person was a peace officer." *Id*. at 592 n 1 (quotation marks and citation omitted).

[7] A nonexclusive list appears in the statute, including "any factors proffered by the defendant or the state . . . relevant in determining whether to impose a sentence less than death." *Id*. at 593 n 2 (quotation marks and citation omitted).

> ing circumstances sufficiently substantial to call for leniency." [*Id*. at 592-593 (quotation marks and citations omitted; alteration in original).]

The Supreme Court overruled a prior decision "to the extent that it allows a sentencing judge, sitting without a jury, to find an *aggravating circumstance* necessary for imposition of the death penalty." *Id*. at 609 (emphasis added). The Supreme Court concluded that "[b]ecause 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*. (quotation marks and citation omitted; emphasis added). Here, the sentencing court did not find any additional aggravating circumstances beyond what the jury found.

In *Cunningham v California*, 549 US 270, 274; 127 S Ct 856; 166 L Ed 2d 856 (2007), the United States Supreme Court held unconstitutional under the Sixth and Fourteenth Amendments a determinate sentencing law that "assign[ed] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," because the facts that the trial court found "are neither inherent in the jury's verdict nor embraced by the defendant's plea." *Id*. The Supreme Court summarized:

> As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. The relevant statutory maximum, this Court has clarified, is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. In petitioner's case, the jury's verdict alone limited the permissible sentence to 12 years. Additional factfinding by the trial

> judge, however, yielded an upper term of 16 years. . . . We . . . reverse [the petitioner's sentence] because the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial. [*Id*. at 274-275 (quotation marks, citations, and emphasis omitted).]

The United States Supreme Court restated the relevant analysis from some of its recent decisions in this area:

> We have since reaffirmed the rule of *Apprendi*, applying it to facts subjecting a defendant to the death penalty, *Ring*, 536 U.S., at 602, 609, facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act, [*Blakely v Washington*, 542 US 296, 304-305; 124 S Ct 2531; 159 L Ed 2d 403 (2004)], and facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines, [*United States v Booker*, 543 US 220, 243-244; 125 S Ct 738; 160 L Ed 2d 621 (2005)]. *Blakely* and *Booker* bear most closely on the question presented in this case.
>
> Ralph Howard Blakely was convicted of second-degree kidnaping with a firearm, a class B felony under Washington law. *Blakely*, 542 U.S., at 298-299. While the overall statutory maximum for a class B felony was ten years, the State's Sentencing Reform Act (Reform Act) added an important qualification: If no facts beyond those reflected in the jury's verdict were found by the trial judge, a defendant could not receive a sentence above a "standard range" of 49 to 53 months. *Id*., at 299-300. The Reform Act permitted but did not require a judge to exceed that standard range if she found " ' "substantial and compelling reasons justifying an exceptional sentence." ' " *Ibid*. (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (2000)). The Reform Act set out a nonexhaustive list of aggravating facts on which such a sentence elevation could be based. It also clarified that a fact taken into account in fixing the standard range—*i.e.*, any fact found by the jury—could under no circumstances count in the determination whether to impose an exceptional sentence. 542 U.S., at 299-300. Blakely was sentenced to 90 months'

imprisonment, more than three years above the standard range, based on the trial judge's finding that he had acted with deliberate cruelty. *Id*., at 300.

Applying the rule of *Apprendi*, this Court held Blakely's sentence unconstitutional. The State in *Blakely* had endeavored to distinguish *Apprendi* on the ground that "[u]nder the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict." Brief for Respondent in *Blakely*, . . . p 15. We rejected that argument. The judge could not have sentenced Blakely above the standard range without finding the additional fact of deliberate cruelty. Consequently, that fact was subject to the Sixth Amendment's jury-trial guarantee. 542 U.S., at 304-314. It did not matter, we explained, that Blakely's sentence, though outside the standard range, was within the 10-year maximum for class B felonies:

> " 'Our precedents make clear . . . that the " 'statutory maximum' " for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant " '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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts " 'which the law makes essential to the punishment,' " . . . and the judge exceeds his proper authority.' " *Id*., at 303-304 (quoting 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872); emphasis in original).

Because the judge in Blakely's case could not have imposed a sentence outside the standard range without finding an additional fact, the top of that range—53 months, and not 10 years—was the relevant statutory maximum. 542 U.S., at 304.

The State had additionally argued in *Blakely* that *Apprendi*'s *rule was satisfied because* Washington's Re-

> form Act *did not specify an exclusive catalog of potential facts on which a judge might base a departure from the standard range*. This Court rejected that argument as well. "*Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or any aggravating fact (as here)," we observed, "it remains the case that the jury's verdict alone does not authorize the sentence*." 542 U.S., at 305 (emphasis in original). Further, we held it irrelevant that the Reform Act ultimately left the decision whether or not to depart to the judge's discretion: "*Whether the judicially determined facts require a sentence enhancement or merely allow it," we noted, "the verdict alone does not authorize the sentence*." *Ibid*., n. 8 (emphasis in original). [*Cunningham*, 549 US at 282-284 (some emphasis added; alteration in original).]

Our statute does not run afoul of *Cunningham* because Hyatt did not receive an enhanced sentence. The sentencing court did not determine facts not already determined by the jury's verdict.

In *Alleyne*, 570 US at ___; 133 S Ct at 2155, the United States Supreme Court held that a sentencing court violated the Sixth Amendment and the principles outlined in *Apprendi*, 530 US 466, by finding any fact that *increased a mandatory minimum sentence*. The Supreme Court explained:

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. [*Alleyne*, 570 US at ___; 133 S Ct at 2155 (citation omitted).]

The Supreme Court in *Alleyne* elaborated: (1) "*Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," and

"the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt," *id*. at ___; 133 S Ct at 2160; (2) "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed," *id*. at ___; 133 S Ct at 2160; and (3) because "facts increasing the legally prescribed floor *aggravate* the punishment," "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury," *id*. at ___; 133 S Ct at 2161. Our statute does not run afoul of *Alleyne* because juveniles are not exposed to an increased penalty.

While our Supreme Court in *Carp* mentioned the term "default," the language of § 25(4) only divests the sentencing court of the discretion to impose a sentence other than the term of years "[i]f the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for" in § 25(3). In circumstances like those in this case, in which the prosecutor indisputedly timely filed a motion seeking the imposition of life in prison without parole under § 25(3), the remainder of MCL 769.25 neither expressly provides nor reasonably suggests that the sentencing court should apply any default sentence.

Moreover, unlike the sentencing statutes the United States Supreme Court ruled unconstitutional 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.

Finally, the plain language of the statute did not require the trial court to make any findings concerning aggravating or mitigating 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, specifically " 'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.' " *Cunningham*, 549 US at 283, quoting *Blakely*, 542 US at 303-304 (emphasis omitted).

At Hyatt's *Miller* hearing, Officer Terrence Green testified that, unlike the other defendants, Hyatt showed "no remorse, no concern" for what happened. Green acknowledged that the robbery was Perkins's idea and that the other defendants were older than Hyatt. Hyatt's school records revealed assaultive behavior and a threat to "put a cap" in a teacher, resulting in his suspension. A counselor had worried that Hyatt appeared to have no remorse or conscience.

Psychologist Karen Noelle testified that Hyatt's IQ was below average. She testified that Hyatt was a "seriously disturbed young man" with "serious maladjustment" who was "impressionable, easily led, frustrated," depressed and "caught in a morass of . . . conflict." Hyatt reported that his mother, who was a lesbian, preferred "her women and alcohol" over her children. In contrast, Hyatt's father was a "very solid role model" for Hyatt. But Hyatt's father had been shot by intruders and was paralyzed from the chest down. Hyatt believed his father blamed him for the incident, and Hyatt also blamed himself. After his father went to a VA hospital in Texas, Hyatt lived with his mother and other family members, though he considered himself homeless.

Noelle believed Hyatt had the intellectual capacity to be rehabilitated. She was "not sure" whether Hyatt was capable of remorse before the incident occurred because he clearly failed to appreciate the consequences of his prior actions. Hyatt was immature and irresponsible. Noelle testified: "I don't know that he has no sense of remorse and no conscience at all. . . . I do feel that he is not a sensitive, compassionate young man. I do feel that he's pretty disconnected from societal morals and mores. I think that's concerning, yes I do." Noelle testified that she could not predict whether Hyatt was going to change. It would "require extreme effort and dedication on his part." But she could not say that he was "irredeemable." "[I]f I were to predict in five years, it would not be possible."

The sentencing court took the *Miller* factors into consideration at sentencing and concluded, "I don't think any factor that I've considered has anything to do with his age." Hyatt's criminal acts were not the result of "impetuosity or recklessness." After extensively reviewing the evidence before it, the sentencing court concluded that "[i]n considering all of that and the nature of the crime itself and the defendant's level of participation as the actual shooter in this case, the principle of proportionality requires this Court to sentence him to life in the State prison without parole." Were it not for *Skinner*, we would affirm the sentencing court's decision to sentence Hyatt to life imprisonment without the possibility of parole. Instead, we are compelled to remand for resentencing consistent with *Skinner*.

V. CONCLUSION

In Docket No. 323454, we affirm Perkins's convictions and sentences, but remand for the ministerial

task of correcting Perkins's judgment of sentence to reflect that his felony-firearm sentence does not run consecutively to his sentence for conspiracy to commit armed robbery.

In Docket No. 323876, we affirm Williams's convictions and sentences.

In Docket No. 325741, we affirm Hyatt's convictions, but remand for resentencing so that a jury may determine whether Hyatt should receive a sentence of life in prison without the possibility of parole.

We do not retain jurisdiction.

TALBOT, C.J., and CAVANAGH, J., concurred with K. F. KELLY, J.

PEOPLE v SCHRAUBEN

Docket No. 323170. Submitted November 3, 2015, at Grand Rapids. Decided January 26, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 860.

Marti J. Schrauben was convicted following a jury trial in the Ionia Circuit Court of eight counts of uttering and publishing, MCL 750.249, four counts of forgery, MCL 750.248, and four counts of fraudulent insurance acts, MCL 500.4511. The court, David A. Hoort, J., granted defendant's motion for a directed verdict of acquittal on one count of conducting a criminal enterprise (CCE), MCL 750.159i(1), one count of receiving the proceeds of a criminal enterprise (CCE proceeds), MCL 750.159i(3), and eight counts of embezzlement, MCL 750.174. Defendant and Michael Lehman had jointly owned two funeral homes. Lehman bought out defendant's shares, but defendant later returned to work as an employee for Lehman. Lehman alleged that he subsequently discovered financial irregularities related to the sale of prepaid funerals by defendant and reported the issues to the police. Defendant appealed his convictions, and the prosecution cross-appealed. The Court of Appeals granted defendant's motion to remand the case for an evidentiary hearing regarding defendant's motion for a new trial. The Court of Appeals retained jurisdiction. Following the hearing, which revealed some inconsistencies in Lehman's testimony, the trial court denied defendant's motion for a new trial.

The Court of Appeals *held*:

1. If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In this case, there was no evidence that the prosecution knew about the potential perjury. And even if the prosecution knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury. While the inconsistencies exposed at the evidentiary hearing certainly cast doubt on Lehman's testimony at trial and raised questions regarding his involvement in the fraud, there was other evidence that supported defendant's guilt. The trial court did not abuse its discretion by denying defendant's motion for a new trial based on the alleged perjury.

2. Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. To establish that a defendant's trial counsel was ineffective, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Defendant argues that trial counsel was ineffective for failing to introduce exculpatory evidence and develop testimony regarding (1) the timing of Lloyd Dickinson's death, which led Lehman to discover defendant's wrongdoing, and errors on Dickinson's death certificate, (2) the fact that Lehman testified that he confirmed defendant's wrongdoing after visiting Independent Bank, when the banking was actually conducted at Firstbank, and (3) the fact that Lehman never filed claims for many clients who had passed away before Lehman allegedly discovered the fraud despite testimony that he had a tracking mechanism to ensure that he was paid by the escrow companies or the families. These alleged errors, however, did not show that trial counsel's performance fell below an objective standard of reasonableness. Trial counsel testified at the evidentiary hearing that he chose to focus on what he felt were much larger issues. On appeal, the Court would not second-guess counsel's trial strategy or assess his competence with the benefit of hindsight. Defendant failed to overcome the strong presumption that his counsel's trial strategy was sound and, therefore, failed to prove that he received ineffective assistance of counsel.

3. The prosecution may not suggest that defense counsel is intentionally attempting to mislead the jury. In this case, the prosecution's argument that defense counsel was a "mud slinger" who "pulls things out of people and muddies up the water" suggested that defense counsel was distracting the jury from the truth and deterring the jury from seeing the real issues. This argument was improper. But the trial court instructed the jury that the attorneys' statements and arguments were not evidence, and it was presumed that the jurors followed their instructions. Further, any prejudicial effect created by the improper statements could have been alleviated by a timely objection and curative instruction. Accordingly, reversal was not warranted.

4. Defendant's recommended minimum sentence range for his insurance fraud convictions entitled him to an intermediate sanction under MCL 769.34(4)(a). However, in *People v Lockridge*, 498 Mich 358 (2015), the Supreme Court held that any part of MCL 769.34 that refers to the guidelines as mandatory or refers

to departures from the guidelines had to be severed or struck down. Accordingly, under *Lockridge*, a trial court is no longer required to impose an intermediate sanction under MCL 769.34(4)(a). Consistently with *Lockridge*, the word "shall" in MCL 769.34(4)(a) has to be replaced with the word "may," and there is no longer a requirement that the trial court articulate substantial and compelling reasons to depart from an intermediate sanction. Defendant's recommended minimum sentence was zero to 17 months' imprisonment. The trial court sentenced defendant to a minimum of 16 months in prison, which was within the range authorized by law. When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information. Defendant did not dispute that his sentence was within the recommended minimum guidelines range and did not argue that the trial court relied on inaccurate information or that there was an error in scoring the guidelines. Therefore, the sentence had to be affirmed.

5. Offense Variable (OV) 4, MCL 777.34, requires the trial court to determine whether a serious psychological injury requiring professional treatment occurred to a victim. The trial court may assess 10 points if the serious psychological injury may require professional treatment. In this case, Lehman stated that the past three years had been a struggle for him psychologically, and the trial court observed that it would have to ignore the obvious to conclude that there was no evidence of serious psychological injury requiring professional treatment. Accordingly, the trial court's factual finding that Lehman suffered a serious psychological injury was not clearly erroneous and was supported by a preponderance of the evidence. The trial court, therefore, properly assessed 10 points for OV 4.

6. In its cross-appeal, the prosecution argued that the trial court erred by granting defendant's motion for a directed verdict of acquittal and dismissing defendant's convictions for embezzlement, CCE, and CCE proceeds. Embezzlement by an agent or employee, MCL 750.174, requires proof of six elements: (1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant

intended to defraud or cheat the principal. Under MCL 328.222 of the Prepaid Funeral and Cemetery Sales Act, MCL 328.211 *et seq*., all funds received in connection with a prepaid contract shall be held in escrow by an escrow agent for the benefit of the contract beneficiary. And funds are not disbursed until the death of the contract beneficiary and upon performance by the provider of its obligation to furnish merchandise or funeral or cemetery services pursuant to the prepaid contract. Accordingly, in this case, the money never belonged to the funeral home. The money belonged to the contract beneficiaries until their death and upon performance of the funeral home's obligations. Further, the money did not come into defendant's possession because of a relationship of trust. The money came into defendant's possession because he tricked the insurance companies into writing checks to the funeral home by filing false death claims. In discussing the difference between larceny and embezzlement, our Supreme Court has stated that with embezzlement there must be an unlawful appropriation of that which comes into possession rightfully. Defendant did not come into possession of the money rightfully. Therefore, the trial court did not err by granting defendant's motion for a directed verdict of acquittal and dismissing defendant's convictions for embezzlement, CCE, and CCE proceeds.

Affirmed.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, concluded that Lehman's perjury had practical ramifications for at least some of defendant's convictions and affected the fairness of his trial, and she would have held that the trial court abused its discretion by denying defendant's motion for a new trial. The prosecution's theory of the case was that defendant falsely placed Lehman's signature on certain checks to divert funds from Lehman's funeral home to defendant's own use and that defendant crafted false death certificates and again falsely placed Lehman's signature on them as part of a scheme to receive certain insurance payments. Defendant's theory of the case was that Lehman was running an illegal scheme to pay off a debt to defendant and that the signatures purporting to be from Lehman were, in fact, Lehman's actual signature or had been made with Lehman's knowledge and approval. It might be of no consequence to defendant's insurance fraud convictions whether Lehman's signatures were genuine because in those matters, as noted by the prosecution, at most Lehman would have been guilty along with defendant. However, whether Lehman's signatures were genuine would have been of enormous consequence to any matter entailing a signature purporting to be from Lehman that the prosecu-

tion contended was actually executed by defendant. Consequently, Lehman's credibility was critical. Further, there was a reasonable likelihood that if the jury concluded that defendant was not guilty of the uttering and publishing and forgery charges, it might well have concluded that any insurance fraud was actually under Lehman's control as well. The trial court abused its discretion by denying defendant's motion for a new trial.

SENTENCES — SENTENCING GUIDELINES — INTERMEDIATE SANCTIONS.

MCL 769.34(4)(a) states that an intermediate sanction shall be imposed if the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines is 18 months or less, unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections, but, in accordance with prior caselaw, a trial court is no longer required to impose an intermediate sanction under MCL 769.34(4)(a); rather, the word "shall" in MCL 769.34(4)(a) has to be replaced with the word "may," and there is no longer a requirement that the trial court articulate substantial and compelling reasons to depart from an intermediate sanction.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

Alane & Chartier, PLC (by *Mary Chartier*), for defendant.

Before: MARKEY, P.J., and OWENS and RONAYNE KRAUSE, JJ.

OWENS, J. Defendant appeals as of right his jury trial convictions of eight counts of uttering and publishing, MCL 750.249, four counts of forgery, MCL 750.248, and four counts of fraudulent insurance acts, MCL 500.4511. He was sentenced to serve nine months in jail for the forgery convictions, 11 months in jail for the uttering and publishing convictions, and 16 months in prison for the insurance fraud convictions.

The jury also convicted defendant of one count of conducting a criminal enterprise (CCE), MCL 750.159i(1), one count of receiving the proceeds of a criminal enterprise (CCE proceeds), MCL 750.159i(3), and eight counts of embezzlement, MCL 750.174, which the trial court dismissed when it granted defendant's motion for a directed verdict of acquittal. The prosecution cross-appeals the trial court's order granting defendant's motion for a directed verdict of acquittal. We affirm defendant's convictions and sentences and the trial court's order granting defendant's motion for a directed verdict of acquittal.

Defendant and Michael Lehman jointly owned two funeral homes in Portland and Ionia, where they sold prepaid funeral plans. In 2005, Lehman bought out defendant's shares in the business, and defendant began to operate a country club. Lehman testified that he and his wife discovered some financial irregularities after defendant left, but they did not give them much consideration. In December 2007, defendant talked to Lehman about returning to work for the funeral homes as an employee, which Lehman agreed to, but Lehman testified that defendant was not allowed to have any direct financial responsibilities. According to Lehman, if a customer arranged for a prepaid funeral plan with defendant, Lehman was to handle the transaction, which included bank deposits. Lehman managed the Portland chapel while defendant worked at the Ionia chapel.

Lehman testified that after defendant had been working at the Ionia chapel for at least two years, he learned defendant had been making deposits himself, which caused Lehman to investigate further. Lehman discovered that customers who had intended to purchase prepaid funeral plans had actually written

checks to Schrauben Management, which was a holding company for the country club owned by defendant and had nothing to do with the funeral home business. In addition, several of the escrow accounts and insurance policies used to fund the prepaid funerals had been paid out before the deaths of the individuals who had purchased those plans. According to Lehman, his name was forged on checks originally made payable to the funeral home and then signed over to Schrauben Management.

Defendant first argues on appeal that the trial court abused its discretion by denying defendant's motion for a new trial based on Lehman's perjured testimony. We review the trial court's decision to deny defendant's motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

The trial court held an evidentiary hearing to address the perjury allegations against Lehman, during which many inconsistencies in Lehman's testimony were exposed. Defendant argues that these inconsistencies show Lehman perjured himself and warrant a new trial. "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "If a conviction is obtained through the knowing use of perjured testimony, it 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Id*., quoting *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

Defendant does not explain how the prosecution knowingly presented perjured testimony, and, as the trial court found, there is no evidence that the pros-

ecution knew about the potential perjury. Even if the prosecution knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury. While the inconsistencies exposed at the evidentiary hearing certainly cast doubt on Lehman's testimony at trial and raised questions as to his involvement in the fraud, there was other evidence that implicated defendant. Specifically, the undersheriff discovered approximately 65 checks in the Schrauben Management bank account, maintained by defendant, which came from funeral home clients or the insurance companies. Information taken from defendant's home computer, specifically the Quickbooks program, matched the checks found in the Schrauben Management bank account. The manager of defendant's country club testified that she would often enter deposits into Quickbooks for defendant, and large deposits were commonly allocated under "membership dues." Evidence showed that these large deposits coincided with the checks that were deposited into the Schrauben Management bank account from the funeral home. Further, two funeral home clients testified that they were directed by defendant to write a check to Schrauben Management when they purchased prepaid funeral policies. The defense's theory at trial was that Lehman was giving the money to Schrauben to pay the debt he owed him for the buyout, but this does not explain why defendant would direct two clients to write their checks to Schrauben Management. Finally, defendant, not Lehman, was the one on trial, and even if the jury had been aware that Lehman was involved, it likely would not have changed the verdict against defendant.

Additionally, although this Court has not specifically ruled on whether a defendant may be entitled to a new trial irrespective of the prosecution's culpability, it has stated that "it is the 'misconduct's effect on the trial,

not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes.' " *Aceval*, 282 Mich App at 390, quoting *Smith v Phillips*, 455 US 209, 220 n 10; 102 S Ct 940; 71 L Ed 2d 78 (1982) (alteration in *Aceval*). The focus "must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Aceval*, 282 Mich App at 390. Therefore, "a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment." *Id*. at 389.

Defendant argues that the inconsistencies in Lehman's testimony are material to defendant's guilt because they show that Lehman was the actual perpetrator. As discussed, however, there was concrete evidence presented that implicated defendant, despite the level of Lehman's potential involvement. Although Lehman was a key witness at trial, the deposits into the Schrauben Management bank account maintained by defendant and the records on defendant's home computer strongly implicated defendant, even without Lehman's testimony. Therefore, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a new trial based on perjury.

Defendant next argues that trial counsel was ineffective for failing to introduce exculpatory evidence and develop testimony that would have shown Lehman testified falsely. "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

Criminal defendants have a right to the effective assistance of counsel under the United States and

Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. See *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *Vaughn*, 491 Mich at 669.

Defendant argues that trial counsel was ineffective for failing to introduce exculpatory evidence and develop testimony regarding (1) the timing of Lloyd Dickinson's death, which led Lehman to discover defendant's wrongdoing, and errors on Dickinson's death certificate, (2) the fact that Lehman testified that he confirmed defendant's wrongdoing after visiting Independent Bank, when the banking was actually conducted at Firstbank, and (3) the fact that Lehman never filed claims for many clients who had passed away before Lehman allegedly discovered the fraud despite testimony that he had a tracking mechanism to ensure that he was paid by the escrow companies or the families. These alleged errors, however, do not show that trial counsel's performance fell below an objective standard of reasonableness. Trial counsel testified at the evidentiary hearing that he chose to focus on what he felt were much larger issues than Dickinson's claim and was unaware of the Firstbank account that the Lehmans had. Trial counsel made it clear that, in hindsight, he could have highlighted other issues that cast doubt on Lehman's credibility, particularly the fact that Lehman never filed claims for other clients

who had passed away before he discovered the fraud. However, we will not second-guess counsel's trial strategy or assess his competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant has failed to overcome the strong presumption that his counsel's trial strategy was sound and, therefore, has failed to prove that he received ineffective assistance of counsel. *Id*.

Defendant next argues that, during the prosecutor's closing argument and rebuttal, the prosecutor suggested to the jury that defense counsel was attempting to purposefully mislead the jury. Defendant forfeited this issue by failing to object at trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). Therefore, our review is for plain error affecting defendant's substantial rights. *Id*. at 460-461. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 461.

Defendant specifically challenges the following statements made during the prosecutor's closing argument:

> [*Defendant's attorney*] *is a very skilled, excellent trial attorney. He's an excellent cross-examiner. He pulls things out of people and muddies up the water. And that's what we talk about when we are prosecutors. We say the defense attorney is going to come and throw mud up on the wall, except we don't use that word when we talk amongst ourselves. Let's see how muddy we can make this water so the jury can't really see what's going on here. Let's see what can we come up with? How about this? How about that? How about the other thing? Does that make sense? That's what defense attorneys do. I know. I'm married to one. You should be at our house sometimes.* They would like you to—the Defense would like you to believe that he was—

> that Mr. Lehman was conspiring with Mr. Schrauben about this; that that was going to pay off the buyout amount. And it happens to be around the same amount so they could make that argument. [Emphasis added.]

Defendant also challenges the following statements made during the prosecutor's rebuttal:

> Ladies and gentlemen, I asked you before to render a guilty verdict for each and every one of the counts that I have charged the defendant with. *And I will call* [*defendant's attorney*] *a mud slinger and he's really good at it. He's very convincing. He's picking out every little thing that he could possibly think of that would try and create reasonable doubt, but it just doesn't make it.* I want you to look at the elements and the Judge is going to tell you, you can believe some things from a witness, one witness and not others from that witness. But you have to believe with [sic] to make my burden of proof, to find the defendant guilty is the elements of the offenses. Were the elements proved beyond a reasonable doubt? Not all this other stuff that he calls reasonable doubt. That's for you to make the call. I say it's not. I say it's mud. Thank you very much. I appreciate your very good attention. [Emphasis added.]

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial," *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), but a prosecutor "may not suggest that defense counsel is intentionally attempting to mislead the jury," *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Such an argument implies that defense counsel does not believe his own client, which undermines the defendant's presumption of innocence. *Fyda*, 288 Mich App at 461.

In this case, the prosecutor's argument that defense counsel is a "mud slinger" who "pulls things out of people and muddies up the water" suggests that defense counsel was distracting the jury from the truth

and deterring the jury from seeing the real issues. This argument is improper. See, e.g, *Watson*, 245 Mich App at 592 (holding that the prosecutor exceeded the bounds of proper argument by suggesting that defense counsel used " 'red herrings' " to distract the jury from the truth).

However, the trial court instructed the jury that the attorneys' statements and arguments were not evidence, and we presume that jurors follow their instructions. *Unger*, 278 Mich App at 237. Further, reversal is not warranted because any prejudicial effect created by the improper statements could have been alleviated by a timely objection and curative instruction. *Id*. at 238.

Defendant also argues that the cumulative effect of the earlier alleged errors denied him a fair trial. To warrant reversal based on cumulative error, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, defendant only identified one error involving the prosecutor's improper argument, which could have been cured by a timely objection. Therefore, reversal is not warranted.

Defendant next argues that the trial court erred by not imposing an intermediate sanction for his insurance fraud convictions. A trial court's decision to depart from the sentencing guidelines is reviewed for reasonableness. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

Defendant's recommended minimum sentence range for his insurance fraud convictions entitled him to an intermediate sanction pursuant to MCL 769.34(4), which provides:

> Intermediate sanctions *shall* be imposed under this chapter as follows:
>
> (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, *the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.* An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [Emphasis added.]

Subsection (4)(a) required the trial court to sentence defendant to an intermediate sanction that does not include prison time, absent a substantial and compelling reason for departure. See *Lockridge*, 498 Mich at 387 (stating that "shall" indicates a mandatory directive). However, our Supreme Court in *Lockridge* specifically stated that any part of MCL 769.34 that refers to the guidelines as mandatory or refers to departures from the guidelines is severed or struck down. *Id*. at 365 n 1 ("To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary."). Accordingly, under *Lockridge*, a trial court is no longer required to impose an intermediate sanction.

Consistently with the remedy explained in *Lockridge*, we replace the word "shall" in MCL 769.34(4)(a) with the word "may." See *Lockridge*, 498 Mich at 391 (stating that to remove the mandatory directive of MCL 769.34(2), the Court only needed to substitute the word "may" for "shall"). Additionally, we strike down the requirement that a trial court must articulate substantial and compelling reasons to depart from an

intermediate sanction. See *id*. (stating that under MCL 769.34(3), a trial court no longer needs to provide substantial and compelling reasons to depart from the applicable guidelines range). In accordance with the broad language of *Lockridge*, under Subsection (4)(a), a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less.

In this case, defendant first argues that the trial court's reasons for departing from an intermediate sanction were not substantial and compelling. However, as discussed, this is no longer a requirement following *Lockridge*.

Second, defendant argues that the trial court violated *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), because the reasons used to justify an upward departure from the statutorily mandated intermediate sanction were not based on facts found beyond a reasonable doubt by the jury. However, because, under *Lockridge*, an intermediate sanction is no longer mandated, defendant's argument is without merit because *Alleyne* stands for the proposition that any fact that increases a *mandatory* minimum sentence must be submitted to the jury and found beyond a reasonable doubt. *Id*. at ___; 133 S Ct at 2163. This "does not mean that any fact that influences judicial discretion must be found by a jury." *Id*. at ___; 133 S Ct at 2163. Now, pursuant to *Lockridge*, a trial court has discretion to impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less, but it is not required to do so.

In this case, defendant's recommended minimum sentence was zero to 17 months' imprisonment. The trial court sentenced defendant to a minimum of 16

months in prison, which is within the range authorized by law. See *id*. at ___; 133 S Ct at 2163 (stating that a trial court has discretion to sentence a defendant within the range authorized by law). When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information. MCL 769.34(10).[1] Defendant does not dispute that his sentence was within the recommended minimum guidelines range, and he does not argue that the trial court relied on inaccurate information or that there was an error in scoring the guidelines.[2] Therefore, this Court must affirm the sentence.

Finally, defendant argues that the trial court erred by assessing 10 points for Offense Variable (OV) 4 for his uttering and publishing convictions. We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the factual determinations were sufficient to assess points under OV 4. *Id*. See also *People v Steanhouse*, 313 Mich App 1, 38; 880 NW2d 297 (2015) (holding that because scoring the offense variables remains relevant under

[1] Notably, *Lockridge* did not alter or diminish MCL 769.34(10), which provides, in pertinent part, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."

[2] Although defendant challenges the scoring of Offense Variable 4, as will be discussed later, that challenge relates to the scoring of the offense variables for his convictions of uttering and publishing, not his convictions of fraudulent insurance acts. The trial court scored the offense variables separately for each group of offenses.

Lockridge, the standards of review traditionally applied to the trial court's scoring of the offense variables remain viable).

OV 4 requires the trial court to determine whether a serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a). The trial court may assess 10 points "if the serious psychological injury may require professional treatment." MCL 777.34(2). Defendant does not base his argument on the fact that Lehman, the victim, did not seek professional treatment, but rather argues that Lehman's psychological injury was not serious.

In this case, defendant acknowledges that Lehman indicated in a letter discussed in the trial court that " 'the past three years have been a struggle for him psychologically.' " We have upheld a trial court's assessment of 10 points for OV 4 when the victim suffered "personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014).

Further, the trial court noted that based on its memory and the impression it got from trial, it "would be ignoring the obvious if [it] were to say that there were no signs or no evidence of serious psychological injury requiring professional treatment." The trial court had the opportunity to observe Lehman's demeanor during trial, and it noted how the funeral home was his life and that when defendant committed the crimes, everything changed for Lehman. See *Steanhouse*, 313 Mich App at 38-39 (discussing serious psychological injury as it relates to OV 5 and noting that the trial court's opportunity to observe the demeanor of the victim's family members supported its factual findings that they sustained psychological injury). Accordingly, we conclude that the trial court's

factual finding that Lehman suffered a serious psychological injury was not clearly erroneous and was supported by a preponderance of the evidence. The evidence sufficiently demonstrates that Lehman suffered a serious psychological injury that may require professional treatment, and, therefore, the trial court properly assessed 10 points for OV 4.

In its cross-appeal, the prosecution argues that the trial court erred by granting defendant's motion for a directed verdict of acquittal and dismissing defendant's convictions for embezzlement, CCE, and CCE proceeds. In reviewing a trial court's decision regarding a motion for directed verdict, we review the evidence in a light most favorable to the prosecution to "determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140, 659 NW2d 611 (2003).

On appeal, the parties only argue whether the money converted by defendant belonged to the funeral home to support the convictions for embezzlement under MCL 750.174, which in turn supports the convictions for CCE and CCE proceeds. Embezzlement by an agent or employee, MCL 750.174, requires proof of six elements:

> (1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

The Prepaid Funeral and Cemetery Sales Act[3] provides that "all funds received in connection with a prepaid contract shall be held in escrow by an escrow agent for the benefit of the contract beneficiary." MCL 328.222(1). Funds are not disbursed until "the death of the contract beneficiary and upon performance by the provider of its obligation to furnish merchandise or funeral or cemetery services pursuant to the prepaid contract . . . ." MCL 328.222(11).

In this case, the money never belonged to the funeral home. The money belonged to the contract beneficiaries until their death and upon performance of the funeral home's obligations. The prosecution argues that defendant's wrongful acts caused title to pass to the funeral home, and therefore the money belonged to it. However, although the funeral home received checks from the insurance company, the money still did not belong to it. The money belonged to the contract beneficiaries until their death and upon performance of the funeral home's obligations, neither of which had occurred at the time of trial.

Additionally, the money did not come into defendant's possession "because of the relationship of trust . . . ." *Lueth*, 253 Mich App at 683. The money came into defendant's possession because he tricked the insurance companies into writing checks to the funeral home by filing false death claims. In discussing the difference between larceny and embezzlement, our Supreme Court has stated that with embezzlement "there must be an unlawful appropriation of that which comes into possession rightfully." *People v Bergman*, 246 Mich 68, 71; 224 NW 375 (1929). In this case, defendant did not come into possession of the money rightfully. Therefore, the trial court did not err by granting defendant's motion for a

[3] MCL 328.211 *et seq*.

directed verdict of acquittal and dismissing defendant's convictions for embezzlement, CCE, and CCE proceeds because the money converted by defendant never belonged to his employer, the funeral home, as required by MCL 750.174.

Affirmed.

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

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*). I respectfully disagree that defendant is not entitled to a new trial. I believe that the trial court and the majority misconstrue, subtly, but with important implications, the gravamen of defendant's theory of the case. I agree with the majority that nothing in the record suggests that the prosecution was aware of the perjury, and I believe, as the majority implies but does not outright state, that perjured testimony that affects the fairness of the trial entitles a defendant to a new trial irrespective of whether the prosecution bears any blame. Where I differ from the majority is my conclusion that Lehman's perjury does have practical ramifications for at least some of defendant's convictions and does affect the fairness of defendant's trial. I would hold, as a consequence, that the trial court abused its discretion by denying defendant a new trial. In all other respects, I agree with the majority.

The alleged factual bases for each of the charges at issue are important. Four of defendant's convictions for uttering and publishing, MCL 750.249, were based on four "false, forged, altered, or counterfeit" death certificates filed for people who were still alive at the time; all four of his convictions for forgery, MCL 750.248, were based on the same death certificates. The other four uttering and publishing convictions were based on

four checks made payable to defendant's holding corporation with Lehman's signature allegedly forged[1] on the endorsement line of those checks by defendant. The prosecution's theory of the case was that defendant falsely placed Lehman's signature on the checks to divert funds from Lehman's funeral home to defendant's own use, and that defendant also crafted the false death certificates and again falsely placed Lehman's signature on them as part of a scheme to receive certain insurance payments. Defendant's theory of the case was that Lehman was running an illegal scheme to pay off a debt to defendant and that the signatures purporting to be from Lehman were, in fact, Lehman's actual signature or had been made with Lehman's knowledge and approval.

The majority and the trial court neglect to observe the obvious and necessary implication of defendant's theory of the case: it is *critical* to the prosecution's theory of the case that Lehman's purported signatures were not made by Lehman or with Lehman's knowledge and approval. Consequently, defendant's theory of

[1] Of note, "forgery" is a distinct crime that entails making a *document* purport to be something it is not. *People v Hodgins*, 85 Mich App 62, 64-65; 270 NW2d 527 (1978). However, throughout this matter, the word "forged" or "forgery" has also, confusingly, been used in a more colloquial sense to refer to the allegation that defendant placed Lehman's signature on various documents without Lehman's knowledge or approval. Strictly speaking, a fictitious signature on a document is not per se the *crime* of "forgery" unless doing so makes *the instrument itself* a lie. *Id*. at 66-67; see also *Bank of Detroit v Standard Accident Ins Co*, 245 Mich 14, 17-23; 222 NW 134 (1928). That being said, a false signature made without authority certainly *can* make a writing a lie and thus constitute forgery. *People v Susalla*, 392 Mich 387, 392-393; 220 NW2d 405 (1974). "The key appears to be that *the writing itself* is a lie." *Id*. (emphasis added). Unfortunately, the phraseology of a false signature made by one person purporting to be that of another as "forged" is deeply embedded in common parlance and makes this discussion more difficult to follow than it might otherwise be.

the case *would* in fact completely undercut most of his convictions. It might be of no consequence to defendant's insurance fraud convictions whether Lehman's signatures were genuine, because in those matters the prosecution correctly states that at most Lehman would have been guilty along with defendant. However, it would be of enormous consequence to any matter entailing a signature purporting to be from Lehman that the prosecution contended was actually executed by defendant. Consequently, Lehman's credibility was far more critical than it might superficially appear.[2] Beyond that, I believe that there is a "reasonable likelihood" that if the jury had concluded that defendant was not guilty of the uttering and publishing and forgery charges, it might well have concluded that any insurance fraud was actually under Lehman's control as well.

The only possible way Lehman's perjury could be irrelevant and harmless is if this Court were to conclude that defendant's theory of the case was fundamentally hopeless from the outset. In other words, that there was no possible way defendant could have convinced the jury to acquit him. I am not prepared to draw that conclusion, any more than I am prepared to conclude that defendant will necessarily be successful on retrial. I would therefore hold that the trial court abused its discretion by denying defendant a new trial. I would grant defendant that new trial.

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[2] The majority states that "this does not explain why defendant would direct two clients to write their checks to Schrauben Management." I disagree. If Lehman and defendant were both involved in such a dubious payback scheme, the obvious implication is that defendant would have directed checks to be made out to Schrauben Management because defendant and Lehman had agreed to such occurrences as part of that scheme. While I do not, of course, know if that is actually what happened, the logical significance appears to me quite obvious.

LAWRENCE v BURDI

Docket No. 322041. Submitted October 14, 2015, at Detroit. Decided January 26, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich ___.

Frank Lawrence filed a complaint in the Macomb Circuit Court against defendants, attorney Caren M. Burdi and Earl, Earl & Rose, PLLC, for defamation and abuse of process for actions taken by defendants in a property dispute involving Lawrence's employer. In the property dispute, the plaintiff, William P. Froling, was Lawrence's employer, and the defendant, Pelican Property, was represented by the same firm representing defendants in the instant case. Lawrence was not a party to the property dispute, and discovery in the dispute had already closed. Nevertheless, Pelican Property served on Froling several requests for admission involving Lawrence. Pelican Property requested that Froling admit that Lawrence had two previous drug convictions and that he had been unable to take Michigan's bar examination because he could not meet the character and fitness standards required for admission to the bar. After defendants refused to withdraw the requests, Lawrence brought this action, in which he first moved to strike and expunge the requests to admit because they represented an abuse of process and defamation. He later withdrew that motion and moved to seal the requests for admission and also a Board of Law Examiners (BLE) opinion on Lawrence's character and fitness. According to Lawrence, the statements made in the requests for admission were unrelated to the property dispute and were intended to maliciously defame Lawrence, a nonparty. The court, Jennifer M. Faunce, J., ordered that the requests to admit that Lawrence had previous drug convictions be sealed, but the court denied Lawrence's request that the statement regarding the bar examination and the BLE opinion be sealed because there were "some legitimate questions" about Lawrence and the bar examination. The court denied Lawrence's motion for sanctions. Defendants moved for summary disposition of Lawrence's allegations on the basis that his complaint failed to state a claim on which relief could be granted or that there was no genuine issue of material fact. The court granted defendants' motion for summary disposition because it determined that defendants' requests for admission

were protected by absolute immunity under the judicial proceedings privilege and that statements defendant Burdi made to Froling in the courthouse hallway before a facilitation proceeding were only opinion and did not show any ulterior motive. Lawrence appealed.

The Court of Appeals *held*:

1. The trial court wrongly concluded that Lawrence had failed to state a claim on which relief could be granted, and therefore the trial court erred by granting defendants' motion for summary disposition of Lawrence's claim of abuse of process. Lawrence complained that defendants' requests for admission constituted abuse of process because the requests had no legitimate purpose and were filed with the intent of defaming and harming him. To establish abuse of process, Lawrence must show that (1) defendants had an ulterior purpose and (2) defendants' conduct constituted the improper use of process in the ordinary course of litigation. Because the requests were submitted to Lawrence's employer, the apparent purpose was to cause Lawrence harm by embarrassing him and by generating mistrust of Lawrence. The result could have ultimately been the termination of Lawrence's employment. Additionally, the requests for admission did not comply with the court rule or further the policy behind requests for admission. That is, the requests did not limit the areas of controversy or save the parties time, energy, and expense. Lawrence adequately stated a claim of abuse of process on which relief could be granted.

2. The trial court erred by granting defendants' motion for summary disposition of Lawrence's allegations of defamation. To establish defamation, Lawrence had to show (1) a false and defamatory statement about him, (2) an unprivileged publication to a third party, (3) that defendants were at fault, or at least that defendants acted negligently, and (4) defamation per se (which *does not* require that harm result from publication of the defamatory statement) or defamation per quod (which *does* require that special harm occur as a result of the defamatory statement's publication). In this case, defendants' statements regarding Lawrence's previous drug convictions were defamation per se because statements that accuse a person of committing a crime are presumptively injurious to the reputation of the person about whom the statements are made. These statements had no factual basis and were entirely false. Defendants were at fault for the defamatory statements because the statements were purposely included in the requests for admission. Finally, the statements were published to a third party (Froling), who was Lawrence's employer,

prompting Froling to question whether Lawrence was truthful in his employment interview with Froling. Summary disposition of Lawrence's defamation claim was improper because Lawrence produced evidence of each required element. Defendants may defend against Lawrence's allegations by showing that the statements were substantially true or by establishing that the statements were privileged under the judicial proceedings privilege.

3. The trial court erred when it granted defendants' motion for summary disposition with regard to Lawrence's allegations of defamation because the statements made by defendants in their requests for admission were not privileged under the judicial proceedings privilege. Absolute privilege applies to relevant, material, or pertinent statements made by judges, attorneys, and witnesses during the course of judicial proceedings. The immunity offered by the judicial proceedings privilege applies to any statement made in relation to the matter at issue in the proceeding. What is pertinent or relevant is determined liberally to further the public policy of giving participants relative freedom to express themselves without fear of retaliation. In this case, the subject matter of defendants' requests for admission had no connection at all to the litigation between Froling and Pelican Property concerning the prescriptive easement. Although a statement does not need to be strictly relevant to an issue involved in the litigation, there must be "some reference" in the statement to the subject matter of the litigation. The immunity offered by the judicial proceedings privilege cannot protect defendants' statements suggesting that Lawrence had previous drug convictions and that he was prevented from taking the bar examination because his character and fitness were somehow deficient. Lawrence provided sufficient evidence that the statements were not relevant, material, or pertinent to the prescriptive easement dispute and, therefore, that the statements were not privileged.

4. The trial court properly denied Lawrence's request for sanctions. Sanctions may be appropriate when a document is filed for the purpose of harassment. The trial court's conclusion that the requests for admission were not submitted for an improper purpose was not clearly erroneous.

Affirmed in part and reversed in part.

Essex Park Law Office, PC (by *Dennis B. Dubuc*), for plaintiff.

Collins Einhorn Farrell, PC (by *Geoffrey M. Brown* and *Michael J. Cook*), for defendants.

Before: METER, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiff appeals as of right from a Macomb Circuit Court order granting defendants' motion for summary disposition. The court concluded that the statements made by defendant Burdi[1] were privileged, that the statements could not be the basis of plaintiff's claims, and that therefore, plaintiff failed to state a claim that was actionable. We affirm in part and reverse in part.

I. FACTUAL BACKGROUND

Plaintiff's claims of abuse of process and defamation arose from an underlying property dispute being litigated in the Macomb Circuit Court before Judge Jennifer Faunce (notably, the same judge who presided over the instant case), *Froling v Pelican Prop, LLC*, Case No. 2013-003083-CZ. That case concerned a prescriptive easement claim brought by William P. Froling, plaintiff's employer, against Pelican Property, a party represented in the matter by defendant. Plaintiff acted as a liaison between Mr. Froling's various corporate entities and the law firms that represented those entities. Plaintiff passed the Michigan Bar Examination in 2001, but was unable to pass character and fitness and be admitted to the practice of law. The easement dispute centered on whether a restaurant business established on Mr. Froling's property was entitled to use property owned by Pelican Property for parking and trash bin storage. A main contention in that case was whether the restaurant's use of the property had been continuous over the past 15 years.

[1] For ease of reference, hereafter, we refer to a singular defendant throughout this opinion.

After one of Pelican's main witnesses—District Court Judge Michael Chupa—stated in an affidavit that the restaurant had been closed for " 'a substantial period of time' sometime between April 2004 and November of 2007," the case was publicized in the local news; the local news quoted plaintiff and identified him as Froling's "spokesman." Specifically, regarding plaintiff, the article said, " 'We can show [continuous use] through continuous unbroken leases. We can show it through health inspection reports, through utility records and eyewitness accounts of owners, of employees and most importantly, customers,' said Frank Lawrence, spokesman for Titan Construction [one of Froling's companies]."

Shortly after the article was published, and *after* the closure of discovery in the *Froling* case, defendant submitted "Requests to Admit in the Froling v Pelican Case," which asked for six admissions from Mr. Froling, including:

> 4. Please admit that Frank Lawrence has been denied the opportunity to take the attorney bar exam for the State of Michigan as he cannot pass character and fitness.
>
> 5. Please admit that Frank Lawrence has a felony drug conviction from 1996.
>
> 6. Please admit that Frank Lawrence has another drug conviction prior to 1996.

When defendant refused to withdraw the requests, plaintiff filed this suit, claiming abuse of process and defamation. Plaintiff asserted that the statements were not true and were "unrelated in any way to the litigation and were intended to maliciously defame a non-party." Also included in plaintiff's complaint were allegations that in February 2014, while they waited for a facilitation proceeding in the Macomb County courthouse, defendant approached plaintiff and Frol-

ing and "questioned them in a disrespectful and hostile manner," before telling Froling "that he should be careful [about the people] with whom he associates," in reference to plaintiff.

Plaintiff first filed a "Motion to Strike and Expunge," asking that the alleged defamatory requests to admit be stricken from the record and expunged from the court's computer system. Defendant's response to the motion argued that the trial court had no authority to strike discovery requests filed in a separate case. Plaintiff responded by withdrawing his motion to strike and replacing it with a motion to seal. He asserted that the statements, as part of the public record, were harmful to his reputation and were false; he had no drug convictions and had, in fact, passed the Michigan bar examination. Plaintiff also filed a separate motion for sanctions under MCR 2.114(E), asserting that defendant had violated MCR 2.114(D) by filing a document she knew had no factual basis, for the purpose of harassing and embarrassing plaintiff. In addition, he asked the court to seal the Board of Law Examiners opinion from 2006. Defendant then moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted) and MCR 2.116(C)(10) (no genuine issue of material fact).

The trial court first held a hearing on the motion to seal. Plaintiff argued that the statements at issue, being in the form of requests to admit, appeared to the public as though they were statements of fact supported by evidence, and he requested that these untrue and misleading statements be sealed. Plaintiff's counsel also asserted that plaintiff's character was irrelevant to the property dispute. To this, the trial court responded, "[H]is name was thrown around an awful lot in those hearings. . . . So, I tend to think he's a

relevant party as far as a witness goes." When counsel asserted that plaintiff was not a property manager, but merely worked with Froling's lawyers in property disputes, the court asked, "Does he work with that particular property? His name came up an awful lot. To make me think that he's completely irrelevant to that lawsuit doesn't strike me as genuine." Counsel replied that plaintiff may not be "totally irrelevant to the lawsuit, because he's helping the lawyers work in the lawsuit," but that "his history with the State Bar, has nothing to do with the Froling lawsuit." Ultimately, regarding the statement about the bar examination and the Board of Law Examiners opinion, the trial court found that "there are some legitimate question[s] regarding that, and . . . I'm not going to order that sealed." However, the court ordered sealed the two statements about drug convictions. Subsequently, sanctions were not ordered. The entirety of the court's reasoning on that issue was the statement: "I'm not issuing sanctions. I don't think it rose to the level of sanctions."

The trial court heard the motion for summary disposition a few weeks later. Defendant argued that the statements made in the requests to admit were made "within the context of the litigation," and so "the absolute immunity under the judicial proceedings privilege applies." Defendant also indicated that the statement made in the courthouse hallway was only an opinion and, therefore, could not be the basis for a defamation claim. Defendant asserted that "the courts have consistently held that defamation cannot be an ulterior motive for an abuse of process" claim, and therefore, plaintiff's claims must fail. Plaintiff responded by arguing that because plaintiff was not a party to the *Froling* case, his claim was not on equal footing with the caselaw defendant cited for the above

propositions. Defendant replied that the trial court already noted that plaintiff was a witness and as a result, "his character and credibility [we]re relevant to the case [a]nd because of that relevancy, the privilege of judicial proceedings applies."

The court noted that it had "let a lot of things come in after discovery was closed," and it stated, "I think he [plaintiff] was always a potential witness." Regarding the statements about drug convictions, the court said that "there wasn't anything to support the criminal, the alleged criminal allegation." Nevertheless, the court reasoned, "[T]hat is part of the discovery process. I do believe that it is privileged . . . ." In addition, the court concluded that the statement made in the courthouse hallway "is opinion and you cannot show any ulterior motive."[2] For those reasons, the trial court granted defendant's motion for summary disposition, stating that plaintiff "failed to state a claim for [sic] which could be actionable." Plaintiff appealed.

II. MOTION FOR SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition in regard to his claims for abuse of process and defamation. An appellate court "review[s] de novo a decision on a motion for summary disposition." *Green-*

[2] It appears that the trial court mistakenly combined aspects of defamation (opinions) with aspects of abuse of process (ulterior motive). To be clear, our Supreme Court said in *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 128; 793 NW2d 533 (2010), that "a statement of opinion is not automatically shielded from an action for defamation because expressions of opinion may often imply an assertion of objective fact. . . . [A] statement of opinion that can be proven to be false may be defamatory because it may harm the subject's reputation or deter others from associating with the subject." (Quotation marks and citations omitted.)

ville Lafayette, LLC v Elgin State Bank, 296 Mich App 284, 286; 818 NW2d 460 (2012). The trial court's ruling did not expressly state whether the motion was granted under MCR 2.116(C)(8) or MCR 2.116(C)(10). Based on the trial judge's comment "I do believe that it is privileged and, therefore, I think on that portion you failed to state a claim for [sic] which could be actionable," and the court's use of language similar to the language of MCR 2.116(C)(8), this Court presumes that the motion for summary disposition was granted for "fail[ure] to state a claim on which relief can be granted" under MCR 2.116(C)(8). Accordingly,

> [a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews . . . a motion [for summary disposition] under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [*Averill v Dauterman*, 284 Mich App 18, 21; 772 NW2d 797 (2009), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). (Quotation marks and citations omitted.)]

A. ABUSE OF PROCESS CLAIM

"Abuse of process is the wrongful use of the process of a court." *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911). "This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue." *Id*. at 623 (quotation marks and citation omitted). "To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular

prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). Expanding on each of the elements, the *Friedman* Court went on to explain that the act must be something more than just the initiation of a lawsuit, and the ulterior purpose has to be something other than settling a suit. *Id*. at 31. Justice Cooley, in his treatise on torts, stated, "One way in which process is sometimes abused, is by making use of it to accomplish not the ostensible purpose for which it is taken out, but some other purpose for which it is an illegitimate and unlawful means." Cooley, *The Law of Torts or the Wrongs Which Arise Independently of Contract* (3d ed), p 356.

We turn now to the requests to admit filed in the *Froling v Pelican* case. Requests for admission are governed specifically by MCR 2.312, and more generally by MCR 2.302. MCR 2.302(B)(1), regarding the scope of discovery, provides in general:

> Parties may obtain discovery regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis added.]

MCR 2.312(A) states in part:

> Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B)

> stated in the request that relates to statements or opinions of fact or the application of law to fact . . . .

There is no doubt that filing requests to admit is an act of process, the purpose of which was given by our Supreme Court in *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-420; 551 NW2d 698 (1996):

> MCR 2.312 is modeled after FR Civ P 36, and serves two vital purposes:
>
> > Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. [Advisory Committee note of 1970 to amend rule 36.]
>
> By encouraging admissions, the goal of the rule . . . [is] to expedite the pending action.

"[R]equests for admission are used to establish admission of facts about which there is no real dispute." 7 Moore's Federal Practice (3d ed), § 36.02[1], p 36-5. Similarly, Michigan's court rule has "a two-fold function: (1) to limit the areas of controversy and (2) to save time, energy and expense that would otherwise be required for preparing proof and submitting evidence on matters properly subject to admission." 2 Longhofer, Michigan Court Rules Practice (6th ed), § 2312.3, p 429.

Plaintiff contends that defendant's filing of the requests to admit did not serve any legitimate purpose, but instead claims in his complaint that the requests were filed "with the intent to cause harm to [plaintiff]" by "defam[ing] and harm[ing] a non-party to the litigation." Because the requests were submitted to plaintiff's employer, the intended purpose appears to be harm resulting from embarrassment, mistrust by plaintiff's employer, and even possible termination of

employment. The requests to admit in no way limited the areas of controversy or saved the parties time, energy, and expense. In fact, the result has been quite the opposite due directly to the requests to admit filed by defendant. More time, energy, and money has been spent by all parties involved to argue over an area that was never previously in controversy. Therefore, plaintiff successfully stated in his complaint a cause of action for abuse of process, and accordingly, summary disposition was improper.

B. DEFAMATION CLAIM

"A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000).

> The elements of a cause of action for defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id*.]

It has long been established that "words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal." *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000). With the first element of a defamation claim being a false statement, it naturally follows that a statement which is "substantially true"

is a defense to a charge of defamation by implication. See *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998). Furthermore, defendants in defamation suits are not required to prove the statement "is literally and absolutely accurate in every minute detail." *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992).

Plaintiff's complaint asserts that the requests to admit are the basis for the defamation claim. The requests suggest that plaintiff was disallowed from sitting for the bar exam in Michigan and that plaintiff had drug convictions, both prior to and in the year 1996.[3] There does not seem to be any dispute that the fifth and sixth statements, those about plaintiff's alleged drug convictions, had no factual basis and were entirely false. The fourth statement, that plaintiff was denied the opportunity to take the state bar examination because of character and fitness, is more capable of being considered substantially true. To determine whether a statement is substantially true, the Michigan Supreme Court has said:

> "[A] slight inaccuracy in one of its details will not prevent the defendant's succeeding, providing the inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce . . . ." Thus, the test looked to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial. [*Rouch*, 440 Mich at 259, quoting *McAllister v Detroit Free Press Co*, 85 Mich 453, 461; 48 NW 612 (1891).]

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[3] The statement made by defendant in the hallway to Mr. Froling, that he should be careful about the people with whom he associates, in reference to plaintiff, is nothing more than a platitude, which we find unactionable.

Here, Froling was fully aware that plaintiff was not a member of the state bar but also had been told that plaintiff had "multi-stated" the bar examination and his intellect was considered a valuable asset and a reason he was hired.[4] The Board of Law Examiners opinion expressly stated that plaintiff "took the July 2001 Michigan bar examination and received a passing score."[5] The inaccurate statement—that plaintiff had been "disallowed" from taking the bar examination—caused Froling to question if plaintiff had been fully truthful with him about the bar exam during his employment interview. Therefore, defendant's statement that plaintiff "has been denied the opportunity to take the attorney bar exam for the State of Michigan as he cannot pass character and fitness" had a very different effect on the persons to whom it was published (Froling) than had it been a completely accurate statement. Because it specifically was false in the most relevant fact, it is difficult to characterize the statement as having "a slight inaccuracy in one of its details." The burden at trial is for a plaintiff to prove falsity. Although the statement about plaintiff's character and fitness seems substantially true to the general reader, the effect it had on the person to whom it was published, plaintiff's employer, was very different from the effect a purely accurate statement would have had.

Plaintiff further pleads that the statements regarding drug convictions are "defamation *per se* . . . and . . . do not require proof of damage to [plaintiff's] reputation." Assertions that someone has prior drug convictions are certainly "[a]ccusations of criminal activity [and] are considered 'defamation per se' under the law and so do not require proof of damage to the plaintiff's

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[4] Affidavit of Carole Froling, pp 1-2.

[5] *In re Lawrence*, BLE Opinion, issued June 14, 2006, p 1.

reputation." *Ghanam v John Does*, 303 Mich App 522, 545; 845 NW2d 128 (2014). Defendant's main argument regarding the defamation claim is the protection afforded by the judicial proceedings privilege. Plaintiff argues that the communications made by defendant were unprivileged because they "were not relevant, material or pertinent" to the underlying litigation. This issue is discussed next.

C. DEFENSE OF JUDICIAL PROCEEDINGS PRIVILEGE

The trial court was persuaded by defendant's argument that the statements made in the requests to admit were made during the course of discovery. Thus, the statements fall under the judicial proceedings privilege, thereby barring plaintiff's causes of action. We disagree.

"Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are *relevant*, *material*, *or pertinent* to the issue being tried." *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006) (emphasis added). "The immunity extends to every step in the proceeding and *covers anything that may be said in relation to the matter at issue*, including pleadings and affidavits." *Couch v Schultz*, 193 Mich App 292, 295; 483 NW2d 684 (1992) (emphasis added). What a litigant considers to be pertinent or relevant is given much freedom, and the privilege is liberally construed as a matter of public policy "so that participants in judicial proceedings may have relative freedom to express themselves without fear of retaliation." *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961) (quotation marks and citation omitted); see also *Couch*, 193 Mich App at 295. The statement "need not be strictly relevant to any issue

involved" in the litigation. 3 Restatement Torts, 2d, § 586, comment c, p 248. All that is required is that the publication has "some reference to the subject matter" of the litigation; however, the privilege does not extend to matters that have "no connection whatever with the litigation." *Id*. From this, it appears that the statement's relevance or pertinence to the issue being tried—the existence of a prescriptive easement—is determinative of whether the statement was protected by the privilege.

The record for this case contains absolutely no evidence that plaintiff's character had any relevance or pertinence to the disputed easement. When the trial court granted defendant's motion, it agreed with defendant that plaintiff was a potential witness for the reason that his name "came up a lot" in the easement case. But there is no evidentiary support for that conclusion, and defendant notably has not attached copies of transcripts from the easement case or even the witness list she allegedly filed after submitting the requests to admit—a list that supposedly named plaintiff as a witness. The record before this Court does not contain evidence to support the assertion that plaintiff's name "came up a lot," or that his prior struggles with the Board of Law Examiners and alleged history of drug convictions were relevant, pertinent, or material to the *Froling* case or that they would shed any light on the easement issue. Indeed, the proceedings in the underlying *Froling* case support the conclusion that the admissions sought in the requests served no purpose in resolving that case; the court apparently never granted permission for the late filing, the requests to admit were never actually answered, defendant apparently never pursued answers, and neither plaintiff's name nor his character made even a passing appearance in the court's final judgment.

In her brief, defendant relies considerably on the assertion that statements are presumed relevant once it is established that they were made during the course of a judicial proceeding. See *Sanders*, 362 Mich at 695-696. This, however, is a muddy area in defamation law. That statement is not a rule of law. Rather, it is a quotation of the trial court's language in *Sanders*. The *Sanders* Court never expressly endorsed the concept. *Id*. In Michigan, the source of this "presumption" seems to be *Hartung v Shaw*, 130 Mich 177; 89 NW 701 (1902). In *Hartung*, the Court stated:

> If statements made in the course of judicial proceedings, in pleadings or in argument, are relevant, material, or pertinent to the issue, their falsity or the malice of their author is not open to inquiry. They are then absolutely privileged. . . .
>
> * * *
>
> Where a party shows in his declaration a publication presumptively privileged, it is his duty, in order to recover, to prove that the words spoken were not pertinent or relevant, and that they were not spoken *bona fide*. If it be necessary to prove this, it is equally necessary to allege it. [*Id*. at 179-180 (citations omitted).]

In short, the "presumption" identified in *Hartung* is another way of saying that the burden is on the plaintiff to allege and then prove that statements made in the course of judicial proceedings, including pleadings and argument, have no relevance, pertinence, or materiality to the matter being litigated. Plaintiff sufficiently made that allegation in his complaint.

Moreover, defendant's pleadings fail to explain, and it is not facially apparent, how the character of a nonparty who is not a potential eyewitness has any "reference" to the subject matter of the easement

litigation. 3 Restatement Torts, 2d, § 586, comment c, p 248. Taking as true plaintiff's argument that defendant filed the requests to admit in retaliation for plaintiff's public statements about the case, defendant's conduct seems to turn upside down the public policy behind the privilege, that is, to permit participants in judicial proceedings to be relatively free to express themselves without fear of retaliation. *Sanders*, 362 Mich at 695.

III. DENIAL OF SANCTIONS

This Court reviews de novo whether the trial court properly interpreted and applied the relevant court rules to the facts, *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012), and "review[s] for clear error the trial court's determination whether to impose sanctions under MCR 2.114," *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A finding is clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that a mistake was made. *Id*.

In regard to the trial court's ability to levy sanctions against an attorney, MCR 2.114(D) provides:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) *the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* [Emphasis added.]

"If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it . . . an appropriate sanction . . . ." MCR 2.114(E).

The requests to admit asked Froling to "admit that Frank Lawrence ha[d] been denied the opportunity to take the attorney bar exam for the State of Michigan as he cannot pass character and fitness." Although the statement itself is not entirely true in the specifics, defendant contends that it indicates that plaintiff was denied bar admission because of character and fitness, which is true. The Board of Law Examiners decision supports this broader contention, even though it contradicts the specific assertion that plaintiff was not allowed to take the bar examination. From the broader point of view, the document was reasonably attached to defendant's motion to support her argument that plaintiff was denied bar admission. The trial court's conclusion that the filing did not constitute harassment does not leave this Court with a definite and firm conviction that a mistake was made. Therefore, we affirm the trial court's denial of sanctions against defendant and her attorneys.

IV. CONCLUSION

Accordingly, we affirm the trial court's decision to deny plaintiff's motion for sanctions against defendant and her attorneys. However, we conclude that plaintiff sufficiently stated claims for abuse of process and defamation on which relief can be granted. Therefore, we reverse the trial court's grant of summary disposition in favor of defendant.

METER, P.J., and WILDER and RONAYNE KRAUSE, JJ., concurred.

NL VENTURES VI FARMINGTON, LLC v CITY OF LIVONIA

Docket No. 323144. Submitted December 9, 2015, at Detroit. Decided December 22, 2015. Approved for publication January 28, 2016, at 9:00 a.m. Leave to appeal sought.

NL Ventures VI Farmington, LLC (plaintiff), filed a complaint in the Wayne Circuit Court against the city of Livonia (defendant). Plaintiff leased property to Awrey Bakeries, LLC (Awrey), and beginning in 2009, Awrey began failing to pay its bill for water service to the leased property. Defendant did not pursue collection from Awrey or certify the arrearages and place them on the tax roll or shut off water service to Awrey. Defendant continued to provide water service to Awrey without requiring timely payment. Awrey went out of business in 2012 and later filed for bankruptcy. Defendant initiated proceedings against Awrey to collect the water service arrearages. Defendant, Awrey, and Awrey's lender entered into a settlement agreement calling for Awrey's partial payment of the total owed for water service. Defendant then initiated proceedings against plaintiff to collect the balance of the unpaid water bills or to enforce its lien against plaintiff's property. Defendant filed a motion for summary disposition of plaintiff's claims. The trial court, David J. Allen, J., acknowledged that defendant did not comply with its own ordinance that authorized defendant to certify the arrearages each year and to place them on the property tax rolls for the property receiving water service. The court denied defendant's motion for summary disposition, and it granted summary disposition to plaintiff on one count (the liens were invalid and unenforceable). The court declined to rule on plaintiff's remaining claims. The court agreed with plaintiff that the liens were invalid and unenforceable because defendant did not comply with the applicable law and local ordinance governing liens arising from a consumer's failure to pay for its water service. The court denied defendant's motion for reconsideration, and it granted defendant's motion to stay the proceedings pending the outcome of defendant's appeal in the Court of Appeals.

The Court of Appeals *held*:

1. The trial court erred by finding that the liens against plaintiff's property created by Awrey's failure to pay for water service were invalid and unenforceable. Defendant is entitled to payment of the arrearages within the three-year statutory limitations period. Defendant's failure to strictly comply with its own ordinance did not negate the lien on the property arising from MCL 123.162. The creation of a lien on real property as security for payment of water service a municipality provides to that property is automatic. However, there is no single method by which a municipality must respond to delinquencies in payment for water service. The applicable statutory provisions and defendant's own ordinance authorize defendant to (1) shut off water service to the property, (2) initiate proceedings to collect the money owed for water service received, or (3) certify the lien to the city assessor for entry of the lien amount on the city tax roll. A lien against real property for payment for water service to the property arises as soon as water is delivered to the property. A lien is not invalidated or altered in any way when a municipality opts not to exercise any of the methods available for collecting delinquent payments and continues providing water to the property.

2. Defendant's knowledge that plaintiff's tenant, Awrey, was using the water service provided did not relieve plaintiff of responsibility for the water service charges in arrears. A landlord must engage in an affirmative action to avoid liability for the arrearages belonging to the landlord's tenant. Plaintiff did not take any affirmative action to relieve itself of the obligation to pay for water service to its property. Plaintiff did not file an affidavit attesting that Awrey leased the property and was responsible for paying for water service, and plaintiff did not provide a copy of Awrey's lease.

3. The trial court erred by failing to address plaintiff's remaining equitable claims. Plaintiff's remaining claims did not require remand for completion of discovery, however, because each claim should have been dismissed as a matter of law under MCR 2.116(C)(7) and MCR 2.116(C)(8). Plaintiff's equitable estoppel or waiver claim arose from defendant's subordination of its liens to those held by plaintiff's lender. Plaintiff argued that defendant's subordination agreement with the lender diverted funds to the lender that could have been used to pay plaintiff's outstanding bills for water service. Plaintiff's claim of equitable estoppel failed because there was no evidence that defendant made any representations to plaintiff upon which plaintiff relied and that would have prejudiced plaintiff if defendant was permitted to deny those representations.

4. Plaintiff's claims of unjust enrichment and quantum meruit failed because plaintiff did not demonstrate that defendant received a benefit from plaintiff as a result of the subordination agreement that, if retained, would result in defendant's unjust enrichment. Moreover, there was no merit in its argument that defendant's subordination of its liens to Awrey's lender constituted a voluntary relinquishment of any benefits it was entitled to receive.

5. Plaintiff's claims of tortious interference and civil conspiracy could not overcome defendant's governmental immunity defense. Plaintiff failed to plead that the tortious interference occurred during defendant's exercise of a nongovernmental function or that a statutory exception to governmental immunity applied. In short, plaintiff failed to plead in avoidance of governmental immunity. A government function is an activity, either expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. To determine whether an identified activity is a governmental function requires the Court to focus on the general activity involved and not the specific conduct. At all times relevant to this case, defendant operated the municipal water supply, which is routinely acknowledged to be a governmental function.

Vacated and remanded. Costs to defendant.

Honigman Miller Schwartz and Cohn LLP (by *Jason Conti* and *Gregory J. DeMars*) for plaintiff.

Donald L. Knapp, Jr., and *Michael E. Fisher* for defendant.

Amici Curiae:

Eric D. Williams for the Michigan Municipal League and the Michigan Townships Association.

Dykema Gossett PLLC (by *Jill M. Wheaton*, *Kathryn J. Humphrey*, and *Mark D. Jacobs*) for the City of Detroit Water and Sewerage Department.

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM. Defendant appeals the order granting summary disposition in favor of plaintiff, which invalidated accumulated water and sewer charges and liens against plaintiff's real property. Defendant further appeals the trial court's denial of its motion for summary disposition on plaintiff's remaining tort claims. Defendant's motion for summary disposition was premised on governmental immunity and the failure to state a viable claim. We vacate the trial court's order and remand for further proceedings.

The factual and procedural history of this litigation is not disputed. Rather, this appeal is focused on the interpretations of, and interrelationships among, various statutory schemes, including (1) MCL 123.161 *et seq*., municipal water and sewage liens, (2) MCL 141.101 *et seq*., the Revenue Bond Act of 1933, and (3) Livonia Ordinances, § 13.08.010 *et seq*., the city of Livonia's water rate ordinance chapter.

Defendant first contends that the trial court erred by granting summary disposition in favor of plaintiff, which resulted in voiding and dismissing defendant's liens for unpaid water bills incurred by Awrey Bakeries, LLC (Awrey) while Awrey was a tenant on plaintiff's real property. Defendant argues that the trial court misconstrued and misinterpreted the meaning and interactions of the relevant statutory provisions in reaching its erroneous decision. Predictably, plaintiff lauds the trial court's decision and reasoning, emphasizing the correctness of the trial court's determination that defendant's failure to abide by or follow its own ordinance regarding the placement of water arrearages on the tax rolls necessitated voiding the liens, rendering them unenforceable.

Questions of statutory interpretation are reviewed de novo. *Omelenchuk v City of Warren*, 466 Mich 524,

527; 647 NW2d 493 (2002), overruled in part on other grounds *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). A trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is also reviewed de novo. *Fingerle v City of Ann Arbor*, 308 Mich App 318, 343; 863 NW2d 698 (2014), affirmed for reasons stated in concurring opinion (O'CONNELL, J.), majority opinion vacated 498 Mich 910 (2015).

> When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party. To overcome a motion brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law. [*Id*. (quotation marks and citations omitted).]

"A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Id*. at 129-130. "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). All reasonable inferences are to be construed in favor of the nonmoving party. *Dextrom*

v Wexford Co, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ." *Ernsting*, 274 Mich App at 510. Because the trial court's ruling in this case is not premised on defendant's claim of governmental immunity and instead appears to rely on information garnered extraneous to the pleadings, we review the motion under MCR 2.116(C)(10).

There is a dearth of published caselaw discussing the statutory provisions relevant to this matter. The most efficacious approach to unraveling the complexities of this case requires a study of the actual statutory language involved in an attempt to determine how the provisions are to be applied to the circumstances of this case. The starting point is the recognition of certain, basic tenets of statutory construction.

> The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by examining the plain language of the statute itself. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required. Under the plain-meaning rule, courts must give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would frustrate the legislative intent as evidenced by other statutory lan-

> guage or by reading the statute as a whole. [*Atchison v Atchison*, 256 Mich App 531, 535; 664 NW2d 249 (2003) (citations omitted).]

The statutory provisions pertaining to municipal water and sewage liens appear in 1939 PA 178, MCL 123.161 *et seq*.[1] The purpose of MCL 123.161 *et seq*. is "to provide for the collection of water or sewage system rates, assessments, charges, or rentals; and to provide a lien for water or sewage system services furnished by municipalities as defined by this act." The following provisions of the 1939 Act are relevant:

> *A municipality* which has operated or operates a water distribution system or a sewage system for the purpose of supplying water or sewage system services to the inhabitants of the municipality, *shall have as security for the collection of water or sewage system rates*, or any assessments, charges, or rentals due or to become due, respectively, for the use of sewage system services or for the use or consumption of water supplied to any house or other building or any premises, lot or lots, or parcel or parcels of land, *a lien upon the house or other building* and upon the premises, lot or lots, or parcel or parcels of land upon which the house or other building is situated or *to which the sewage system service or water was supplied*. *This lien shall become effective immediately upon the distribution of the water or provision of the sewage system service to the premises or property supplied, but shall not be enforceable for more than 3 years after it becomes effective*. [MCL 123.162 (emphasis added).]

In accordance with MCL 123.163, "The lien created by this act may be enforced by a municipality in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality." In

[1] As amended by 1981 PA 132, effective October 7, 1981.

turn, MCL 123.164 addresses the issue of notice with regard to liens created under this statutory scheme, stating: "The official records of the proper officer, board, commission, or department of any municipality having charge of the water distribution system or sewage system shall constitute notice of the pendency of this lien."

Prioritization of liens created within this statutory scheme and a mechanism for lessors to avoid liability for the imposition of liens are discussed in MCL 123.165. The enforcement and collection of liens is addressed in MCL 123.166 as follows:

> *A municipality may discontinue water service* or sewage system service from the premises against which the lien created by this act has accrued if a person fails to pay the rates, assessments, charges, or rentals for the respective service, *or may institute an action for the collection of the same in any court of competent jurisdiction*. However, *a municipality's attempt to collect* these sewage system or water rates, assessments, charges, or rentals by any process *shall not invalidate or waive the lien upon the premises*. [Emphasis added.]

Finally:

> *This act* shall not repeal any existing statutory charter or ordinance provisions providing for the assessment or collection of water or sewage system rates, assessments, charges, or rentals by a municipality, but *shall be construed as an additional grant of power to any power now prescribed by other statutory charter or ordinance provisions, or as a validating act to validate existing statutory or charter provisions creating liens which are also provided for by this act*. [MCL 123.167 (emphasis added).]

Under the statutory provisions of 1939 PA 178, the trial court erred by dismissing and invalidating defendant's liens on plaintiff's real property for the unpaid water charges. Initially, the wording of MCL 123.162 is

mandatory through the use of the term "shall." "A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole. Thus, the presumption is that 'shall' is mandatory." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) (citations omitted). As a consequence, MCL 123.162 establishes a lien on the real property receiving service "as security" for the collection of rates and fees incurred for water usage. In addition, the lien is "effective immediately upon the distribution of the water," but with enforceability limited to "[not] more than 3 years after it becomes effective," or from the date the service was received. MCL 123.162. Notice of the existence of the lien is deemed constructive through the language of MCL 123.164.

Importantly, a municipality is granted discretion in the manner of collection; in accordance with MCL 123.163, such liens "may be enforced . . . in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, *or* by an ordinance duly passed by the governing body of the municipality." (Emphasis added.) As defined in *Merriam-Webster's Collegiate Dictionary* (11th ed),[2] the term "or" is "used as a function word to indicate an alternative . . . ." This is reinforced through the language of MCL 123.166,

[2] It is a well-recognized precept that this Court may use and rely on a dictionary to determine the plain and ordinary meaning of a term. *Ryant v Cleveland Twp*, 239 Mich App 430, 433; 608 NW2d 101 (2000) ("Unless defined in the statute, 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.").

which provides a municipality with the authority to discontinue water service when arrearages exist "or [to] institute an action for the collection of the same in any court of competent jurisdiction." Of significance is the further provision within MCL 123.166, indicating that collection efforts "shall not invalidate or waive the lien upon the premises." In addition, 1939 PA 178 must be "construed as an additional grant of power . . . or as a validating act . . . ." MCL 123.167. Such language serves to obviate the trial court's determination that defendant's failure to strictly conform to its own ordinance negated the lien mandated by the statutory scheme of 1939 PA 178.

This is not to suggest that defendant is entitled to the entirety of the amount indicated by its liens. As noted in MCL 123.162, the enforceability of the lien cannot extend "for more than 3 years after it becomes effective." At the very least, however, defendant is entitled to payment for those arrearages that are within the time frame designated by MCL 123.162.

The other statutory scheme relied on by the litigants is the Revenue Bond Act of 1933 (Bond Act), MCL 141.101 *et seq*. Construction of the Bond Act is governed by MCL 141.102, which states that "the purpose and intention of this act [is] to create full and complete additional and alternate methods for the exercise of such powers. The powers conferred by this act shall not be affected or limited by any other statute or by any charter, except as otherwise herein provided." The Bond Act provides municipalities with discretion to "adopt an ordinance relating to the exercise of the powers granted in this act and to other matters necessary or desirable to effectuate this act, to provide for the adequate operation of a public improvement established under this act, and to insure the security of

bonds issued." MCL 141.106. In turn, MCL 141.108 creates a lien for the benefit of bondholders, stating:

> There shall be created in the authorizing ordinance a lien, by this act made a statutory lien, upon the net revenues pledged to the payment of the principal of and interest upon such bonds, to and in favor of the holders of such bonds and the interest coupons pertaining thereto, and each of such holders, which liens shall be a first lien upon such net revenues, except where there exists a prior lien or liens then such new lien shall be subject thereto.

The Bond Act clearly prohibits providing services without charge: "[F]ree service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." MCL 141.118(1). As a result:

> 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. In addition to

> any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to the premises and the payment of charges for sewage disposal service or storm water disposal service to a premises may be enforced by discontinuing the water service, the sewage disposal service, or the storm water disposal service to the premises, or any combination of the services. The inclusion of these methods of enforcing the payment of charges in an ordinance adopted before February 26, 1974, is validated. [MCL 141.121(3) (emphasis added).]

The Bond Act provides that it "shall be liberally construed to effect the purposes hereof." MCL 141.134.

In contrast to 1939 PA 178, the Bond Act is discretionary in areas or procedures relevant to this appeal. Specifically, MCL 141.121(3), through use of the term "may," makes it discretionary for a municipality such as defendant to effectuate a lien for delinquent payments or accumulated arrearages beyond a six-month period and permits, as an option, annual certification for placement on the tax rolls for purposes of collection. The details of the method adopted are relegated to the local authority to determine "[t]he time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien" through adoption of an ordinance. MCL 141.121(3). This appears to be where the confusion ensues based on defendant's adoption of the following ordinance language, as permitted by MCL 141.121(3):

> Charges for water service constitute a lien on the property served, and during March of each year the person or agency charged with the management of the system shall certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who shall enter the same upon the city tax roll of that year against the premises to which such service shall have been rendered; and said

> charges shall be collected and said lien shall be enforced in the same manner as provided in respect to taxes assessed upon such roll. [Livonia Ordinance § 13.08.350(A).]

MCL 141.121(3) provides a municipality with the discretion to treat water service arrearages as liens, with the option of placing on the municipality's tax rolls charges that are delinquent for more than six months. Although MCL 141.121(3) provides for "[t]he time and manner of certification" along with "details in respect to the collection of the charges and the enforcement of the lien" to be "prescribed by the ordinance adopted by the governing body," there is no language mandating immediate placement on the tax rolls. Similarly, defendant's ordinance, while requiring yearly certification of delinquencies, implies that a municipality has a level of discretion in the certification of delinquencies because the ordinance does not require immediate certification of a delinquency of six months, but rather, certification of delinquencies that have existed for "six (6) months or more." Livonia Ordinance § 13.08.350(A). In other words, MCL 141.121(3) authorizes the creation of liens for delinquent water usage charges and establishes minimal delinquency criteria for initiating collection efforts, while the defendant's ordinance provides a municipality with the methodology and authority to proceed once the municipality has decided to pursue enforcement or collection efforts.

This interpretation of MCL 141.121(3) and Livonia Ordinance § 13.08.350(A) provides a more reasoned and fair result and is in accordance with the rules of statutory construction. As discussed by Justice CAVANAGH in *Waltz v Wyse*, 469 Mich 642, 665-666; 677 NW2d 813 (2004) (CAVANAGH, J., dissenting):

> The primary goal of statutory interpretation is to give effect to the intent of the Legislature. To reach this goal, this Court has recognized the rule that statutes relating to the same subject matter should be read and construed together to determine the Legislature's intent. Further, it is a maxim of statutory construction that *every word* of a statute should be read in such a way as to be given meaning . . . .
>
> As detailed above, the . . . provisions . . . are interconnected and are part of a common legislative framework. Because the various statutory provisions implicated in this case relate to the same subject matter, the terms of the provisions should be read *in pari materia*. The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject. [Quotation marks and citations omitted.]

Statutes *in pari materia* are defined as " 'those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times . . . .' " *Id*. at 666, quoting *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965), abrogated in part on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006).

All of the cited statutory provisions or schemes seek, at least in part, to provide mechanisms for collecting payment for water service rendered when payment for the service has fallen into arrears. All of the statutory provisions are clear that the provision of such service is not "free" and that there is a need to provide "security" for payment. See MCL 123.162; MCL 141.118(1); Livonia Ordinance § 13.08.300 ("No free service shall be fur-

nished by said system to any person, public or private, or to any public agency or instrumentality."). While 1939 PA 178 is the most adamant regarding liens for water arrearages, it also provides wide discretion to the water service provider regarding the means of collection and enforcement. While permitting liens for delinquent water charges, the Bond Act provides municipalities with greater discretion in electing methods of collection, MCL 141.121(3).

The trial court erred by reading the statutory provisions as unrelated and by elevating the local ordinance to a position that would supersede 1939 PA 178 and MCL 141.101 *et seq*., rather than viewing all of the statutory schemes in a comprehensive and cohesive manner. In this instance, MCL 123.162 provided for the immediate effectuation of a lien on plaintiff's property for any water charges incurred. Notice of a lien was constructive, in accordance with MCL 123.164, and the lien's validity did not require defendant to give actual notice to plaintiff. The method of enforcing the lien was discretionary; MCL 123.163 permits defendant to elect methods prescribed "in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality." Other than the limitations on initiating enforcement or collection actions, MCL 141.121(3), and the length of time available for enforcement, MCL 123.162, the validity of liens is sacrosanct, even when a municipality pursues collection of the arrearages. Defendant, or any other similarly situated municipality, is not constrained in the manner in which it may collect arrearages.

In addition, in the context of a lighting utility, this statutory scheme has been addressed by a federal

court.[3] See *Brown Bark I, LP v Traverse City Light & Power Dep't*, 736 F Supp 2d 1099 (WD Mich, 2010), aff'd 499 F Appx 467 (CA 6, 2012). A municipal authority or government utility is not required "to file a specific lien . . . before the unpaid charges will cause the formation of a lien," the court, citing an unpublished decision of this Court,[4] opined:

> So long as the municipality's governing body has enacted an ordinance exercising its § 141.121(3) authority, . . . the lien automatically comes into being as soon as the private party incurs the "charges for services furnished to [its] premises." Thus, by operation of the statute and the municipal implementing ordinance, [the] lien against the . . . property came into being each time [the municipality] furnished [the utility service] to that property. [*Brown Bark*, 736 F Supp 2d at 1118-1119 (first alteration in original).]

The *Brown Bark* court noted that delinquent charges exceeding six months "are to be *treated like* unpaid taxes." *Id*. at 1119, citing MCL 141.121(3). "[T]o ascertain the 'manner provided for collection of taxes assessed upon the roll,' " the court found it necessary to consult other Michigan statutes, including Michigan's General Property Tax Act, MCL 211.55 *et seq*., which was noted to provide, in relevant part:

> The people of this state have a valid lien on property returned for delinquent taxes, with rights to enforce the lien as a preferred or first claim on the property. The right to enforce the lien is the *prima facie* right of this state and

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[3] "[F]ederal case law can only be persuasive authority, not binding precedent, in resolving the present case, which involves only questions of state law." *Sharp v City of Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001).

[4] *Saginaw Landlords Ass'n v City of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 2001 (Docket No. 222256).

> shall not be [set] aside or annulled except in the manner and for the causes specified in this act. [*Brown Bark*, 736 F Supp 2d at 1119, quoting MCL 211.60a(4) (quotation marks omitted).]

This further serves to support the contention that the trial court erred by invalidating the liens in their entirety, because the trial court's ruling does not comport with the cited statutory schemes or the recognized statutes relevant to enforcement.

Therefore, we vacate the trial court's ruling and remand this matter to the trial court to reinstitute the liens, subject to determining whether any of the charges incurred has exceeded the time limitations for enforcement.

Our ruling is not altered by plaintiff's contention that, because of various negotiations and agreements entered into between defendant and Awrey, defendant was aware that plaintiff's tenant was the user of the services provided. Plaintiff claimed that notice of the tenant constituted the landlord's disavowal of liability for the changes. This claim is without merit. Specifically, MCL 123.165 provides a method for a landowner to avoid liability for a tenant's water arrearage accrual:

> [T]his act shall not apply if a lease has been legally executed, containing a provision that the lessor shall not be liable for payment of water or sewage system bills accruing subsequent to the filing of the affidavit provided by this section. An affidavit with respect to the execution of a lease containing this provision *shall be filed* with the board, commission, or other official in charge of the water works system or sewage system, or both, and 20 days' notice shall be given by the lessor of any cancellation, change in, or termination of the lease. The affidavit shall contain a notation of the expiration date of the lease. [Emphasis added.]

A similar provision exists within MCL 141.121(3), which provides in relevant part:

> 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.

It is undisputed that plaintiff did not provide an affidavit in accordance with MCL 123.165 or provide written notification as required in MCL 141.121(3). Plaintiff cannot escape the mandatory nature of the directives delineated in MCL 123.165 by use of the word "shall." MCL 141.121(3), when viewed in conjunction with MCL 123.165, indicates the necessity of an affirmative act by plaintiff to avoid liability. The fact that defendant was aware of Awrey's tenant status does not relieve plaintiff of its responsibility to engage in an affirmative act to avoid liability as a landlord.

Next, defendant takes issue with the trial court's failure to grant summary disposition to defendant on plaintiff's remaining tort and equitable claims. We agree that the trial court shirked its responsibilities by failing to address these issues, and instead, indicated that they were moot or premature due to the ongoing nature of discovery. Although plaintiff contends that if this Court deems error occurred, then the claims should be remanded to the trial court for the completion of discovery, we conclude that a remand is unnecessary. This Court reviews a trial court's decision regarding the applicability of governmental immunity de novo. *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494

(2007). "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). In this instance, the claims are subject to dismissal as matters of law under MCR 2.116(C)(7) and MCR 2.116(8), rendering remand to permit additional discovery unnecessary.

Plaintiff's complaint is cursory in the exposition of these claims. In support of its claim of estoppel or waiver, plaintiff asserts that defendant's entry into the subordination agreement precluded enforcement of the unpaid water charges and tax liens. It contends that defendant's agreement to subordinate its liens in favor of Awrey's lender improperly diverted funds that could have been used to pay the outstanding charges, and therefore, should be deemed a waiver. Plaintiff fails to identify the type of estoppel specifically asserted, leading this Court to assume, based on its pairing with an assertion of waiver, that plaintiff is asserting equitable estoppel. *Huhtala v Travelers Ins Co*, 401 Mich 118, 132; 257 NW2d 640 (1977) ("Equitable estoppel is essentially a doctrine of waiver.").

"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) (citation omitted), implicit overruling on other grounds recognized by *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 239-240; 882 NW2d 194 (2015). Plaintiff's claim is deficient as it lacks any assertion, or evidence,

that defendant made any representations to plaintiff. Any representations made were to Awrey and Cole Taylor Bank, entities that are not parties to this case. Hence, plaintiff's assertions of estoppel or waiver do not constitute viable claims.

Next, plaintiff claims unjust enrichment and quantum meruit, making the broad assertion that entry into the subordination agreement improperly diverted monies and enriched defendant to the detriment of plaintiff. "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment . . . ." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006). As such, claims for unjust enrichment and quantum meruit have historically been treated in a similar manner. See *id*. at 195; see also *Roznowski v Bozyk*, 73 Mich App 405, 409; 251 NW2d 606 (1977). To establish a claim of unjust enrichment, plaintiff must demonstrate: "(1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2013). Plaintiff has failed to demonstrate that defendant received a benefit from plaintiff according to the subordination agreement. Any potential benefit received by defendant was through Awrey, not plaintiff. That a person benefits from another is not alone sufficient to require the person to make restitution for the benefit. *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986). "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." *Id*. Plaintiff's complaint is also internally inconsistent. It asserts that

defendant received a benefit from the subordination agreement, and it concurrently asserts that by agreeing to subordinate to Cole Taylor Bank its liens on Awrey's personal property, defendant voluntarily relinquished any benefit it would have been entitled to receive. This claim also lacks merit.

Plaintiff also asserts that defendant breached its ordinance and that plaintiff suffered damage as a proximate result of the breach. Based on our analysis of the statutory schemes pertaining to delinquent water charges, plaintiff's claim is rendered moot. "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *Parsons Investment Co v Chase Manhattan Bank*, 466 F2d 869, 871 (CA 6, 1972) (quotation marks and citation omitted). We further note that plaintiff mistakenly pleaded this claim as suggestive of strict liability or having been established as a matter of law, which is incorrect. "[B]reach of an ordinance is evidence of negligence, not negligence *per se*." *Rotter v Detroit United R*, 205 Mich 212, 231; 171 NW 514 (1919). The claim is not sustainable.

Plaintiff's remaining claims encompass tortious interference and civil conspiracy. The tortious interference claim is premised on plaintiff's assertions that defendant improperly interfered in its lease with Awrey by entering into the subordination agreement, which failed to comport with defendant's ordinance and which diverted funds from payment of the water arrearages. The civil conspiracy claim is intrinsically related to the tortious interference claim because it

relies on the same alleged behaviors between Awrey, Cole Taylor Bank, and defendant. Defendant asserts governmental immunity as its defense to these claims.

As discussed in *Laurence G Wolf Capital Mgt Trust v City of Ferndale*, 269 Mich App 265, 269; 713 NW2d 274 (2005), "Generally, governmental agencies engaged in the exercise or discharge of a governmental function, i.e., an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law, are immune from tort liability." (Quotation marks and citations omitted.) There is no intentional tort exception to governmental immunity. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992).

At the outset, plaintiff's complaint makes no reference or mention of governmental immunity with respect to these claims. Specifically, plaintiff failed to allege that the tortious interference occurred during the exercise of a nongovernmental function or that a statutory exception to immunity was applicable. Plaintiff never discussed or alleged in its complaint the question whether the collection or enforcement of charges for water service constituted a governmental function. Neither did plaintiff assert a pecuniary benefit, nor point out a proprietary function. Because plaintiff failed to state a claim that falls within a statutory exception to governmental immunity or to assert facts in its pleadings demonstrating that the alleged tortious action occurred during the exercise of a nongovernmental or proprietary function, plaintiff failed to plead in avoidance of governmental immunity, and its claims are subject to dismissal pursuant to MCR 2.116(C)(8).

Even if plaintiff's pleadings were deemed adequate, summary disposition would still be appropriate. To

survive a summary disposition motion premised on governmental immunity, a plaintiff must allege facts sufficient to demonstrate that governmental immunity is inapplicable or that the application of an exception is warranted. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004); *Summers v Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994).

Plaintiff implies that defendant's effort to collect overdue water charges for services provided is not a governmental function. A "governmental function" is defined as an activity "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). "The term 'governmental function' is to be broadly construed . . . ." *Id*. at 614. Whether an activity is a governmental function must be determined by the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

It cannot be reasonably asserted or maintained that defendant's operation of a municipal water supply did not constitute a governmental function. It is routinely acknowledged that "[t]he operation of a municipal water supply system is a governmental function . . . ." *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 487; 532 NW2d 183 (1995), citing MCL 41.331 *et seq*. and MCL 41.411 *et seq*. As such, plaintiff's claims of tortious interference and civil conspiracy cannot be sustained.

We vacate the trial court's ruling and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant may tax costs.

SAWYER, P.J., and BECKERING and BOONSTRA, JJ., concurred.

In re ENGLAND

Docket No. 327240. Submitted January 13, 2016, at Lansing. Decided January 28, 2016, at 9:05 a.m.

The Department of Health and Human Services filed an abuse and neglect petition regarding a minor child in the Family Division of the Washtenaw Circuit Court, seeking termination of the respondent father's parental rights. The court, Timothy P. Connors, J., held a preliminary inquiry, seeking, in part, to ensure compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. Following a combined adjudication trial and termination hearing, the court terminated respondent's parental rights. Respondent appealed.

The Court of Appeals *held*:

1. In termination cases involving Indian children, in addition to finding that at least one state statutory ground for termination was proven by clear and convincing evidence, the trial court must also make findings in compliance with the ICWA and the MIFPA before terminating parental rights. The specific findings required by the ICWA and the MIFPA in termination proceedings are: (1) proof that active efforts were made to prevent the breakup of the family, 25 USC 1912(d); MCL 712B.15(3); MCR 3.977(G)(1); and (2) proof beyond a reasonable doubt that the continued custody of the child by the parent would likely result in serious emotional or physical damage to the child, 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2). Finally, as in all termination proceedings, the trial court has a duty to determine that termination is in the child's best interests before it can terminate parental rights. Respondent argued that MCL 712B.15(3) is unconstitutionally vague because it does not provide an evidentiary standard by which the trial court must make its factual findings. That provision states that a party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful. Regarding the analogous provision in the

ICWA, 25 USC 1912(d), the Michigan Supreme Court held that because Congress did not provide a heightened standard of proof in that provision, the default standard of proof for termination of parental rights cases—clear and convincing evidence—applies to the determination whether the petitioner provided active efforts to prevent the breakup of the Indian family. The same reasoning applies to the standard of proof for MCL 712B.15(3). The Legislature set forth specific evidentiary standards in MCL 712B.15(2) and (4), while declining to do so in MCL 712B.15(3). The inevitable conclusion, therefore, is that the Legislature intended for the default evidentiary standard applicable in child protective proceedings—clear and convincing evidence—to apply to the findings required under MCL 712B.15(3). Because a default standard of proof applies to MCL 712B.15(3), it is not unconstitutionally vague. And, in this case, there was clear and convincing evidence to conclude that active efforts were made to prevent the breakup of the family, and the trial court did not clearly err when it made the requisite findings under MCL 712B.15(3).

2. Under MCL 712B.15(4), the trial court may not order termination unless the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. In this case, the evidence, including the testimony of a qualified expert witness, proved beyond a reasonable doubt that returning the child to respondent's care would likely result in serious emotional or physical harm. In challenging this conclusion on appeal, respondent attacked the qualifications and opinions of the expert witness, but he failed to raise those issues in the trial court. And, in any event, given her extensive knowledge and experience, coupled with the fact that she was a member of the Sault Ste. Marie Tribe of Chippewa Indians, the tribe in which the child was eligible for membership, any challenge to the expert's qualification as an expert would have been futile. The trial court did not clearly err by considering her testimony.

3. A preliminary inquiry is, as defined by MCR 3.903(A)(23), an informal review proceeding to determine proper action on a petition. Because of its informal nature and the narrowly tailored purpose it serves, MCR 3.962(B) states that a preliminary inquiry need not be conducted on the record or in the presence of the parties. Given that respondent was not entitled to be present at the preliminary inquiry, he was not entitled to the assistance of counsel at that proceeding. Moreover, there was nothing in the court rule governing preliminary inquiries, MCR 3.962, that entitled respondent to any advance notice of the tribe's intent to intervene and present testimony, and respondent

had no right to cross-examine the tribe's expert witness at the preliminary inquiry or present his own expert witnesses. Finally, respondent had no right to seek a transfer of jurisdiction at the preliminary inquiry. Simply put, there was no plain error. In any event, respondent's substantial rights were not affected, inasmuch as it was undisputed that he was represented by counsel throughout the remainder of the proceedings, had a chance to cross-examine the expert and present his own witnesses at the termination hearing, and had the opportunity—which he did not use—to seek a transfer of jurisdiction.

4. MCL 712B.15(2) provides, in pertinent part, that an Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian only upon clear and convincing evidence that active efforts have been made, that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This subsection applies only to removal decisions. The record in this case made clear that the child was not removed from the parental home or placed in foster care. Rather, the child remained with his mother in the family home throughout these proceedings. Because the child was never removed, the trial court was not required to make any findings at the preliminary inquiry pursuant to MCL 712B.15(2). Instead, the trial court was only required, as part of its termination order, to make "active efforts" and "risk of harm" findings pursuant to MCL 712B.15(3) and (4). The trial court made those findings, and the trial court's findings in that regard were not clearly erroneous.

Affirmed.

CHILD CUSTODY — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD — MICHIGAN INDIAN FAMILY PRESERVATION ACT — ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY — STANDARD OF PROOF — CLEAR AND CONVINCING EVIDENCE.

Under MCL 712B.15(3), a party seeking a termination of parental rights to an Indian child must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful; the default clear-and-convincing-evidence standard of proof applies to the findings required under MCL 712B.15(3); because that default standard of proof applies to MCL 712B.15(3), the provision is not unconstitutionally vague.

Brian L. Mackie, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Lisa J. Peterson, PLLC (by *Lisa J. Peterson*), for respondent.

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

PER CURIAM. The respondent father appeals as of right the trial court's order terminating his parental rights to the minor child, EM, which was entered at the initial disposition under MCL 712A.19b(3)(b)(*i*) (parent caused physical injury or abuse and reasonable likelihood that child will suffer from injury or abuse in the future if returned to the parent), (j) (reasonable likelihood that child will be harmed if returned to the parent), and (k)(*iii*) (parent abused the child and abuse included battering, torture, or other severe physical abuse). For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

These proceedings stem from an investigation of child abuse that took place after the child, EM, then approximately two months old, was brought by his parents to the Mott Children's Hospital at the University of Michigan on Sunday, December 15, 2013, with concerns of a " 'popping sound' " on the left side of his ribs. X-rays ultimately revealed that EM had two acute fractures in the seventh and eighth ribs on the left posterior side of his body, as well as several other, potentially older, fractures in the fourth, fifth, and sixth ribs on his right and left sides. X-rays also showed that EM had a fracture in his right tibia, which

was definitely older than the rib fractures and already healing. Finally, EM was observed to have a bruise on his chest. Dr. Bethany Mohr, a pediatric hospitalist and director of the child protection team at Mott Children's Hospital, opined that, given the various stages of healing, the injuries showed there were "at least 2 separate incidents" in which EM was harmed. In her opinion, the fractures were "diagnostic of abuse" and the bruise was "also highly suspicious, if not diagnostic of abuse."

Respondent was interviewed at the hospital by Dr. Mohr. He initially indicated that he did not know how EM could have been injured, but subsequently acknowledged two previous occasions, including one on December 14, 2013, in which he had fallen while carrying EM in his car seat. Respondent clarified to Dr. Mohr, however, that the child was not injured in either of these falls because he never fell out of his car seat. Respondent was also interviewed by Child Protective Services (CPS) specialist Rita Sharma and Washtenaw County Sheriff's Detective Craig Raisanen. As in his first interview, respondent initially told Sharma and Raisanen that he did not know how EM was injured. Subsequently, however, he admitted being responsible for the child's rib and leg fractures. Specifically, as to the leg fracture, respondent indicated that he lifted EM up by both of his legs while changing his diaper on December 11, 2013, and that in doing so he had used enough force to possibly cause the injury. Regarding the rib injuries, respondent told Sharma and Raisanen about his fall on December 14, 2013, while he was carrying EM. As in his first interview, respondent clarified that EM was not injured when he fell. However, in falling, respondent injured his back. Subsequently, when he attempted to remove the child from the car seat, he felt a sharp pain in his back, causing

him to squeeze EM in the torso area with both hands, possibly causing the rib injuries. Respondent acknowledged that on both occasions he recognized that EM may have been injured, but he did not seek medical attention or inform EM's mother.

Respondent was eventually charged with two counts of second-degree child abuse. He pleaded guilty to one count and was sentenced to two years' probation. At the same time, the Department of Health and Human Services (DHHS) petitioned the trial court to terminate respondent's parental rights. After a two-day combined adjudication trial and termination hearing, the trial court granted that request. Respondent now appeals as of right.

II. GOVERNING LAW

At the outset, we note that there is no dispute that EM is eligible for membership in the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) and is thus an Indian child, such that the various procedural and substantive provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., applied to these proceedings. See 25 USC 1903(4); MCL 712B.3(k). To facilitate our analysis, we provide the following brief overview of both acts.

"In 1978, Congress enacted [the] ICWA in response to growing concerns over 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " *In re Morris*, 491 Mich 81, 97-98; 815 NW2d 62 (2012), quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). The stated purpose of the

ICWA is to protect and preserve Indian families, tribes, and tribal culture. *Morris*, 491 Mich at 98.

More recently, in 2012, the Michigan Legislature enacted the MIFPA "with the purpose of protecting 'the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families.' " *In re Spears*, 309 Mich App 658, 669; 872 NW2d 852 (2015), quoting MCL 712B.5(a) (alteration in original). The ICWA and the MIFPA each establish various substantive and procedural protections for when an Indian child[1] is involved in a child protective proceeding.

Relevant to this appeal, the ICWA sets forth the following substantive provisions for child protective proceedings involving an Indian child:

> **(d) Remedial services and rehabilitative programs; preventive measures**
>
> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
>
> **(e) Foster care placement orders; evidence; determination of damage to child**
>
> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of

[1] Under the ICWA, an "Indian child" is "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). The MIFPA more broadly defines "Indian child" to include a child "[e]ligible for membership in an Indian tribe as determined by that Indian tribe," without reference to whether the parent is a tribal member, MCL 712B.3(k)(*ii*). See *In re KMN*, 309 Mich App 274, 287; 870 NW2d 75 (2015).

qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [25 USC 1912.]

Similarly, in relevant part, the MIFPA sets forth the following requirements:

(2) An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, that includes testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. . . .

(3) A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.

(4) No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt,

> including testimony of at least 1 qualified expert witness . . . that the continued custody of the child by the parent or Indian custodial is likely to result in serious emotional or physical damage to the child. [MCL 712B.15.]

As the plain language of these provisions makes clear, 25 USC 1912(e) and MCL 712B.15(2) pertain to removal decisions, while 25 USC 1912(d) and (f) and MCL 712B.15(3) and (4) pertain to termination decisions. Because this case did not involve the removal of EM from the parental home, but instead involved the termination of respondent's parental rights, the latter provisions govern the outcome of this appeal.

Stated succinctly, in proceedings involving termination, the ICWA and the MIFPA "require a dual burden of proof." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 58; 874 NW2d 205 (2015). "That is, in addition to finding that at least one state statutory ground for termination was proven by clear and convincing evidence, the trial court must also make findings in compliance with [the] ICWA [and the MIFPA] before terminating parental rights." *Id*.

The specific findings required by the ICWA and the MIFPA in termination proceedings are: (1) proof that active efforts were made to prevent the breakup of the family, 25 USC 1912(d); MCL 712B.15(3); MCR 3.977(G)(1); and (2) proof beyond a reasonable doubt that the continued custody of the child by the parent would likely result in serious emotional or physical damage to the child, 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2).

Finally, as in all termination proceedings, the trial court has a duty to determine, by a preponderance of the evidence, "that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144

(2012). These findings are reviewed for clear error. MCR 3.977(K); *In re SD*, 236 Mich App 240, 245-246; 599 NW2d 772 (1999). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed . . . ." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (quotation marks and citation omitted).

We proceed by determining whether the trial court properly applied the dual burden of proof required under this statutory framework.

III. ANALYSIS

A. STATUTORY GROUNDS/BEST INTERESTS

Respondent does not challenge the trial court's findings that a statutory ground for termination was proved and that termination was in EM's best interests. Nevertheless, because the court's findings in these respects are inextricably linked to its findings under the ICWA and the MIFPA, we have reviewed the record and conclude that the trial court did not clearly err by finding statutory grounds for termination and that the termination was in EM's best interests.

As noted, respondent pleaded guilty to second-degree child abuse after he admitted causing EM's various rib and leg fractures and then failing to seek medical care or report those injuries in a timely manner. There was thus abundant evidence that respondent caused serious physical harm to EM. Moreover, there was clear and convincing evidence that the child would suffer additional injury or abuse in the future if returned to respondent's care. In sum, despite his guilty plea, the evidence established that respondent failed to take responsibility for his actions and instead blamed others for EM's injuries—including the child's

mother and a babysitter—months after entering his guilty plea. He also failed to follow through with counseling services that would help him address his issues, and Dr. Joshua Ehrlich, the clinical psychologist who performed respondent's psychological evaluation, opined at the termination hearing that respondent was dangerous, at high risk for reoffending, and should not be around children. Likewise, Sharma and Stacey O'Neill, a member of and caseworker for the Tribe, opined that respondent presented a substantial risk to EM in light of his failure to take responsibility and his failure to adequately participate in services. Termination was thus appropriate under MCL 712A.19b(3)(b)(*i*), (j) and (k)(*iii*). Moreover, in light of this evidence, termination was also in EM's best interests. *In re Olive/Metts*, 297 Mich App at 40.

B. CONSTITUTIONALITY OF MCL 712B.15(3)

Respondent argues that MCL 712B.15(3) is unconstitutionally vague because it does not provide an evidentiary standard by which the trial court must make its factual findings.

Constitutional issues and issues of statutory construction involve questions of law that we review de novo. *Federal Home Loan Mortgage Ass'n v Kelley (On Reconsideration)*, 306 Mich App 487, 493; 858 NW2d 69 (2014). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). "[U]nless explicitly defined in a statute, 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." *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotation marks and

citation omitted). Moreover, "[u]nder established rules of statutory construction, statutes are presumed constitutional, and courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *In re Gosnell*, 234 Mich App at 326, 334; 594 NW2d 90 (1999) (quotation marks and citation omitted).

As previously noted, MCL 712B.15 provides heightened evidentiary requirements in child protective proceedings involving Indian children. Specifically, MCL 712B.15(2) provides that an Indian child may not be removed from the home or placed into foster care absent "clear and convincing evidence" that active efforts were made to provide the family with services, that those efforts were unsuccessful, and that the child is likely to be harmed if not removed. Similarly, with respect to termination, MCL 712B.15(4) provides that parental rights may not be terminated absent evidence to establish, "beyond a reasonable doubt," that the parent's continued custody of the child would likely result in serious physical or emotional harm to the child. Finally, MCL 712B.15(3), the provision specifically challenged by respondent, provides:

> A party seeking a termination of parental rights to an Indian child under state law must demonstrate *to the court's satisfaction* that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful. [Emphasis added.]

A statute is void for vagueness if " '(1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the stat-

ute has been violated.' " *Kenefick v Battle Creek*, 284 Mich App 653, 655; 774 NW2d 925 (2009), quoting *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001). In this case, respondent argues that MCL 712B.15(3) is unconstitutionally vague because, unlike MCL 712B.15(2) and (4), which clearly set forth an applicable standard of proof, the former section does not provide any standard of proof. Essentially, respondent argues that MCL 712B.15(3) is unconstitutionally vague in that it provides the trial court with unfettered discretion to determine whether "active efforts" were made.

We are unaware of any published caselaw addressing the applicable burden of proof under MCL 712B.15(3). However, both this Court and our Supreme Court have addressed an identical issue in the context of the analogous "active efforts" provision of the ICWA, 25 USC 1912(d). That statutory provision is as follows:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall *satisfy the court* that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [25 USC 1912(d) (emphasis added).]

In *In re Roe*, 281 Mich App 88, 99-101; 764 NW2d 789 (2008), this Court was tasked with determining what standard of proof applied to the "active efforts" requirement in 25 USC 1912(d). In resolving the issue, this Court found particularly persuasive the Nebraska Supreme Court's decision in *In re Walter W*, 274 Neb 859; 744 NW2d 55 (2008), in which that court reasoned:

> Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional [or] physical damage" element

> in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so. [*In re Roe*, 281 Mich App at 100, quoting *In re Walter W*, 274 Neb at 864-865 (quotation marks omitted).]

Relying on the Nebraska Supreme Court's reasoning, the *Roe* Court held that Congress intentionally chose not to impose a particular standard for 25 USC 1912(d) and, therefore, "the proper standard of proof for determinations under § 1912(d) of the ICWA is the default standard applicable to all Michigan cases involving the termination of parental rights. That standard is proof by clear and convincing evidence." *In re Roe*, 281 Mich App at 101.

Our Supreme Court ultimately adopted *Roe*'s holding regarding the standard of proof in *In re JL*, 483 Mich 300; 770 NW2d 853 (2009).[2] In that case, the Court noted that "[b]ecause Congress did not provide a heightened standard of proof in 25 USC 1912(d), as it did in 25 USC 1912(f), the default standard of proof for termination of parental rights cases, clear and convincing evidence, applies to the determination whether the DHS provided 'active efforts . . . to prevent the breakup of the Indian family' under 25 USC 1912(d)." *In re JL*, 483 Mich at 318-319, citing *In re Roe*, 281 Mich App at 100-101.[3]

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[2] Our Supreme Court, however, abrogated this Court's decision in *Roe*, in part, on other grounds. See *In re JL*, 483 Mich at 326-327.

[3] As our Supreme Court noted, other states have also applied the clear-and-convincing-evidence standard to active efforts determinations

As this authority illustrates, in the face of Congress's failure to articulate a standard of proof in 25 USC 1912(d), rather than declare the statute unconstitutionally vague, courts have concluded that Congress intended the "default" standard of clear and convincing evidence to apply to the ICWA's "active efforts" determination. We conclude that the same reasoning applies with equal force in this case.

As already noted, the relevant provisions of the ICWA and the MIFPA are essentially identical; that is, each requires proof by "clear and convincing evidence" to remove an Indian child and place him or her into foster care, 25 USC 1912(e), MCL 712B.15(2); proof sufficient to satisfy the trial court that active efforts have been made to prevent the breakup of the family in order to terminate parental rights, 25 USC 1912(d), MCL 712B.15(3); and proof "beyond a reasonable doubt" that continued custody will harm the child in order to terminate parental rights, 25 USC 1912(f); MCL 712B.15(4). Thus, as with its federal counterpart, the Legislature, in enacting the MIFPA, set forth specific evidentiary standards in MCL 712B.15(2) and (4), while declining to do so in MCL 712B.15(3). The inevitable conclusion, therefore, is that, like Congress, the Legislature intended for the "default" evidentiary standard applicable in child protective proceedings—i.e., clear and convincing evidence—to apply to the findings required under MCL 712B.15(3) regarding whether "active efforts" were made to prevent the

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under the ICWA. *In re JL*, 483 Mich at 319 n 13, citing *In re Walter W*, 274 Neb at 864-865, *In re MS*, 2001 ND 86; 624 NW2d 678 (2001), and *In re Michael G*, 63 Cal App 4th 700, 709-712; 74 Cal Rptr 2d 642 (1998). See also *In re Vaughn R*, 2009 Wis App 109, ¶¶ 41-51; 320 Wis 2d 652; 770 NW2d 795 (2009); *In re Dependency of AM*, 106 Wash App 123, 131-135; 22 P3d 828 (2001); *In re Doe*, 127 Idaho 452, 457-458; 902 P2d 477 (1995).

breakup of the Indian family. Accord *In re JL*, 483 Mich at 318-319; *In re Roe*, 281 Mich at 100-101. Therefore, because the default standard of proof applies to MCL 712B.15(3), it is not unconstitutionally vague.

Although it is somewhat unclear whether respondent challenges the trial court's "active efforts" determination under MCL 712B.15(3), we conclude that there was no clear error with regard to the trial court's findings in this respect.

The record indicates that Sharma contacted the Tribe at the outset of the proceedings to solicit the Tribe's involvement and that she maintained regular contact with O'Neill throughout the approximately 11-month duration of these proceedings. In turn, O'Neill kept the Tribe's child welfare committee apprised of respondent's progress throughout the case. Sharma also met with respondent at the outset of the proceedings, while he was in jail, in order to identify respondent's barriers to reunification. Then, upon his release, Sharma met with respondent to develop a service plan that would address respondent's various needs, including employment, housing, anger management, and parenting skills, and tailored the service plan to work in conjunction with respondent's probation requirements. Sharma contacted American Indian Health and Family Services (AIHFS)—which O'Neill identified as a culturally appropriate referral service—to arrange for respondent's participation in counseling and encouraged respondent to contact AIHFS to schedule an intake appointment. Sharma also arranged for respondent to participate in a parenting class and a psychological evaluation.

Throughout the proceedings, Sharma maintained, or attempted to maintain, regular contact with respondent by telephone and by mail and also stayed in touch

with respondent's service providers and his probation officer. When respondent expressed that he had not been participating in services, Sharma encouraged him to reconnect with AIHFS and also offered to assist respondent with his transportation needs. Finally, she reviewed the service plan with respondent toward the end of the case to ensure he was aware of his needs and to ask if respondent needed any additional services. O'Neill opined that Sharma had made active efforts to provide remedial services to respondent. Based on this record evidence, there was clear and convincing evidence to conclude that active efforts were made, and the trial court did not clearly err in making the requisite findings under MCL 712B.15(3).

C. FINDINGS UNDER MCL 712B.15(4)

Respondent argues that the trial court clearly erred by finding, beyond a reasonable doubt, that EM would be harmed if returned to respondent's care. See 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2).

Respondent caused serious physical harm to EM on more than one occasion. Throughout these proceedings, however, he failed to take responsibility for his actions and instead attempted to shift the blame to others and cast himself as the victim. Respondent failed to adequately participate in counseling services or maintain consistent contact with DHHS. At the time of termination, Dr. Ehrlich opined that respondent was a danger to the child and should not be around children. Moreover, based on Dr. Ehrlich's report and the fact that respondent failed to adequately participate in services or take responsibility for his actions, O'Neill, a qualified expert witness, opined that EM would be at risk of future harm if returned to respondent's care. Sharma shared this opinion. On this record, the evi-

dence, including the testimony of a qualified expert witness, proved beyond a reasonable doubt that returning EM to respondent's care would likely result in serious emotional or physical harm. 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2).

In arguing otherwise, respondent essentially attempts to attack O'Neill's qualifications and opinions. We note, however, that respondent did not challenge O'Neill's qualification as an expert at the termination hearing. In any event, given her extensive knowledge and experience, coupled with the fact that she is a member of the Tribe, any challenge to O'Neill's qualification as an expert would have been futile. See MCL 712B.17. Finally, we reject respondent's argument that O'Neill was merely a puppet for the Tribe's child welfare committee. To the contrary, O'Neill expressed her independent expert opinion that EM would be subject to future harm if returned to respondent's care and merely elaborated that the Tribe's child welfare committee shared the same opinion. The trial court did not clearly err by considering O'Neill's testimony.

D. PRELIMINARY INQUIRY

Next, for the first time on appeal, respondent raises several arguments regarding the January 10, 2014 preliminary inquiry, each of which we find to be without merit.

Respondent argues that his statutory and constitutional rights were violated at the preliminary inquiry when the trial court permitted the Tribe to intervene upon an oral motion, without proper notice or service and without first appointing respondent an attorney, and when the trial court subsequently allowed O'Neill to testify without allowing respondent a chance to cross-examine her or to offer his own expert to rebut

her testimony. Additionally, he argues that his rights were violated when he was not afforded an opportunity to seek a transfer of jurisdiction to the tribal court. We disagree. We review these unpreserved issues for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

A preliminary inquiry is, by definition, an "informal review" proceeding to determine proper action on a petition. MCR 3.903(A)(23). It is distinguished from a preliminary hearing in that the child is not in the temporary custody of DHHS and there is no request for the child's removal contained in the petition. MCR 3.962(A); MCR 3.965(A)(1); *In re Hatcher*, 443 Mich 426, 434; 505 NW2d 834 (1993). "The permissible actions following a preliminary inquiry are limited to granting or denying authorization to file the petition, or referring the matter to 'alternative services.' " *In re Kyle*, 480 Mich 1151, 1151 (2008), citing MCR 3.962(B)(1) through (3). Because of its "informal" nature, MCR 3.903(A)(23), and the narrowly tailored purpose it serves, MCR 3.962(B), the court rules provide that "[a] preliminary inquiry need not be conducted on the record or in the presence of the parties." MCR 3.962(B).

In this case, given that respondent was not entitled to be present at the January 10, 2014 preliminary inquiry, he was not entitled to the assistance of counsel at that proceeding. Moreover, there is nothing in the court rule governing preliminary inquiries, MCR 3.962, that entitled respondent to any advance notice of the Tribe's intent to intervene and present testimony. Furthermore, respondent had no right to cross-examine O'Neill at the preliminary inquiry or present his own expert witnesses. Finally, he had no right to seek a transfer of jurisdiction at the preliminary in-

quiry. Simply put, there was no plain error. In any event, respondent's substantial rights were not affected, inasmuch as it is undisputed that he was represented by counsel throughout the remainder of the proceedings, had a chance to cross-examine O'Neill and present his own witnesses at the termination hearing, and had the opportunity—which he did not use—to seek a transfer of jurisdiction.

Finally, respondent argues that the trial court erred by concluding at the preliminary inquiry, under MCL 712B.15(2), that active efforts were made to prevent the breakup of the family and that the child would be subject to future harm in respondent's custody. This argument lacks merit.

MCL 712B.15(2) provides, in pertinent part, that "a[n] Indian child may be *removed* from a parent or Indian custodian, *placed into a foster care placement*, or, for an Indian child already taken into protective custody, *remain removed* from a parent or Indian custodian . . . only upon clear and convincing evidence . . . that active efforts have been made . . . , that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCL 712B.15(2) (emphasis added). As noted, this subsection applies only to removal decisions. In this case, however, the record makes abundantly clear that EM was not removed from the parental home or placed in foster care. Rather, EM remained with his mother in the family home throughout these proceedings. Because EM was never removed, the trial court was not required to make any findings at the January 10, 2014 preliminary inquiry pursuant to MCL 712B.15(2). Instead, the trial court was only required, as part of its termination

order, to make "active efforts" and "risk of harm" findings pursuant to MCL 712B.15(3) and (4). The trial court made those findings, and the trial court's findings in that regard were not clearly erroneous. There was no error.

IV. CONCLUSIONS

We hold that the trial court did not clearly err by finding grounds for termination and by determining that the termination was in EM's best interests. Additionally, we hold that MCL 712B.15(3) is not unconstitutionally vague given that the default clear-and-convincing-evidence standard applies to the findings mandated by that statutory provision; furthermore, we conclude that the trial court did not clearly err in making the findings required under MCL 712B.15(3) and MCL 712B.15(4). Finally, the trial court did not deny respondent his constitutional or statutory rights at the preliminary inquiry.

Affirmed.

SHAPIRO, P.J., and O'CONNELL and BORRELLO, JJ., concurred.

PEOPLE v LEE

Docket No. 322154. Submitted July 14, 2015, at Detroit. Decided February 2, 2016, at 9:00 a.m.

Edward D. Lee pleaded *nolo contendere* in the Oakland Circuit Court to a charge of false pretenses involving $20,000 or more, MCL 750.218(5)(a). The charge arose out of the sale of real property. Defendant and three others engaged in a scheme to secure mortgage loans from First Mariner Bank. Defendant was the loan officer involved. One of his codefendants, Jack Kahn, secured loans of $1,125,000 and $375,000 for the purchase of the property. An FBI special agent testified that defendant received more than $600,000 from the sale of the property. The bank sold the loans to investors but subsequently repurchased the loans for $1,176,226.13 and $411,000 because of nonpayment. Thereafter, the bank foreclosed on the property, taking ownership of the premises following a sheriff's sale after making a full-credit bid, which is a bid equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure that satisfies the mortgage debt and extinguishes the mortgage. The bank later resold the property for $333,000. Before charges were brought against defendant, Kahn, and another codefendant, Katherine Kudla, the bank had initiated a civil suit involving the same subject matter. The trial court in the civil suit granted their motions for summary disposition, holding that the bank's claims were barred because they arose out of a debt that had been extinguished as a matter of law by the bank's full-credit bid, so that the bank was not entitled to any damages. Following defendant's *nolo contendere* plea in the instant case, the court, Leo Bowman, J., sentenced him to a 60-day jail term that was held in abeyance pending successful completion of 5 years' probation. At the restitution hearing, the prosecution requested that restitution be ordered in the amount of $1,092,343 and that defendant, Khan, and Kudla be held jointly and severally liable for the total amount of restitution. The court agreed and entered an order to that effect. Defendant appealed, contending that the court erred by finding that the bank had suffered a loss and, therefore, erred by ordering restitution because the bank was deemed to have received full payment of the $1,125,000 loan through the full-credit bid.

The Court of Appeals *held*:

1. Article 1, § 24 of the Michigan Constitution provides that crime victims have the right to restitution. MCL 780.766(2), part of Article 1 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., provides that when sentencing a defendant convicted of a felony, the court must order the defendant to make full restitution to any victim of the defendant's course of conduct that gave rise to the conviction. Under MCL 780.766(8), the only exception to this mandatory action applies when the victim or victim's estate has received or is to receive compensation for that loss. The statute does not contain any mitigating language predicated on the preclusion of recovery, or a finding of no damages, in a separate suit. Accordingly, the court was required by MCL 780.767(1) to consider the victim's loss and by MCL 780.766(2) to order the defendant to make full restitution.

2. Defendant asserted that for restitution purposes, the bank had been paid back the full amount of the loan by virtue of its full-credit bid, just as if the property had been sold for that amount to a third party, and therefore the bank had not suffered any loss in connection with the loan. Defendant, however, provided no authority for the proposition that restitution should be precluded or reduced on the basis of a full-credit bid. To the contrary, the fact that civil damages are not available because of a full-credit bid does not necessarily mean that restitution is also unavailable. The statutory restitution scheme is separate from and independent of any damages that may be sought in a civil proceeding. Restitution is not a substitute for civil damages, and a civil judgment alone provides no basis for reducing the restitution award. Although the victim will have the benefit of both a civil judgment and a restitution order to obtain monetary relief from the defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed. Accordingly, the mere fact that the bank was not entitled to civil damages on the basis of its full-credit bid did not render the trial court's restitution order erroneous or excessive or establish that the bank did not incur any loss due to defendant's conduct. Moreover, the bank did, in fact, incur actual economic loss from the criminal activities of defendant and his codefendants because it lost the capital that it had disbursed when it provided the loan. Although the bank ultimately recouped a small portion of that capital when it sold the real property that served as the collateral for the loan, it was not until this point that the bank actually recovered a portion of

the funds that were lost. Likewise, the bank's inability to pursue a deficiency against the borrower or a fraud claim against a nonborrower third party following the full-credit bid did not by itself indicate that the bank experienced no loss from the fraudulent scheme and, therefore, was not entitled to restitution or that the bank was fully compensated for the loss.

3. Defendant also argued that the bank was collaterally estopped from seeking restitution. The doctrine of collateral estoppel requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel. Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Courts have recognized cross-over estoppel, which occurs when the application of collateral estoppel crosses over the line between a criminal and civil proceeding. The issue decided in the civil case was whether the bank was entitled to damages in light of its full-credit bid. That was not the same as the issue in the instant case, which was whether the bank was entitled under the CVRA to restitution as a victim that suffered a loss because of defendant's criminal conduct. Additionally, mutuality of estoppel requires that for a party to estop an adversary from relitigating an issue, that party must have been a party or in privity with a party in the previous action. In other words, the estoppel is mutual if the party taking advantage of the earlier adjudication would have been bound by it had it gone against the party. There was no indication in the civil case transcript that defendant was, in fact, a party or was in privity with a party to the previous suit. Furthermore, even if an exception to the mutuality requirement applied, the bank was not a party to the criminal case despite its status as a victim, and the prosecution was neither a party to the civil suit nor in privity with the bank. Therefore, mutuality of estoppel was not present, and the same parties did not have a full and fair opportunity to litigate the issue.

4. Defendant contended that the trial court erred by holding him and his codefendants jointly and severally liable for the victim's loss, arguing that he would face an excessive burden if the codefendants did not make a diligent effort to pay down the restitution. The CVRA provides for restitution to any victim of the defendant's course of conduct that gave rise to the conviction. The crime of conspiracy involves a defendant's course of conduct and is based on an unlawful agreement between coconspirators. A

conspirator need not participate in all the objects of the conspiracy. In general, each conspirator is held criminally responsible for the acts of his or her associates committed in furtherance of the common design, and the acts of one or more are the acts of all the conspirators. While defendant was not convicted of conspiracy, the same principles apply to this case. The evidence established that defendant acted in concert with three others in a scheme that caused a financial loss to the bank. Defendant was responsible for his acts and the acts of those with whom he acted in concert to cause the bank's losses.

Affirmed.

1. CRIME VICTIMS — RESTITUTION — MANDATORY NATURE — AVAILABILITY OF CIVIL DAMAGES.

MCL 780.766(2), part of Article 1 of the Crime Victim's Rights Act, MCL 780.751 *et seq*., provides that when sentencing a defendant convicted of a felony, the court must order the defendant to make full restitution to any victim of the defendant's course of conduct that gave rise to the conviction; under MCL 780.766(8), the only exception to this mandatory action applies when the victim or victim's estate has received or is to receive compensation for that loss; accordingly, there is no exception to mandatory restitution predicated on the preclusion of recovery, or a finding of no damages, in a separate civil suit; moreover, the statutory restitution scheme is separate from and independent of any damages that may be sought in a civil proceeding, so restitution is also not a substitute for civil damages, and a civil judgment alone provides no basis for reducing the restitution award; the availability of two methods of recovery of losses merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed and does not mean that the victim will have a double recovery.

2. CRIMINAL LAW — CONSPIRACY — CRIME VICTIMS — RESTITUTION — JOINT AND SEVERAL LIABILITY.

The Crime Victim's Rights Act, MCL 780.751 *et seq*., provides for restitution to any victim of a defendant's course of criminal conduct that gave rise to the conviction; the crime of conspiracy is based on an unlawful agreement between coconspirators, but a conspirator need not participate in all the objects of the conspiracy; in general, each conspirator is held criminally responsible for the acts of his or her associates committed in furtherance of the common design, and the acts of one or more are the acts of all the conspirators; accordingly, a sentencing court may hold all codefendants jointly and severally liable for any restitution it orders for a victim's loss.

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.

State Appellate Defender (by *Marilena David-Martin*) for defendant.

Before: WILDER, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

WILDER, P.J. Defendant appeals by delayed leave granted the trial court's order of restitution following his plea of *nolo contendere* to a charge of false pretenses of $20,000 or more, MCL 750.218(5)(a).[1] For the reasons set forth below, we affirm.

This prosecution arose out of the sale of real property located at 5100 Deer Run, Orchard Lake, Michigan. Defendant and three others engaged in a scheme to secure mortgage loans from First Mariner Bank (the Bank). Defendant was the loan officer involved in the transactions. Through the scheme, codefendant Jack Kahn secured loans of $1,125,000 and $375,000 for the purchase of the property. An FBI special agent testified that defendant received "over $600,000 from the sale of the property." The Bank sold the loans to investors, but it subsequently repurchased the loans for $1,176,226.13 and $411,000 due to nonpayment. Thereafter, the Bank foreclosed on the property, taking ownership of the premises following a sheriff's sale, at which it made a full-credit bid. The Bank later resold the property for $333,000.

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[1] *People v Lee*, unpublished order of the Court of Appeals, entered July 11, 2014 (Docket No. 322154).

Before charges were brought against defendant and his codefendants (Kahn and Katherine Kudla), the Bank initiated a civil suit involving the same subject matter.[2] The trial court granted codefendants' motions for summary disposition under MCR 2.116(C)(10), holding that the Bank's claims were barred because they arose out of a debt that had been extinguished as a matter of law by the Bank's full-credit bid, such that the Bank was not entitled to any damages.[3]

Defendant pleaded *nolo contendere* to a charge of false pretenses of $20,000 or more, MCL 750.218(5)(a),[4] and was sentenced to a 60-day jail term that was held in abeyance pending successful completion of 5 years' probation. At the restitution hearing, the prosecutor requested that restitution be ordered in the amount of $1,092,343 and that defendant and his codefendants be held jointly and severally liable for the total amount of restitution. The trial court issued a restitution order requiring defendant, jointly and severally with Khan and Kudla, to reimburse $1,092,343 to the Bank.[5]

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[2] It is not clear whether defendant was named as a defendant in this suit.

[3] As the prosecution suggests on appeal, it does not appear that the transcript from the civil case was presented in the lower court. Although we usually will not consider evidence that was not presented at the lower court, and the appropriate means for an appellee to amend the record is by motion, *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997), we will consider the transcript of the proceeding provided by defendant on appeal under the authority conferred on us by MCR 7.216(A)(4), *People v Nash*, 244 Mich App 93, 99-100; 625 NW2d 87 (2000), because the issue of collateral estoppel was raised in the lower court and the parties do not dispute the authenticity of the transcript.

[4] A charge of conspiracy to commit false pretenses, MCL 750.157a, was dismissed under the plea agreement.

[5] Kudla and Kahn applied for and were denied leave to appeal the trial court's restitution order. *People v Kudla*, unpublished order of the Court of Appeals, entered March 21, 2014 (Docket No. 320187); *People v Kahn*, unpublished order of the Court of Appeals, entered September 19,

On appeal, defendant contends that the trial court erred by finding that the Bank had suffered a loss and, therefore, erred by ordering restitution as a matter of law because the Bank is deemed to have received full payment of the $1,125,000 loan through the full-credit bid. We disagree.

A trial court's decision to order restitution is reviewed for an abuse of discretion, *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006), which "occurs when the trial court chooses an outcome that falls outside the range of principled outcomes," *People v Gonzalez-Raymundo*, 308 Mich App 175, 186; 862 NW2d 657 (2014). "However, '[w]hen the question of restitution involves a matter of statutory interpretation, review de novo applies.' " *Gubachy*, 272 Mich App at 708 (citation omitted) (alteration in original). A trial court's factual findings underlying a restitution order are reviewed for clear error. *Id*., citing MCR 2.613(C). "A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012).

Crime victims are entitled to restitution under the Michigan Constitution, Const 1963, art 1, § 24, and the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. *People v Bell*, 276 Mich App 342, 346; 741 NW2d 57 (2007). Article 1, § 24(1) of the Michigan Constitution provides that crime victims have "[t]he right to restitution." MCL 780.766 provides, in part:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court *shall* order,

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2014 (Docket No. 322581). The Michigan Supreme Court remanded the *Kudla* case for consideration as on leave granted, *People v Kudla*, 497 Mich 909 (2014), but the parties thereafter stipulated to dismiss the appeal.

> in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . .
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> * * *
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> (8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action. [Emphasis added.][6]

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[6] MCL 780.766 is part of Article 1 of the CVRA, which concerns victims of felonies. Other articles of the CVRA concern victims of misdemeanors or offenses by juveniles. "Crime" is defined for purposes of Article 1 as a violation of a Michigan penal law for which the punishment may be "imprisonment for more than 1 year or an offense expressly designated by law as a felony." MCL 780.752(1)(b). In relevant part, for purposes of Article 1, a "victim" is "[a]n individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime . . . ." MCL 780.752(1)(m)(*i*). "For the purposes of MCL 780.766(2), the term 'victim' includes 'a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime.' " *Allen*, 295 Mich App at 282, quoting MCL 780.766(1).

The only exception to this mandatory action is when "the victim or victim's estate has received or is to receive compensation for that loss . . . ." MCL 780.766(8); see also *Bell*, 276 Mich App at 347. Thus, under the clear statutory language indicating that the trial court *shall* order restitution to the victim, "restitution is mandatory, unless the exception applies." *Bell*, 276 Mich App at 347 ("The use of the word 'shall' indicates that the directive to order restitution is mandatory, unless the exception applies."). Notably, the statutory language does not include any mitigating language predicated on the preclusion of recovery, or a finding of no damages, in a separate suit. Accordingly, the court is required to consider the amount of the victim's "loss," MCL 780.767(1), and order the defendant to "make full restitution," MCL 780.766(2).

In support of his position that the Bank is not entitled to restitution because of its full-credit bid on the property, defendant cites *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008), in which this Court stated:

> When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a "full credit bid." When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. [Citations omitted.]

As such, "the full credit bid rule dictates that there are no damages," even in actions involving fraudulent inducement allegations against a nonborrower third party. See *id*. at 72, 74-75, 86. In light of this rule, defendant asserts that "for restitution purposes, by virtue of its full credit bid, the Bank has been paid back

the full amount of the . . . Loan, just as if the property had been sold for that amount to a third party, and therefore, has not suffered any loss in connection with the . . . Loan." (Emphasis omitted.)

Defendant has failed to identify any authority holding that restitution should be precluded or reduced on the basis of a full-credit bid, and we find no basis for this conclusion given the mandatory nature of restitution. Instead, this Court has rejected the argument that an award of restitution may be precluded by the result of civil proceedings, which indicates that the fact that civil damages are not available due to a full-credit bid does not necessarily mean that restitution is also unavailable. "[T]he statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding. . . . [R]estitution is not a substitute for civil damages." *In re McEvoy*, 267 Mich App 55, 67; 704 NW2d 78 (2005); see also *Bell*, 276 Mich App at 349 ("The existence of the civil settlement between [the parties] does not relieve the sentencing court of its statutorily mandated duty to order restitution."). Likewise, in *People v Dimoski*, 286 Mich App 474, 481; 780 NW2d 896 (2009), this Court stated that a "civil judgment alone provides no basis for reduction in the restitution award." (Quotation marks and citation omitted.)

> Although the victim will have the benefit of both a civil judgment and a restitution order to obtain monetary relief from the defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed. [*Id*. at 482.]

Accordingly, the mere fact that the Bank may not be entitled to civil damages on the basis of its full-credit

bid does not render the trial court's restitution order erroneous or excessive or establish that the Bank did not incur any loss due to defendant's conduct.

Moreover, as the prosecution observes on appeal, the Bank did, in fact, incur actual economic loss from the criminal activities of defendant and his codefendants, as it lost the capital that it disbursed when it provided the loan. Although the Bank ultimately recouped a small portion of the original capital that it lost when it sold the real property that served as the collateral for the loan, it was not until this point that the Bank actually recovered a portion of the funds that were previously lost. Likewise, the Bank's inability to pursue a deficiency against the borrower, or a fraud claim against a nonborrower third party, following the full-credit bid does not by itself indicate that the Bank experienced no loss from the fraudulent scheme and, therefore, was not entitled to restitution, see MCL 780.767(1), or that the Bank was fully compensated for the loss, see MCL 780.766(2).

Finally, as noted by this Court in *Dimoski*, 286 Mich App at 480-481, with regard to MCL 780.766(8):

> In *People v Washpun*, 175 Mich App 420, 425-426; 438 NW2d 305 (1989),[7] this Court explained the two purposes of the provision as follows:

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[7] At the time *Washpun* was decided, the predecessor provision of MCL 780.766(8) was in effect and was located at MCL 780.766(10). *Dimoski*, 286 Mich App at 480. The version before the Court in *Washpun* provided:

> The court shall not order restitution with respect to a loss for which the victim or victim's estate has received or is to receive compensation, including insurance, except that the court may, in the interest of justice, order restitution to the crime victims compensation board or to any person who has compensated the victim or victim's estate for such a loss to the extent that the crime victims compensation board or the person paid the compensation. An order of restitution shall require that all restitution to

> Two purposes behind the Legislature's inclusion of [MCL 780.766(10)] may be fairly readily discerned. One apparent legislative intent behind subsection (10) is to avoid ordering restitution which would doubly compensate a victim. The abhorrence of double compensation is well established in our jurisprudence. The Legislature wanted to place the financial burden of crime on the criminal, while fully, but not overly, compensating the victim and reimbursing any third party, such as an insurer, who compensated the victim on an interim basis. . . .
>
> * * *
>
> The second principal effect of subsection (10) would seem to be to prevent application of the "collateral source doctrine" to crime victims' restitution situations. Without such a statutory directive, the victim could recoup damages from the criminal without regard to previous payment from insurance companies or other ancillary sources. By enacting subsection (10), the Legislature limits restitution to those who have losses which are, as of the time restitution is paid, *still* out of pocket. [Alteration in original.]

Thus, it is clear that the trial court's restitution order as properly applied would not represent a double recovery on the part of the Bank.

Defendant also argues that the Bank was collaterally estopped from seeking restitution. We disagree.

"This Court reviews de novo the application of a legal doctrine, including collateral estoppel." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). The doctrine of collateral estoppel requires "that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment,

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a victim or victim's estate under the order be made before any restitution to any other person under that order is made. [MCL 780.766(8), as enacted by 1985 PA 87.]

(2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Id*. at 48 (quotation marks and citation omitted). Stated differently, "[i]n essence, collateral estoppel requires that 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.' " *People v Wilson*, 496 Mich 91, 98; 852 NW2d 134 (2014), quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980). In some circumstances, courts have recognized the feasibility of "cross-over estoppel," which occurs "[w]hen the application of collateral estoppel 'crosses over' the line between a criminal and civil proceeding . . . ." *Trakhtenberg*, 493 Mich at 48. However, the Michigan Supreme Court has previously stated:

> We believe it is important at the outset to recognize that in the body of case law applying this principle the vast majority of cases involve the applicability of collateral estoppel where there are two civil proceedings. Cases involving "cross-over estoppel," where an issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare. [*People v Gates*, 434 Mich 146, 155; 452 NW2d 627 (1990).]

The issue that was decided in the civil case was whether the Bank was entitled to damages in light of its full-credit bid. That is not the same as the issue in the instant case, i.e., whether the Bank is entitled under the CVRA to restitution as a victim that suffered a loss due to defendant's criminal conduct. As explained above, the amount of civil damages to which one is entitled is not necessarily equivalent to the amount of loss that one has experienced for purposes of the CVRA, and "the statutory scheme for restitution is

separate and independent of any damages that may be sought in a civil proceeding." *McEvoy*, 267 Mich App at 67. Additionally,

> "[m]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, '[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.' " [*Monat v State Farm Ins Co*, 469 Mich 679, 684-685; 677 NW2d 843 (2004) (quotation marks and citation omitted; second alteration in original).]

There is no indication in the transcript from the civil case that defendant was, in fact, a party or was in privity with a party to the previous suit. Furthermore, even if an exception to the mutuality requirement applied here, see *id*. at 687-695, it is clear that the Bank is not a party to the instant case, despite its status as a victim, and the prosecution was neither a party to the civil suit nor in privity with the Bank.[8] As such, mutuality of estoppel is not present, and the same parties did not have a full and fair opportunity to litigate the issue.

Lastly, defendant contends that the trial court erred by holding all codefendants jointly and severally liable

[8] "Privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998) (quotation marks and citations omitted). The Bank's interests are not congruous with the prosecution's interests, and the prosecution's interests were not protected in the previous litigation, as the prosecution's duty is to represent the public interest, not to represent the interests of an individual party. See *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998), overruled in part on other grounds by *People v Chenault*, 495 Mich 142 (2014).

for the victim's loss, arguing that he will face an "excessive burden" if the codefendants do not make a diligent effort to pay down the restitution. We disagree.

With regard to coconspirators, the Michigan Supreme Court has stated:

> The Crime Victim's Rights Act provides restitution "to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." The crime of conspiracy involves a defendant's course of conduct and is based upon an unlawful agreement between coconspirators. A conspirator need not participate in all the objects of the conspiracy. In general, each conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators. The defendant pleaded guilty of conspiracy and accepted restitution set by the court, which he received in exchange for limiting his sentence exposure from life (habitual offender, fourth) to a five-year minimum. The defendant cannot now assert that he is responsible for his acts alone because he is also responsible for the acts of his coconspirators made in furtherance of the conspiracy. [*People v Grant*, 455 Mich 221, 236-237; 565 NW2d 389 (1997) (citations omitted).]

While defendant was not convicted of conspiracy, the same principles apply under the instant facts. The evidence established that defendant acted in concert with three others in a scheme that caused a financial loss to the Bank. As such, defendant is responsible for his acts and for the acts of those with whom he acted in concert to cause the Bank's losses, and we reject defendant's claim.

Affirmed.

SHAPIRO and RONAYNE KRAUSE, JJ., concurred with WILDER, P.J.

In re GORNEY ESTATE

In re FRENCH ESTATE

In re KETCHUM ESTATE

In re RASMER ESTATE

Docket Nos. 323090, 323185, 323304, and 326642. Submitted December 8, 2015, at Detroit. Decided February 4, 2016, at 9:00 a.m. Leave to appeal granted 499 Mich 975.

In these consolidated estate cases, the Department of Health and Human Services brought separate actions in the Huron County Probate Court, the Calhoun County Probate Court, the Clinton County Probate Court, and the Bay County Probate Court, seeking to recover Medicaid benefits paid on behalf of the decedents by collecting the value of the decedents' homes following their deaths under the Michigan Medicaid estate recovery program (MMERP), MCL 400.112g *et seq*. Regarding the estate of Irene Gorney, the Huron County Probate Court, David L. Clabuesch, J., dismissed plaintiff's claim and entered a judgment in favor of the estate following a bench trial. The Calhoun County Probate Court, Michael L. Jaconette, J.; the Clinton County Probate Court, Lisa Sullivan, J.; and the Bay County Probate Court, Dawn A. Klida, J., granted summary disposition in favor, respectively, of Daniel French, personal representative of the estate of William French; the estate of Wilma Ketchum; and Richard Rasmer, personal representative of the estate of Olive Rasmer. Plaintiff appealed in each case, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. In 1993, Congress required states to implement Medicaid estate recovery programs, and, in 2007, the Michigan Legislature passed 2007 PA 74. This legislation empowered plaintiff to establish and operate the MMERP. The act, however, under MCL 400.112g(5), required approval by the federal government before the MMERP could be implemented. Michigan finally received approval from the federal Centers for Medicare & Medicaid Services (CMS) for its program on May 23, 2011, and plaintiff circulated instructions to implement the plan on July 1, 2011. The decedents in these cases had begun receiving Medicaid benefits

after the passage of 2007 PA 74, but the initial Medicaid applications filed by the decedents, or by their personal representatives, did not contain any information about estate recovery. In 2012, the decedents' personal representatives submitted form DHS-4574 as part of the annual Medicaid redetermination process. Beginning in 2012, the form contained an acknowledgement provision that advised Medicaid applicants that plaintiff would have the right to seek recovery from the decedents' estates for services paid by Medicaid. Following each decedent's death, plaintiff sought to recover the amount it had paid in Medicaid benefits since July 1, 2010, the date CMS deemed the effective date of the MMERP for its own purposes. In *In re Keyes Estate*, 310 Mich App 266 (2015), the Court of Appeals held that neither the act nor due process required notice of estate recovery at the time of enrollment in Medicaid and that the notice of estate recovery given to the *Keyes* decedent's estate in 2012, combined with the opportunity to contest the property deprivation in the probate court, sufficiently protected the decedent's due-process interests. Because the relevant facts in these cases were the same as those in *Keyes*, the Court was compelled to hold that the notice provided in these cases was statutorily sufficient, and the probate courts erred by concluding otherwise.

2. MCL 400.112g(4) precludes plaintiff from seeking Medicaid recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state. The Ketchum estate contended that plaintiff sought recovery in violation of MCL 400.112g(4). MCL 400.112j(1) gives plaintiff authority to promulgate rules for the MMERP, and plaintiff has indicated that recovery will only be pursued if it is cost-effective to do so as determined by plaintiff at its sole discretion. That the cost-effectiveness decision is made at plaintiff's sole discretion does not preclude judicial review. However, an adequate record was not created in the probate court from which the Court of Appeals could determine whether plaintiff's decision to seek recovery was unconstitutional, illegal, ultra vires, or an abuse of power. The estate, however, could raise the issue again on remand.

3. The Fourteenth Amendment of the United States Constitution and Article I, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. When a protected property interest is at stake, due process generally requires notice and an opportunity to be heard. Defendants raised a multipronged due-process challenge to plaintiff's recovery claims in the probate courts. In

light of the Court's holding in *Keyes*, defendants' due-process challenges had to be rejected to the extent they were based on the lack of notice in the original Medicaid applications. Nor did defendants have a due-process right to the continuation of the favorable Medicaid law that allowed the decedents to receive benefits without having to repay them. No one has a vested right to the continuation of an existing law. Defendants, however, also asserted that plaintiff violated their due-process rights by attempting to recover benefits paid on behalf of the decedents since July 1, 2010, when they were not notified of the program until 2012. MCL 400.112g(5) provides that plaintiff could not implement the MMERP until approval by the federal government was obtained. Federal government approval was not obtained until May 23, 2011. Accordingly, plaintiff could not implement the program until that date, and, in fact, plaintiff did not implement the MMERP until it circulated instructions to its employees to start seeking recovery from estates, which occurred on July 1, 2011. By seeking recovery for benefits paid back to July 1, 2010, plaintiff violated MCL 400.112g(5). While plaintiff was correct that the right to inherit is only an expectancy, when the personal representatives of the estates denied plaintiff's claims, they were not acting to protect their inheritance interests. Rather, the personal representatives stepped into the shoes of the decedents and fought to protect the interests held by the decedents during their lives, and thereby to settle the decedents' estates in accordance with their wills or the law. The decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates. By applying the recovery program retroactively to July 1, 2010, plaintiff deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. Plaintiff impinged on the decedents' rights to dispose of their property. Despite the fact that plaintiff does not try to recover until the individual's death, the individual's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually implemented, the decedents lost the right to choose how to manage their property. Taking their property to recover costs expended between July 1, 2010, and plan implementation would, therefore, violate the decedents' rights to due process. Accordingly, to the extent that the probate courts disallowed plaintiff's claims for that period, the decision was affirmed.

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

JANSEN, P.J., concurring in part and dissenting in part, concurred with the majority's determinations that the notice provided in the redetermination application was statutorily sufficient, that the lack of notice at the time of enrollment did not violate due process, and that the estates did not have a due-process right to the continuation of a favorable Medicaid law, but dissented from the majority's determinations that plaintiff violated the due-process rights of the decedents by seeking to recover benefits expended between July 1, 2010, and July 1, 2011, and that the Ketchum estate may raise on remand the issue whether plaintiff abused its discretion under MCL 400.112g(4). With regard to the majority's conclusion that plaintiff violated the decedents' due-process rights by seeking to recover benefits expended between July 1, 2010, and July 1, 2011, this Court's decision in *Keyes* was controlling. Although the issues surrounding the retroactive application of the MMERP were not directly raised in *Keyes*, the decision nevertheless dictated the outcome in this case given that this Court in *Keyes* held that the MMERP did not violate due process in spite of the fact that the decedent in that case began receiving Medicaid benefits in April 2010. But even if *Keyes* was not controlling, retroactive application of the MMERP did not violate defendants' right to due process because defendants failed to identify a protected property interest given that the decedents were not deprived of the use or possession of their property during their lives or of their right to dispose of their property during their lives. Even assuming that there was a due-process right that was violated when plaintiff applied the MMERP retroactively, the right was personal to the decedents. Thus, the property interest was not transferable to the estates, and the proceedings did not survive the death of the decedents. Regarding the Ketchum estate, plaintiff's decision regarding the cost of estate recovery was not reviewable by the trial court. Judge JANSEN would have reversed and remanded for entry of judgment in favor of plaintiff.

1. STATUTES — MEDICAID ESTATE RECOVERY PROGRAM — COST-EFFECTIVENESS — JUDICIAL REVIEW.

MCL 400.112g(4) precludes the Department of Health and Human Services from seeking Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state; the fact that the cost-effectiveness decision is made in the department's sole discretion does not preclude judicial review.

2. STATUTES — MEDICAID ESTATE RECOVERY PROGRAM — IMPLEMENTATION.

MCL 400.112g(5) provides that the Department of Health and Human Services could not implement the Michigan Medicaid estate recovery program until approval by the federal government was obtained; federal government approval was not obtained until May 23, 2011, and the department did not implement the program until July 1, 2011; accordingly, the department could not seek recovery of benefits paid before July 1, 2011.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Brian K. McLaughlin* and *Geraldine A. Brown*, Assistant Attorneys General, for the Department of Health and Human Services.

Cubitt & Cubitt (by *E. Duane Cubitt*) for the *Estate of Irene Gorney*.

Kreis, Enderle, Hudgins & Borsos, PC (by *James D. Lance*), for Daniel French, personal representative of the Estate of William French.

Charlotte F. Shoup, PLC (by *Charlotte F. Shoup*), for the Estate of Wilma Ketchum.

Dill Law PLLC (by *Colin M. Dill*) for Richard Rasmer, personal representative of the Estate of Olive Rasmer.

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

GLEICHER, J. In these consolidated appeals, the Department of Health and Human Services (DHHS) seeks recovery of Medicaid benefits paid on behalf of the decedents. Specifically, the DHHS submitted claims in the probate courts to collect the value of the decedents' homes upon their deaths. The estates responded that the DHHS had provided inadequate notice of its estate recovery plans and violated their

rights to due process. The probate courts denied the DHHS's collection attempts in all four underlying actions.

On appeal, the DHHS contends that it complied with statutory notice requirements by informing the decedents of estate recovery provisions in annual "redetermination" applications beginning in 2012, and that the judicial process sufficed to meet due-process requirements. This Court recently resolved certain issues raised here in the DHHS's favor in *In re Keyes Estate*, 310 Mich App 266; 871 NW2d 388 (2015).[1] Accordingly, we must reverse in part the probate courts' orders to the extent they conflict with this precedent and remand for further proceedings.

The estates, however, raised additional challenges to the DHHS's collection efforts that are issues of first impression for this Court. We hold that the DHHS would violate MCL 400.112g(5) and the decedents' rights to due process by taking property to cover a Medicaid "debt" incurred before the program creating the debt was approved and implemented. We therefore affirm the probate courts' decisions in relation to recovery claims for sums expended between July 1, 2010, and the July 1, 2011 implementation of the MMERP.

I

"In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. This statute created a cooperative program in which the federal government reimburses state governments

[1] The Keyes estate has filed an application for leave to appeal this Court's decision in the Michigan Supreme Court. That Court has yet to take action on the application.

for a portion of the costs to provide medical assistance to low-income individuals." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010) (citation omitted). In 1993, Congress required states to implement Medicaid estate recovery programs. See Omnibus Budget Reconciliation Act of 1993, § 13612; 42 USC 1396p(b). In 2007, the Michigan Legislature passed 2007 PA 74, which added MCL 400.112g through MCL 400.112k to the Social Welfare Act, MCL 400.1 *et seq*. This legislation empowered the DHHS[2] to "establish and operate the Michigan Medicaid estate recovery program [MMERP] to comply with" 42 USC 1396p. MCL 400.112g(1). MCL 400.112g(5) required approval by the federal government before the MMERP would be "implement[ed]." Michigan finally received approval from the federal Centers for Medicare & Medicaid Services (CMS) for its program (referred to as a State Plan Amendment) on May 23, 2011, and DHHS circulated instructions to implement the plan on July 1, 2011. *Keyes*, 310 Mich App at 268; Letter from the CMS, May 23, 2011, available at <http://www.michigan.gov/documents/mdch/SPA_10_018_Approved_355355_7.pdf> (accessed December 28, 2015) [https://perma.cc/C9FF-GRJW]. The CMS letter approved this State Plan Amendment in May 2011. The letter attached a form titled "Transmittal and Notice of Approval of State Plan Material."[3] The form indicated that the CMS "received" Michigan's "Proposed Policy, Procedures, and Organizational Structure for Implementation" of a Medicaid estate recovery program on September 29, 2010, approved it on May 23, 2011, and, as

[2] The legislation refers to the Department of Community Health. Pursuant to Executive Order No. 2015-4, the authority, powers, duties, functions, and responsibilities of the Department of Community Health were transferred to the DHHS.

[3] Emphasis omitted.

to the CMS, deemed July 1, 2010, the "effective date" of Michigan's recovery program. See Letter from the CMS; Swanberg & Steward, *Medicaid Estate Recovery Update: What You Need to Know Now*, 93 Mich B J 28, 28 (May 2014); Murphy, *Estate Planning with the Advent of Estate Recovery*, 21st Annual Seminar on Drafting Estate Planning Documents (ICLE, January 19, 2012), available at <http://www.icle.org/contentfiles/partners/seminarmaterials/2012CR6535/20122A6535-1.pdf> (accessed December 28, 2015) [https://perma.cc/XD39-E27V].[4]

In the current cases, the decedents began receiving Medicaid benefits after the September 30, 2007 passage of 2007 PA 74. It is undisputed that the initial Medicaid applications (form DHS-4574) filed by the decedents, or by their personal representatives, contained no information about estate recovery. However, it is also undisputed that in order to remain entitled to Medicaid benefits, each applicant was required to resubmit a form DHS-4574 annually for a "redetermination" of eligibility. Each new DHS-4574 contained a section entitled "Acknowledgments," which the applicant certified that he or she "received and reviewed."

At some point during 2012, all four decedents' personal representatives submitted a DHS-4574 as part of the redetermination process. Beginning in 2012, the acknowledgment section of the form included the following provision:

> I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal

[4] As we discuss in greater detail later in this opinion, the "effective date" for the CMS's purposes is not the date that our Legislature identified as the pertinent starting point for the DHHS's recovery efforts. MCL 400.112g(5) provides that the DHHS "shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained."

> 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 services 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.

As with previous applications and redeterminations, each decedent's personal representative signed the statement affirming that he or she had received and reviewed the acknowledgments, which included the provision on estate recovery.

Following each decedent's death, the DHHS served claims on the estate seeking to recover the amount the department had paid in Medicaid benefits since July 1, 2010. In each case, the estate denied the claim, and the DHHS filed suit in probate court. The estates argued that because the decedents had not received proper notice about estate recovery when initially enrolling in the Medicaid program, the DHHS had failed to comply with statutory notice requirements and violated their due-process rights. The estates further contended that the DHHS violated their rights by seeking recovery of benefits dating back to July 1, 2010, one year before the MMERP was approved by the federal government and approximately two years before any notice was provided to the recipients. This precluded recovery, the estates contended. In all four cases, the probate court rejected the DHHS's claims for recovery against the estates. In Docket No. 323090, the court entered a judgment in the estate's favor after a bench trial. In

Docket Nos. 323185, 323304, and 326642, the courts summarily dismissed the DHHS's claims.[5] The DHHS now appeals.

II

We review de novo a trial court's decision on a motion for summary disposition, issues of statutory interpretation, and whether a party has been afforded due process. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013); *Keyes*, 310 Mich App at 269-270. As noted, many issues in these appeals were raised and decided by this Court in *Keyes*. Therefore, we are not writing on a clean slate.

III

The estates challenged the adequacy and effectiveness of the notice provided in the final paragraph of the multipage redetermination application. The notice provisions of the MMERP are found at MCL 400.112g(3)(e) and (7), and instruct:

> (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 [MMERP]. 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 [MMERP]

[5] In Docket No. 326642, however, the court did not resolve the due-process issue.

> 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. . . .
>
> * * *
>
> (7) The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the [MMERP], including, but not limited to, a statement that some or all of their estate may be recovered.

In *Keyes*, 310 Mich App at 272-273, this Court examined these provisions and held:

> We conclude that the timing provision of MCL 400.112g(3)(e) does not apply in this case. MCL 400.112g(3)(e) provides that "[a]t 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." Read in isolation, this provision appears to support the estate's position. But we may not read this provision in isolation. See [*Michigan ex rel*] *Gurganus* [*v CVS Caremark Corp*], 496 Mich [45, 61; 852 NW2d 103 (2014)].
>
> Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions. In this case, [as in the current appeals,] the estate does not assert that the Department failed to seek approval from the federal government concerning the estate recovery notice. Rather, the estate asserts that it did not personally receive a timely notice.
>
> The Act contains a second provision concerning notice, and this provision has different language. MCL 400.112g(7) provides that "[t]he department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the [MMERP] . . . ." When the

> Legislature includes language in one part of a statute that it omits in another, this Court presumes that the omission was intentional. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Subsection (7) applies to the estate's case because the estate alleges that [the decedent] did not receive sufficient notice of estate recovery. The language of Subsection (7) is similar to that in Subsection (3)(e), but there is one major difference—timing. Subsection (3)(e) states that notice should be given "[a]t the time an individual enrolls in medicaid," while Subsection (7) states that the Department must provide a notice when an individual "seek[s] medicaid eligibility[.]" We presume the Legislature's decision not to use the word "enrollment" in Subsection (7) was intentional.[6]

The facts underlying the current matters are largely indistinguishable from those underlying *Keyes*. Ms. Keyes also first enrolled in Medicaid sometime after September 30, 2007, and was not notified at that time of the estate recovery program. Just as in the current appeals, Ms. Keyes's personal representative did not receive notice of the recovery program until filing an application for redetermination of eligibility in 2012. Just as here, the DHHS did not highlight the change on the form or provide additional materials "explaining and describing estate recovery and warning that some of [the decedent's] estate could be subject to estate recovery." *Id*. at 273. In *Keyes*, this Court held that the inclusion of the new paragraph in the form's acknowledgements section "sufficiently notified [the decedent] that her estate could be subject to estate recovery." *Id*. The statutes have not been amended since *Keyes* and still do not demand a separate notification or that the new provision be highlighted in any manner. Accordingly, we are bound to hold that the notice in these

[6] Some alterations in original.

matters was statutorily sufficient, and the probate courts erred by concluding otherwise.

IV

The Ketchum estate also asserts that the DHHS sought recovery in violation of MCL 400.112g(4), which precludes the department from "seek[ing] Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." In support of this argument, the estate contends that its sole asset was a home sold for $30,000, and that the estate's value was whittled away by funeral expenses, administration costs, and certain exempted items.

We note that the probate court did not consider this issue on the record and the estate's appellate argument is cursory. The statutes provide no guidance on the application of MCL 400.112g(4). MCL 400.112j(1) gives the DHHS authority to "promulgate rules for the [MMERP] . . . ." Some of the DHHS policies are set forth in the Bridges Administrative Policy Manuals (BAM). BAM 120 provides, "Recovery will only be pursued if it is cost-effective to do so as determined by the Department at its sole discretion." DHHS, BAM 120 (January 1, 2016), p 7. The Legislature did not direct the DHHS to act "at its sole discretion," and we located no DHHS publication describing how such determinations are made.

That the cost-effectiveness decision is made at the department's "sole discretion" does not preclude all judicial review. For example, the prosecuting attorney, an officer in the executive branch, has sole discretion to determine whether to charge a juvenile as an adult and whether to proceed with charges against a suspect. See MCL 712A.2d(1); *People v Morrow*, 214 Mich App 158,

165; 542 NW2d 324 (1995). Even so, the judiciary may review the prosecutor's decisions where they are "unconstitutional, illegal, or ultra vires or where the prosecutor has abused the power confided in him." *People v Gilmore*, 222 Mich App 442, 457-458; 564 NW2d 158 (1997) (quotation marks and citation omitted).

A record was not created in the probate court from which we can determine whether the DHHS's decision to seek recovery from Mrs. Ketchum's *de minimis* estate was unconstitutional, illegal, ultra vires, or an abuse of power. Accordingly, to the extent that we reverse the probate court's summary disposition order, the estate may wish to raise this issue again. At this time, however, we discern no ground to grant relief.

V

The estates in these consolidated appeals have also raised a multipronged due-process challenge.

A

This Court rejected a due-process challenge identical to one prong, related to notification at the time of enrollment, in *Keyes*, 310 Mich App at 274-275:

> The Fourteenth Amendment of the United States Constitution and Article I, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. *Elba Twp*, 493 Mich at 288. When a protected property interest is at stake, due process generally requires notice and an opportunity to be heard. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). Due process is a flexible concept and different situations may demand different procedural protections. *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct

> 893; 47 L Ed 2d 18 (1976). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id*. at 333 (quotation marks and citation omitted). The question is whether the government provided "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9; 732 NW2d 458 (2007) (quotation marks and citations omitted).
>
> In this case, the trial court determined that allowing estate recovery under the Act would violate [the decedent's] right to due process because she did not receive notice of estate recovery at the time that she enrolled, as required by MCL 400.112g. However, we have already determined that MCL 400.112g does not require notice at the time of enrollment. Further, the trial court's decision improperly conflated statutory notice issues with the notice issues involved in due process. In this case, the estate was personally apprised of the Department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation of its property in the probate court. It received both notice and a hearing, which is what due process requires. See *Hinky Dinky Supermarket, Inc*, 261 Mich App at 606.

Relying on *Keyes*, we are required to reject the estates' due-process challenges to the extent they are based on the lack of notice in the original application. The decedents in these appeals received the same notice as Ms. Keyes. The estates had the same opportunity to contest the estate recovery claims in the probate court, and therefore received the notice and opportunity to be heard required to satisfy due process.

B

In a second prong, the estates suggest that they had a due-process right to the continuation of the favorable

Medicaid law that allowed decedents to receive benefits from the state without having to repay them. "[N]o one has a vested right to the continuation of an existing law . . . ." *Van Buren Charter Twp v Garter Belt Inc*, 258 Mich App 594, 633; 673 NW2d 111 (2003). The Legislature changed the law to require that the benefits received be repaid to the state upon the death of the recipient from the recipient's estate. Standing alone, this change in law did not deprive the decedents of their rights to due process. See *Saxon v Dep't of Social Servs*, 191 Mich App 689, 700-702; 479 NW2d 361 (1991) (observing that the Legislature can change welfare laws without violating due process).

C

Under a third prong, the estates contended that the DHHS violated their rights to due process by seeking to recover benefits expended since July 1, 2010, when the DHHS did not notify them of the recovery program until 2012. Had the decedents been notified at or before the initiation of the recovery program, the estates contend, they could have considered their estate planning options and decided whether to continue receiving Medicaid assistance or to preserve their estate. In its appellate brief, the Keyes estate challenged the DHHS's attempt to retroactively recover Medicaid benefits expended since July 1, 2010, citing MCL 400.112g(5). This Court did not address this issue in *Keyes*. Therefore, this is an issue of first impression.

The DHHS asserts that upon a decedent's death, his or her property rights are extinguished. As the DHHS does not seek recovery until the beneficiary's passing, that person is never deprived of his or her property rights, negating any potential due-process challenge. The decedent's heirs have only an expectation of inher-

iting, not a vested right. And MCL 700.3101 restricts and limits an individual's power to divest his or her property by will by requiring the estate to settle the rights of creditors first. Accordingly, until creditors such as the DHHS are paid, the heirs have no property right to assert, the department contends.

We first note that the estates erroneously identified the date on which their due-process rights were violated. MCL 400.112g(5) provides that the department "shall not implement a [MMERP] until approval by the federal government is obtained." Federal government approval was not obtained until May 23, 2011. Accordingly, the DHHS and its predecessor could not implement a program until that date. The statute does not define "implement," and we must resort to the dictionary to give this term meaning. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "implement" as "CARRY OUT, ACCOMPLISH; [*especially*] : to give practical effect to and ensure of actual fulfillment by concrete measures" and "to provide instruments or means of expression for[.]" The DHHS did not implement the MMERP until it circulated instructions to its employees to begin seeking recovery from estates. This occurred on July 1, 2011, after the CMS approved the plan. However, the DHHS could not "implement" the MMERP *before* the federal government approved it. The DHHS sought to give practical effect to its recovery plan by making it "effective" July 1, 2010. This violated MCL 400.112g(5).[7]

[7] The federal government permits retroactive application, but does not prevent states from enacting statutes restricting the implementation of their recovery plans until after federal approval. See 42 CFR 447.256(c) ("*Effective date*. A State plan amendment that is approved will become effective not earlier than the first day of the calendar quarter in which an approvable amendment is submitted in accordance with [42 CFR 430.20 and 42 CFR 447.253].").

Moreover, the DHHS incorrectly posits that the personal representative cannot raise a due-process challenge to the department's actions. "Explicit in our state and federal caselaw is the recognition that an individual's vested interest in the use and possession of real estate is a property interest protected by due process." *Bonner v City of Brighton*, 495 Mich 209, 226; 848 NW2d 380 (2014). "[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd of Regents of State Colleges v Roth*, 408 US 564, 571-572; 92 S Ct 2701; 33 L Ed 2d 548 (1972). As noted by the DHHS, the right to inherit is not a definite right; it is an expectancy. See *In re Finlay Estate*, 430 Mich 590, 600-601; 424 NW2d 272 (1988). However, when the personal representatives of the estates denied the DHHS's claims, they were not acting to protect their inheritance interests. Rather, the personal representatives stepped into the shoes of the decedents and fought to protect the interests held by the decedents during their lives, and thereby to settle the decedents' estates in accordance with their wills and the law. See MCL 700.3703. The decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates. The right to dispose of one's property is a basic property right; it is one of the " 'strand[s]' " in the " 'bundle' of property rights," which includes "the rights 'to possess, use and dispose of it.' " *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 435; 102 S Ct 3164; 73 L Ed 2d 868 (1982).[8]

[8] Respectfully, the partial dissent conflates defendants' right to challenge the DHHS claims for recovery of estate assets with defendants' "standing" to raise a separate, substantive due-process claim. The personal representatives contend that the DHHS violated the MMERP both by applying it retroactively and by failing to provide the decedents notice of its intent to do so. The MMERP does not *force* elderly,

In *In re Estate of Burns*, 131 Wash 2d 104; 928 P2d 1094 (1997), the Washington Supreme Court was faced with a due-process challenge to the recovery of Medicaid benefits from the recipients' estates. The benefits were paid *before* that state's recovery program took effect. The Court noted that those "recipients who know of the new legal consequence . . . have the choice whether to accept the benefits knowing that recovery may be had from their estate." *Id*. at 117. It was "realistic" that an individual would consider the financial effects before accepting Medicaid, the Court continued, because that state's Medicaid program covers medical expenses for even minor health concerns. A person might choose to forgo a minor procedure to preserve his or her estate. *Id*. "However, recipients of benefits paid before enactment of the statutory provisions would have had no such choice. Application of the statutory provisions in their cases therefore would . . . result in the unfairness for which courts traditionally have disfavored retroactivity." *Id*.

Similarly, in *Estate of Wood v Arkansas Dep't of Human Servs*, 319 Ark 697; 894 SW2d 573 (1995), the Arkansas Supreme Court considered the propriety of recovering Medicaid benefits expended before that state's Medicaid recovery program was enacted. That court did not treat the challenge as a constitutional issue. Even so, the court determined that the recovery program "create[d] a new legal right which allows [the

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care-dependent citizens into forfeiting estate assets. Rather, the MMERP is supposed to provide accurate notice to Medicaid applicants of the parameters, rules, and scope of the estate recovery program so that applicants may make reasoned and informed decisions about whether to accept benefits. Defendants in these cases seek to prevent estate recovery based on the DHHS's failure to follow the rules. This is no different than challenging the claim of an estate creditor because it was untimely filed or otherwise legally deficient.

Department of Human Services (DHS)] to file a claim against the estate of a deceased," thereby affecting a vested property right held by the Medicaid beneficiary. *Id*. at 701. Changing the nature of Medicaid from "an outright entitlement" to "a loan" "effect[ed] . . . the nature of the ownership of the DHS payments made on her behalf." *Id*. at 701-702. Therefore, the Arkansas court held that the recovery program could not be applied retroactively.

The same unfairness exists here. By applying the recovery program retroactively to July 1, 2010, the DHHS deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The DHHS impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," MCL 400.112g(5), the decedents lost the right to choose how to manage their property. Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' rights to due process. Accordingly, to the extent that the probate courts disallowed the DHHS's claims for that period, we affirm.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH, J., concurred with GLEICHER, J.

JANSEN, P.J. (*concurring in part and dissenting in part*). I concur with the majority's determinations that

the notice provided in the redetermination application was statutorily sufficient, the lack of notice at the time of enrollment did not violate due process, and the estates did not have a due-process right to the continuation of a favorable Medicaid law. However, I respectfully dissent from the majority's determinations that the Department of Health and Human Services (DHHS) violated the due-process rights of the decedents by seeking to recover benefits expended between July 1, 2010, and July 1, 2011, and that the Ketchum estate may raise the issue on remand whether the DHHS abused its discretion under MCL 400.112g(4) by seeking recovery from the Ketchum Estate.

With regard to the majority's conclusion that the DHHS violated the decedents' due-process rights by seeking to recover benefits expended between July 1, 2010, and July 1, 2011, I conclude that this Court's decision in *In re Keyes Estate*, 310 Mich App 266; 871 NW2d 388 (2015), controls the outcome in this case. In *Keyes*, this Court concluded there was no due-process violation in spite of the fact that the decedent did not receive notice of the estate recovery program when she enrolled in Medicaid. *Id*. at 275. The decedent began receiving Medicaid benefits in April 2010. *Id*. at 268. Although the decedent was not notified about the possibility of estate recovery when she enrolled in Medicaid, her son signed a Medicaid application form in May 2012, which acknowledged that the estate was subject to estate recovery for services paid by Medicaid. *Id*. at 268-269. The trial court determined that the estate recovery program violated the decedent's right to due process since she did not receive notice of the estate recovery program when she enrolled in Medicaid. *Id*. at 275. However, this Court reasoned that the estate recovery program did not violate the estate's right to due process because MCL 400.112g did not

require notice at the time of enrollment. *Id*. This Court emphasized that the estate received notice when it was informed of the estate recovery program and that the estate had the opportunity to contest the issue during a hearing in the probate court. *Id*. Thus, this Court determined that there was no due-process violation in spite of the fact that the decedent began receiving Medicaid benefits in April 2010. See *id*.

Although the issues surrounding the retroactive application of the estate recovery program were not directly raised in *Keyes*, the decision nevertheless dictates the outcome in this case. In *Keyes*, this Court stated that the decedent began receiving Medicaid benefits in April 2010, and it can be inferred that the Michigan Department of Community Health (now the DHHS) sought to recover an amount that included services paid for by Medicaid before July 2011. See *Keyes*, 310 Mich App at 268-269. In this case, the DHHS sought to recover for Medicaid benefits paid on behalf of the decedents since July 1, 2010. Thus, this case is similar to *Keyes* since this Court in *Keyes* held that the estate recovery program did not violate due process in spite of the fact that the decedent began receiving Medicaid benefits in April 2010. See *id*. at 275. Therefore, I conclude that *Keyes* dictates the outcome that the estate recovery program did not violate the decedents' right to due process. See *id*.

Furthermore, even if *Keyes* did not control the outcome in this case, I do not believe that the retroactive application of the estate recovery program violated the decedents' right to due process. The majority concludes that the Legislature deprived the decedents of their right to dispose of their property by affecting how the decedents chose to manage their property. "The Fourteenth Amendment of the United States Constitution

and Article 1, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law." *Keyes*, 310 Mich App at 274. An individual has a vested interest in the use and possession of real estate. *Bonner v City of Brighton*, 495 Mich 209, 226; 848 NW2d 380 (2014). Additionally, a property owner also has a legal right to dispose of his or her property. *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 435; 102 S Ct 3164; 73 L Ed 2d 868 (1982). As explained in *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972):

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

I do not believe that the interest articulated by the majority constitutes a protected property interest. The decedents were not deprived of the use and possession of their property during their lives. See *Bonner*, 495 Mich at 226. In addition, the decedents were not deprived of the right to dispose of their property through transfer or sale because the decedents were not prevented from selling or transferring their property while they were alive. See *Loretto*, 458 US at 435. At most, the interest at stake can be characterized as the right to choose how to manage property or the right to make alternative healthcare arrangements instead of encumbering an estate. See *id*. I conclude that there is no existing rule or common understanding establishing the right to make alternative healthcare arrangements or the right to choose how to manage property. See *Roth*, 408 US at 577. Furthermore, even assuming

that there is a due-process right that was violated when the DHHS applied the estate recovery program retroactively, the right is personal to the decedents, and it is impossible for the estates to know what alternative arrangements the decedents would have made. See *id*. Therefore, I conclude that the decedents were not deprived of a property interest. See *Keyes*, 310 Mich App at 274.

I also do not believe that the estates have standing to challenge whether the estate recovery program violated the decedents' due-process rights. MCL 700.3703(3) provides, "*Except as to a proceeding that does not survive the decedent's death*, a personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued in the courts of this state and the courts of another jurisdiction as the decedent had immediately prior to death." (Emphasis added.) In this case, the property interest described in the majority opinion was personal to the decedents given that it involved the decedents' ability to make decisions regarding the management of their property. Thus, the property interest was not transferable to the estates, and the proceedings did not survive the death of the decedents. See *id*.

Finally, I disagree with the majority's conclusion that the Ketchum estate may challenge on remand whether the DHHS abused its discretion in seeking estate recovery in violation of MCL 400.112g(4). MCL 400.112g(4) provides, "The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." As noted by the majority, "[r]ecovery will only be pursued if it is *cost-effective* to do so as determined by the Department *at its sole discre-*

tion." See DHHS, *Bridges Administrative Policy Manuals* (*BAM*) *120* (January 1, 2016), p 7 (emphasis added). Thus, the DHHS has the *sole discretion* to determine whether estate recovery is cost-effective in accordance with MCL 400.112g(4). Therefore, I do not believe that the DHHS's decision regarding the cost of estate recovery is reviewable by the trial court. See *BAM 120*, p 7. Accordingly, I respectfully disagree with the majority that the Ketchum estate may raise the issue in the trial court on remand.

For the reasons discussed in this opinion, I conclude that the trial courts erred by denying the DHHS's collection attempts. I would reverse and remand for entry of judgment in favor of the DHHS.

DEPARTMENT OF ENVIRONMENTAL QUALITY v MORLEY

Docket No. 323019. Submitted December 2, 2015, at Lansing. Decided December 15, 2015. Approved for publication February 9, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 887.

The Department of Environmental Quality (DEQ) brought an action in the Ingham Circuit Court against Jack O. Morley, alleging that he had dredged, filled, drained, and maintained a use on property alleged to be a wetland in violation of former Part 303 of the Natural Resources and Environmental Protection Act, MCL 324.30301 *et seq*. The action sought injunctive relief and civil fines. The court, Clinton Canady III, J., entered judgment in favor of plaintiff, ruling that 92.3 acres of defendant's 106.5-acre property was wetland and that defendant's activities on the property had violated Part 303. The court ordered defendant to remove 4.1 acres of fill material, restore that acreage to its prior condition, cease violating Part 303, and pay plaintiff a statutory fine of $30,000. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting plaintiff's motion to strike defendant's demand for a jury trial. Because there was no historical right to a jury trial in Michigan when the relief sought was equitable in nature, and because wetland protection was not a cause of action at common law, defendant was not entitled to a jury trial under Const 1963, art 1, § 14. Defendant also had no right to a jury trial under the federal Constitution, which does not confer a right to trial by jury in civil cases brought in state courts.

2. The trial court did not err by determining that the exhibits defendant challenged at trial or on appeal were admissible because they were supported by reliable expert testimony under MRE 702 and were not inadmissible hearsay.

3. The trial court's order requiring defendant to cease all activities on the 92.3 acres identified as wetland did not constitute a judicial taking under the state or federal Constitutions. The Court of Appeals has previously held that wetland regulations that resulted in the DEQ denying a landowner's application for a permit to fill wetlands did not constitute a taking of the property, even though it decreased the value of the property significantly,

because the property retained substantial value and usefulness, the plaintiffs were aware of the regulations when they purchased the property, and the regulations were universal throughout the state and did not single out the plaintiff's property to bear the burden of the public interest in wetlands. In so holding, the Court noted that, standing alone, a decrease in the value of the property is insufficient to establish a compensable taking. The Court has also recognized that the statutory requirement that a person obtain a permit before engaging in certain uses of his or her property does not itself constitute a taking and neither does the designation of the majority of the property as wetland. Under these holdings, defendant should have been aware of Part 303, which had been in effect for 14 years before he purchased the property; there was no evidence that defendant was singled out to bear the burden of the public's interest in wetlands; and the designation of the majority of defendant's property did not itself constitute a taking. In addition, there was no evidence that the injunction left no economically viable use of the property, regardless of the trial court's comment that there was nothing defendant could do with the property given the injunction.

4. Defendant forfeited his arguments that the DEQ improperly relied on the existence of an agricultural drain to determine that defendant's property was a regulated wetland and that the trial court's motivation for imposing the fine was related to an offer by a land conservancy to buy the property at a price below market value by failing to raise these issues in the trial court. There was no support for the latter argument in the record, and defendant was not permitted to expand the record on appeal to support it.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Daniel P. Bock*, Assistant Attorney General, for plaintiff.

Braun Kendrick Finkbeiner PLC (by *Frederick C. Overdier*) for defendant.

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

PER CURIAM. Defendant Jack O. Morley appeals as of right the final order of the circuit court granting

judgment in favor of plaintiff, the Michigan Department of Environmental Quality (DEQ). We affirm.

The DEQ filed a complaint against defendant, seeking an injunction and civil fines for defendant's dredging, filling, draining, and maintaining a use on property alleged to be a wetland, contrary to Part 303 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30301 *et seq*., which was in effect in 2009.[1] Following a bench trial, the trial court entered judgment in favor of the DEQ, ruling that 92.3 acres of defendant's 106.5-acre property was wetland and that defendant's activities violated Part 303. The court ordered him to remove 4.1 acres of fill material; restore that acreage to its prior condition; cease all Part 303 violations, including farming on all acreage designated as wetland; and pay the DEQ a statutory fine of $30,000.

Defendant first argues that the trial court erred by granting the DEQ's motion to strike his demand for a jury trial. We disagree.

Defendant preserved this issue by filing a demand for jury trial. *Moody v Home Owners Ins Co*, 304 Mich App 415, 444; 849 NW2d 31 (2014). Whether defendant was entitled to a jury trial for a complaint seeking an injunction and civil fines under Part 303 is an issue of constitutional law, which we review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013).

The Michigan Constitution provides that the "right of trial by jury shall remain . . . ." Const 1963, art 1, § 14. "Thus the right to trial by jury is preserved in all cases where it existed prior to adoption of the Constitution." *Conservation Dep't v Brown*, 335 Mich 343,

[1] We note that Part 303 was repealed by 2013 PA 98.

346; 55 NW2d 859 (1952). Further, the "constitutional guaranty applies to cases arising under statutes enacted subsequent to adoption of the Constitution, which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted." *Id*. Because there is no historical right to a jury trial in Michigan when the relief sought is equitable in nature—as in this case, in which the DEQ sought declaratory relief—defendant was not entitled to a jury trial. *Id*. at 347; *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445, 449-450; 455 NW2d 328 (1990). See also *Wolfenden v Burke*, 69 Mich App 394, 399; 245 NW2d 61 (1976) (stating that there is no historical, constitutional guarantee of a jury trial where the relief sought was equitable in nature).

In general, MCL 324.30306 prohibits a person from depositing fill into, dredging soils from, maintaining any use or development on, or draining surface water from a wetland unless the DEQ issues a permit to do so. Under MCL 324.30316(1) and (4), a trial court may restrain a violation of MCL 324.30306, impose a civil fine, and order restoration of the affected wetland. Part 303 was enacted after ratification of the 1908 and 1963 Michigan Constitutions, and there is no evidence that a cause of action based on the activities listed in Part 303 was known to Michigan's legal system when the Constitution was adopted.[2] Because wetland protection is not a cause of action known to the common law, but is instead a new cause of action created by statute, there is no constitutional right to a jury trial, *Brown*, 335 Mich at 349-350, even though the statute also provides for monetary damages, see *Madugula v Taub*,

[2] The substance of what is now Part 303 was enacted by 1979 PA 203 as the Wetland Protection Act and recodified in 1994 PA 451 as Part 303 of NREPA.

496 Mich 685, 696-698; 853 NW2d 75 (2014) (holding that the defendant was not entitled to a jury trial for an action brought under the Business Corporation Act for alleged violations of the shareholder-oppression provisions of the act, even though the statute also provided for damages as a remedy).

Defendant argues that because the DEQ's claims against him would also be a misdemeanor punishable by a fine if the state proved intent, the state was required to prove to a jury that defendant purposefully or voluntarily deposited or permitted the placement of fill material in a known regulated wetland. In addition to providing for a civil lawsuit, Part 303 also provides that a person who violates MCL 324.30306 is guilty of a misdemeanor and subject to a fine. MCL 324.30316(2) and (3). However, the DEQ only filed a civil action against defendant; it did not seek to criminally prosecute him. Therefore, it is irrelevant that the statute provides for criminal liability.[3]

We also reject defendant's argument that federal law rather than state law governs whether a defendant is entitled to a jury trial. The United States Constitution guarantees the right to a jury trial in civil trials, US Const, Am VII, and the Bill of Rights applies only to the federal government, except where the Fourteenth Amendment applies fundamental, substantive rights to the states, *McDonald v City of Chicago*, 561 US 742, 759-760; 130 S Ct 3020; 177 L Ed 2d 894 (2010). See

[3] We note that, contrary to defendant's assertion, the requirement in MCL 324.30316(2) that a "person who violates this part is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00," does not require the DEQ to prove criminal intent. MCL 324.30316(3), which contains a "willful or reckless" element of intent, only applies when there is a violation of a condition or limitation in a permit issued by the DEQ. It is undisputed that defendant never applied for a permit, and this section is therefore not relevant.

also *Hardware Dealers' Mut Fire Ins Co of Wis v Glidden Co*, 284 US 151, 158; 52 S Ct 69; 76 L Ed 214 (1931) (holding that "[t]he Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure" and that "a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard"). Further, our Supreme Court has recognized that "[t]he Constitution of the United States does not confer a federal constitutional right to trial by jury in state court civil cases." *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 183; 405 NW2d 88 (1987). Accordingly, Michigan law controls whether defendant was entitled to a jury trial in the instant civil action brought under Part 303, and Part 303 does not provide for a jury trial for any violation of the statute. Therefore, we conclude that defendant's reliance on *Tull v United States*, 481 US 412, 422; 107 S Ct 1831; 95 L Ed 2d 365 (1987), in which the Court held that the United States Constitution provides a right to a jury trial in actions brought under the federal Clean Water Act when a monetary fine is an element of the relief requested, is misplaced because the federal law requirement does not apply to actions alleging violations of Part 303.

Defendant next asserts that the trial court erred by admitting certain testimony and evidence. We conclude otherwise.

We review for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "An abuse of discretion occurs when the decision results in an out-

come falling outside the range of principled outcomes." *Id*. at 158. We review for plain error affecting substantial rights those evidentiary issues that were not preserved by objection below. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Defendant argues that DEQ witnesses were erroneously allowed to establish wetland jurisdiction, as defined by MCL 324.30301(m), without a proper foundation. Because he did not preserve this issue by objection below, our review is limited to plain error affecting substantial rights. *Id*.

MRE 702 allows opinion testimony by an expert if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The trial court has the fundamental duty of ensuring that all expert opinion testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Accordingly, "the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Id*. at 782. See also *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 147-149; 119 S Ct 1167; 143 L Ed 2d 238 (1989) (holding that the trial court's basic gatekeeping obligation applies to all expert testimony, including technical and other specialized knowledge).

Defendant argues that the trial court ignored the portion of the definition of wetland, as set forth in MCL 324.30301(1)(m), that a wetland "is commonly referred to as a bog, swamp, or marsh" because there was no direct expert testimony about the definition of those words. This claim is without merit. The categorization of the property as wetland was supported by the

results from the site inspection in September 2009 and the expert conclusions by DEQ expert witnesses Kip Cronk, Cathy Sleight, Justin Smith, Todd Losee, and Chad Fizzell that defendant's property contained 92.3 acres of wetland. Further, there is no evidence on the record that supports defendant's assertion that the trial court failed to recognize the lack of evidence related to the Part 303 wetland definition regarding the property being commonly referred to as a bog, swamp, or marsh. Sleight testified that as set forth in Part 303, the term "wetland" commonly refers to a bog, swamp, or marsh, and Losee referred to the statutory definition of wetland when he opined that portions of the property were marsh and portions were swamp. Moreover, Losee, who was qualified as an expert in wetland identification and delineation and the application of Part 303, explained in detail how the site inspection was performed in accordance with guidance manuals from DEQ and Army Corps of Engineers and was highly thorough in scope with 54 soil bores. Losee's conclusion that a portion of the property was marsh and a portion was swamp was properly admitted because it was based on sufficient facts or data and was the product of reliable principles and methods that were applied reliably to the facts of the case. MRE 702. Contrary to defendant's assertion, Losee did delineate the boundaries of the property that were determined to be wetland; MCL 324.30301(1)(m) does not require that the exact boundaries of that which is commonly referred to as marsh or swamp be specified, nor is there a requirement that a Bay County witness testify, as opposed to the expert testimony offered at trial, that a portion of the property was commonly referred to as bog, swamp, or marsh in 2007 or 2008. Thus, we conclude that there was a foundation to establish that 92.3 acres of defendant's property was a wetland as

defined by MCL 324.30301(1)(m) and the admission of this evidence was not plain error that affected defendant's substantial rights. *Hilgendorf*, 245 Mich App at 700.

Defendant next argues that certain exhibits were admitted to establish wetland delineation without the proper foundation. We disagree.

Defendant argues that Exhibits 11 and 12 were inadmissible hearsay because they were admitted without testimony by their creator. This Court reviews for an abuse of discretion a preserved challenge to a trial court's decision to admit evidence. *Barnett*, 478 Mich at 158-159. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. at 158. Hearsay, which is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c), is not admissible at trial unless it falls within an established exception to the hearsay rule, *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992). In this case, Sleight testified that she reviewed plaintiff's Exhibits 11 and 12 to determine whether the property was likely wetland and to decide whether she should inspect the property. Thus, the documents were not offered to prove that the property is in fact a regulated wetland, i.e., for the truth of the matter asserted, and were therefore not hearsay. MRE 801(c).

Defendant next argues that the trial court erred by admitting plaintiff's Exhibit 33 because it was not helpful or reliable and there was no evidence that Fizzell's interpretation of the data conformed to an established standard. Following a review of the evidence, we conclude that the exhibit was helpful in

assisting the trial court to determine whether defendant's property was or had ever been a wetland. MRE 702. Fizzell created Exhibit 33, a saturation/inundation evaluation, using information gathered at the 2009 site inspection. He laid the exhibit over an aerial photograph of the property taken on April 23, 1998, to compare the soil to determine whether it was likely that the property was a wetland before the alterations. We note that Fizzell specifically testified that there is no certification for geographical information and science or aerial imagery interpretation but that he was qualified to create the exhibit through his fifteen years of skill, training, and experience. MRE 702. Accordingly, we hold that the trial court did not abuse its discretion by admitting plaintiff's Exhibit 33 because it was a report based on sufficient facts or data, it was the product of reliable principles and methods, and Fizzell applied the principles and methods reliably to the facts of the case. MRE 702; MRE 703.

Defendant failed to preserve his objections to plaintiff's Exhibits 34 and 35. We have reviewed the evidence and conclude that both exhibits assisted the trial court in understanding the evidence collected on-site and in determining the issue of whether defendant's property contained wetlands under MRE 702. Therefore, the trial court's decision to admit these exhibits did not constitute plain error that affected defendant's substantial rights.

Defendant's preserved challenge to the admission of plaintiff's Exhibit 37, a compilation of soil-testing data, is equally without merit. Fizzell testified that he decided where the soil-testing points would be, went to each of the soil points during the inspection, compiled the data sheets, and created the exhibit. These circum-

stances, coupled with Fizzell's qualification as an expert in geographical information and science and aerial photographic interpretation with regard to wetland and hydrologic features, established a foundation for reliability as required by MRE 702. *Barnett*, 478 Mich at 158-159.

Defendant next argues that the trial court's order requiring him to cease all activities on the 92.3 acres classified as wetland constituted a judicial taking. We disagree. Because he raised this issue for the first time in a motion for reconsideration, the argument is not preserved. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). However, we may review an unpreserved issue "if it is an issue of law for which all the relevant facts are available." *Id*.

"Both the Fifth Amendment of the United States Constitution and art 10, § 2 of the Michigan Constitution prohibit governmental taking of private property without just compensation." *Bevan v Brandon Twp*, 438 Mich 385, 389-390; 475 NW2d 37 (1991). In *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523; 705 NW2d 365 (2005), a panel of this Court concluded that wetland regulations that resulted in the DEQ denying the plaintiff's application for a permit to fill wetlands did not constitute a taking of the plaintiff's property, even though it decreased the value of the property significantly, because the property retained substantial value and usefulness, the plaintiffs were aware of the regulations when they purchased the property, and the regulations were universal throughout the state and did not single out the plaintiff's property to bear the burden of the public interest in wetlands. In so holding, this Court noted that, standing alone, a decrease in the value of the

property is insufficient to establish a compensable taking. *Id*. at 553. In *Bond v Dep't of Natural Resources*, 183 Mich App 225, 231-232; 454 NW2d 395 (1989), this Court recognized that the statutory requirement that a person obtain a permit before engaging in certain uses of his or her property does not itself constitute a taking, and neither does the designation of the majority of the property as wetland.

A party is presumed to have had notice of applicable regulations when it purchased a piece of property, and such notice "helps to determine the reasonableness of the claimant's investment-backed expectations." *Schmude Oil, Inc v Dep't of Environmental Quality*, 306 Mich App 35, 53-54; 856 NW2d 84 (2014). Thus, as in *K & K Constr, Inc*, 267 Mich App at 553-563, defendant should have been aware of Part 303, which was in effect for 14 years before he purchased the property. *Schmude Oil, Inc*, 306 Mich App at 54. Part 303 applies throughout the state for the benefit of everyone, MCL 324.30302(1), and there is no evidence that defendant was singled out to bear the burden of the public's interest in wetlands, *Schmude Oil, Inc*, 306 Mich App at 53. Further, as in *Bond*, 183 Mich App at 231, the designation of the majority of defendant's property as wetlands does not itself constitute a taking. In addition, there was no evidence placed on the record that with the injunction there was no economically viable use of the property, regardless of the trial court's comment that there was nothing defendant could do with the property given the injunction. Moreover, contrary to defendant's assertion, the Army Corps of Engineers notified him in 1994 and 2007 that his property contained a wetland. The DEQ also notified him in 2007 that he had regulated wetlands on his property. Furthermore, as the owner, it is presumed that he was aware of the

statutory ramifications if his land was regulated wetland. *Schmude Oil, Inc*, 306 Mich App at 54. Accordingly, the trial court order requiring defendant to cease all actions on his wetland property that violated Part 303 (in this case farming) did not constitute a taking. *K & K Constr, Inc*, 267 Mich App at 553-563; *Bond*, 183 Mich App at 231-232.

Next, defendant argues for the first time on appeal that the DEQ improperly relied on the existence of an agricultural drain to determine that defendant's property is a regulated wetland. This Court need not address an issue that is raised for the first time on appeal because it is not properly preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005); *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). Because defendant failed to raise this issue below, we consider it forfeited. *Stein v Braun Engineering*, 245 Mich App 149, 154; 626 NW2d 907 (2001). For the same reason, we also consider forfeited his assertion that the trial court only imposed the fine because a local land conservancy was allegedly interested in acquiring defendant's property below market value because of the wetland determination. We also note that there is no support for this assertion in the record and that defendant may not expand the record on appeal to support this argument. *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009).

Finally, we have reviewed the record and conclude that the trial court did not condition any relief from the judgment on defendant's payment of a fine. We further note that even if it had, an order allowing some farming would have been contrary to the clear lan-

guage of MCL 324.30304, which prohibits a person from maintaining a use in a wetland without a permit issued by the DEQ.

Affirmed.

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

MEASEL v AUTO CLUB GROUP INSURANCE COMPANY

Docket No. 324261. Submitted February 2, 2016, at Detroit. Decided February 9, 2016, at 9:05 a.m.

Jenifer Measel brought an action in the 46th District Court under Michigan's no-fault act, MCL 500.3101 *et seq*., against Auto Club Group Insurance Company for unpaid medical bills. Specifically, plaintiff claimed that defendant owed payment for services she received from her chiropractor after she was injured in an automobile accident. Plaintiff sought reimbursement for three services: her initial examination, ultrasound therapy, and massage therapy. The services were provided by Dr. Rosemary Batanjski and the staff at Complete Care Chiropractic. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's chiropractic services fell outside the scope of the "practice of chiropractic" as that phrase was defined as of January 1, 2009. The district court, William J. Richards, J., denied the motion for summary disposition without reaching the question whether the chiropractic services rendered to plaintiff were included in the definition of "practice of chiropractic" as of January 1, 2009. The district court proceeded as if the services were not within the scope of the practice of chiropractic and went on to consider whether the services were lawfully rendered and reasonably necessary. The district court concluded that the services were not unlawfully rendered. Finally, the district court determined that whether the services were "reasonably necessary" was a question of fact for the jury. Defendant stipulated that the services were reasonably necessary but reserved its right to appeal the district court's denial of its motion for summary disposition. Defendant appealed in the Oakland Circuit Court. The circuit court, Colleen A. O'Brien, J., affirmed the district court's denial of defendant's motion for summary disposition even though the circuit court concluded that the district court erred by failing to specifically determine whether the services were chiropractic services. The court ruled that plaintiff's new patient examination qualified under the practice of chiropractic but that the ultrasound and massage therapies plaintiff received did not. Notwithstanding its decision that the ultrasound and massage therapies did not fall within the exceptions to the exclusion of

coverage for chiropractic services in MCL 500.3107b(b), the circuit court concluded that the services were reimbursable because they were lawfully rendered and reasonably necessary. Defendant appealed.

The Court of Appeals *held*:

The district court erred by denying defendant's motion for summary disposition, and the circuit erred by affirming the district court. The services plaintiff received from her chiropractor were not reimbursable under Michigan's no-fault act. The general rule is that chiropractic services are not covered by the no-fault act, but a limited number of chiropractic services are excepted from the rule. Although the services plaintiff received were lawfully rendered and reasonably necessary to plaintiff's treatment—and consequently were eligible for personal protection insurance (PIP) benefits under Michigan's no-fault act—the services were chiropractic services as that term is defined in MCL 333.16401. According to MCL 500.3107b(b), chiropractic services are not reimbursable unless the services were included in the definition of the "practice of chiropractic" in MCL 333.16401 as it existed on January 1, 2009. In this case, the services qualified as chiropractic services under the current statute, but the ultrasound and massage therapies plaintiff received were not included in the definition of the practice of chiropractic on January 1, 2009. Physical examinations were included in the definition of practice of chiropractic, but the physical examination conducted in this case exceeded the scope of a covered examination because it extended to parts of the body other than the spine.

Reversed and remanded.

1. AUTOMOBILES — NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE (PIP) BENEFITS — CHIROPRACTIC SERVICES.

Only those chiropractic services defined in MCL 333.16401 as of January 1, 2009, are eligible for benefits under the no-fault act; although the current definition of "practice of chiropractic" is broader than it was in 2009, the scope of covered chiropractic services remains limited by the definition of practice of chiropractic that was effective on January 1, 2009.

2. AUTOMOBILES — NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE (PIP) BENEFITS — SCOPE OF COVERED CHIROPRACTIC SERVICES.

Those chiropractic services excepted from the general rule that chiropractic services are not eligible for no-fault benefits must not exceed the scope of the practice of chiropractic as it existed on January 1, 2009; a physical examination of an area of the body that is not the spine was outside the scope of a covered physical

examination as of January 1, 2009; ultrasound therapy was not within the scope of the practice of chiropractic as of January 1, 2009; massages that treated an area of the body other than the spine were not within the scope of the practice of chiropractic as of January 1, 2009.

Mark Granzotto, PC (by *Mark Granzotto*), and *Haas & Goldstein, PC* (by *Justin Haas* and *Laurie Goldstein*), for plaintiff.

Hom, Killeen, Arene, Hoehn & Bachrach (by *Jamie Lynn McCutcheon*) and *Mary T. Nemeth, PC* (by *Mary T. Nemeth*), for defendant.

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

GADOLA, J. Auto Club Group Insurance Company (Auto Club) appeals by leave granted the circuit court's opinion and order concluding that expenses associated with the new patient examination, ultrasound therapy, and massage therapy Jenifer Measel received in a chiropractor's clinic were reimbursable under Michigan's no-fault act, MCL 500.3101 *et seq*. We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

On August 28, 2012, Measel sustained bodily injuries as the result of an automobile accident. Three days later, she presented to Complete Care Chiropractic (Clinic), complaining of pain in her back, neck, and shoulders and numbness in her wrists. Dr. Rosemary Batanjski performed a 45-minute new patient examination, and according to Clinic records, Measel received from Batanjski's staff ultrasound therapy to her neck and thoracic spine, in addition to massage therapy. During the next two months, Measel received

several additional therapeutic massages at the Clinic, each of which included a massage of her extremities. Measel also received several additional treatments of ultrasound therapy.

The Clinic billed both Auto Club and Blue Cross Blue Shield of Michigan for the expenses associated with Measel's care.[1] Blue Cross refused to cover one $80 charge for Measel's new patient examination, two $40 charges for ultrasound therapy, and five $100 charges for massage therapy. Auto Club also denied reimbursement for these charges, explaining that the charges were for services that were "outside the scope of chiropractic in Michigan," and therefore, they were "[not] reimbursable as . . . allowable expense[s] under the Michigan No-Fault act."

Measel then filed a complaint in the 46th District Court seeking damages for the unpaid medical bills. In response, Auto Club filed a motion for summary disposition under MCR 2.116(C)(10), arguing that the new patient examination, massage therapy, and ultrasound therapy were excluded from reimbursement because the procedures fell outside the definition in the Public Health Code, MCL 333.1101 *et seq*., of "practice of chiropractic," MCL 333.16401(1)(b), as it existed on January 1, 2009. MCL 500.3107b(b).[2] Auto Club further argued that the exclusion of MCL 500.3107b(b) applied despite the fact that some of the services were administered by Batanjski's staff because

[1] At the time of the accident, Measel had coordinated no-fault medical coverage with Auto Club.

[2] As discussed in more detail below, MCL 500.3107b(b) provides that reimbursement for expenses within personal protection insurance (PIP) coverage is not required for "[a] practice of chiropractic service, unless that service was included in the definition of practice of chiropractic under [MCL 333.16401] . . . as of January 1, 2009."

MCL 333.16215(1) allows a chiropractor to delegate tasks within the scope of chiropractic practice to other qualified individuals.

Measel responded that the services were reimbursable because they fell under the current definition of "practice of chiropractic" provided by MCL 333.16401. She argued that the "new" definition, effective January 5, 2010, "was intended to supplant and replace the prior version of [MCL 333.16401] including amending the provisions of MCL 500.3107b." Alternatively, Measel argued that the services were reimbursable even if they fell outside the definition of "practice of chiropractic" because the services were reasonably necessary for her accident-related care.

The district court denied Auto Club's motion for summary disposition, concluding that it was unnecessary to decide the complicated issue of whether the services were "within the scope of chiropractic." Rather, the court "assume[d] for the sake of argument that all three treatments are not chiropractic services," and then held that the only relevant issue was whether the services were lawfully rendered and reasonably necessary for Measel's accident-related care, which it concluded was a question of fact for the jury. On stipulation of the parties, the district court then entered an order in which Auto Club agreed that the services were reasonably necessary for Measel's care and that the amount charged for the services was reasonable. However, Auto Club reserved the right to appeal the district court's denial of its motion for summary disposition.

Thereafter, Auto Club filed a claim of appeal in the Oakland Circuit Court. In a written opinion, the circuit court affirmed the district court's denial of Auto Club's motion for summary disposition. The

court first determined that under MCL 500.3107b(b), the Legislature intended to limit reimbursement for chiropractic services under the no-fault act "unless those services were included in the Public Health Code's definition of 'practice of chiropractic' as of January 1, 2009." The court concluded that the district court erred by simply assuming that all of the services fell outside the definition of "practice of chiropractic" before considering whether the services were lawfully rendered and reasonably necessary; however, the court nonetheless determined that each of the three services was reimbursable under the no-fault act.

Specifically, the court determined that the new patient examination fell within the definition of "practice of chiropractic" as it existed on January 1, 2009, because Dr. Batanjski "did not undertake differential diagnostic techniques to diagnose or rule out the existence of localized non-spinal ailments" and did not attempt to diagnose conditions of the "arms, hands or wrists." The court determined that ultrasound and massage therapy both fell outside the former definition of "practice of chiropractic," but concluded that the services were reimbursable because they were lawfully rendered and reasonably necessary for Measel's care. Further, the court concluded that MCL 333.16215 did not apply because Dr. Batanjski did not "delegate" to other members of the Clinic's staff the delivery of massage therapy, but rather only "recommended" the treatment for Measel.[3]

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[3] Auto Club filed a delayed application for leave to appeal in this Court, which was granted on May 19, 2015. *Measel v Auto Club Ins Co*, unpublished order of the Court of Appeals, entered May 19, 2015 (Docket No. 324261).

II. STANDARDS OF REVIEW

This Court reviews de novo a lower court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court also reviews de novo questions of statutory interpretation. *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 515; 821 NW2d 117 (2012). The first step when addressing a question of statutory interpretation is to review the language of the statute. *Id*. "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." *Id*. (quotation marks and citation omitted). "Where the statutory language is clear and unambiguous, a court must apply it as written." *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999).

III. ANALYSIS

Auto Club argues that the circuit court erroneously concluded that it was required to reimburse Measel under Michigan's no-fault act for expenses associated with her new patient examination, massage therapy, and ultrasound therapy. We agree.

Generally, under the no-fault act, personal protection insurance (PIP) benefits are payable for medical expenses that are lawfully rendered and reasonably necessary for an insured's care, recovery, and rehabilitation. MCL 500.3107.[4] In 2009, as an exception to this

[4] MCL 500.3107(1)(a) provides that PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Likewise, MCL 500.3157 states that "[a] physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an

general rule, the Legislature enacted 2009 PA 222, which added MCL 500.3107b(b) to the no-fault act. MCL 500.3107b(b) provides the following:

> Reimbursement or coverage for expenses within personal protection insurance coverage under [MCL 500.3107] is not required for any of the following:
>
> * * *
>
> (b) A practice of chiropractic service, unless that service was included in the definition of practice of chiropractic under . . . MCL 333.16401, as of January 1, 2009.

2009 PA 222 was one of several tie-barred bills, all effective January 5, 2010, that addressed a tension between chiropractors and insurance providers regarding the scope of chiropractic care and related insurance liability. Along with 2009 PA 222, the Legislature also enacted 2009 PA 223, which expanded the scope of the definition of "practice of chiropractic" under MCL 333.16401 of the Public Health Code. Thus, while 2009 PA 223 expanded the scope of the definition of "practice of chiropractic," 2009 PA 222 limited insurance providers' liability under the no-fault act for the newly included services.[5]

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accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered."

[5] The Legislature also amended several other statutes to include similar language limiting third-party liability to cover services that were newly included in the broadened definition of "practice of chiropractic." See, e.g., MCL 550.53(15), as amended by 2009 PA 224 (governing prudent purchaser agreements); MCL 550.1502(11), as amended by 2009 PA 225 (governing contracts with professional healthcare providers for reimbursement); MCL 418.315(1), as amended by 2009 PA 226 (governing employer liability under the Worker's Disability Compensation Act, MCL 418.101 *et seq*.).

Considering the plain language of MCL 500.3107b(b), if a service is "within [PIP] coverage under [MCL 500.3107]," the service is generally reimbursable under the no-fault act unless an exception in MCL 500.3107b applies. Under MCL 500.3107b(b), reimbursement for a service otherwise covered by MCL 500.3107 "is not required" if the service is (1) "[a] practice of chiropractic service," (2) "unless that service was included in the definition of practice of chiropractic under [MCL 333.16401] . . . as of January 1, 2009."[6] Accordingly, if a service falls within PIP coverage under MCL 500.3107 and is "[a] practice of chiropractic service" under MCL 500.3107b(b), reimbursement is only required under the no-fault act if the service was included in the definition of "practice of chiropractic" under MCL 333.16401 as that statute existed on January 1, 2009.

Auto Club admits that each of the disputed services in this case was lawfully rendered and reasonably necessary for Measel's accident-related care. Therefore, these services were within PIP coverage under MCL 500.3107. The next question, then, is whether each of the services was "[a] practice of chiropractic service" for purposes of MCL 500.3107b(b). The statutory phrase "[a] practice of chiropractic service" is not defined in the no-fault act; however, the phrase "practice of chiropractic" is defined by MCL 333.16401 of the Public Health Code. We conclude that the statutory phrase "[a] practice of chiropractic

[6] This Court has previously defined the phrase "as of January 1, 2009," in MCL 500.3107b(b) as referring to the "text of MCL 333.16401 *as that statute existed* on January 1, 2009." *Warren Chiropractic & Rehab Clinic, PC v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2012 (Docket No. 303919). The parties do not dispute on appeal that this is the proper interpretation of the statutory phrase "as of."

service" in MCL 500.3107b(b) should be interpreted in light of the definition of "practice of chiropractic" in MCL 333.16401 under the rule of *in pari materia*,[7] because both statutory provisions were enacted at the same time, 2009 PA 222 and 2009 PA 223, and both statutory provisions involve the scope of the statutory phrase "practice of chiropractic." Therefore, a service is "[a] practice of chiropractic service" for purposes of MCL 500.3107b(b) if that service falls under the current definition of "practice of chiropractic" provided by MCL 333.16401.

The current definition of "practice of chiropractic" in MCL 333.16401(1) is as follows:

> (e) "Practice of chiropractic" means that discipline within the healing arts that deals with the human nervous system and the musculoskeletal system and their interrelationship with other body systems. Practice of chiropractic includes the following:
>
> (*i*) The diagnosis of human conditions and disorders of the human musculoskeletal and nervous systems as they relate to subluxations, misalignments, and joint dysfunctions. These diagnoses shall be for the purpose of detecting and correcting those conditions and disorders or offering advice to seek treatment from other health professionals in order to restore and maintain health.

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[7] The rule of *in pari materia* provides that "[i]f two or more statutes arguably relate to the same subject or have the same purpose, they are considered *in pari materia* and must be read together to determine legislative intent." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 146; 662 NW2d 758 (2003) (emphasis added). "The purpose of the [rule] is to effectuate the purpose of the Legislature as evinced by the harmonious statutes on a subject." *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). "Two statutes that form a part of one regulatory scheme should be read *in pari materia*." *People v Stephan*, 241 Mich App 482, 498; 616 NW2d 188 (2000) (quotation marks and citation omitted; emphasis added).

(*ii*) The evaluation of conditions or symptoms related to subluxations, misalignments, and joint dysfunction through any of the following:

(A) Physical examination.

(B) The taking and reviewing of patient health information.

(C) The performance, ordering, or use of tests. The performance, ordering, or use of tests in the practice of chiropractic is regulated by rules promulgated under [MCL 333.16423].

(D) The performance, ordering, or use of x-ray.

(E) The performance, ordering, or use of tests that were allowed under [MCL 333.16423] as of December 1, 2009.

(*iii*) The chiropractic adjustment of subluxations, misalignments, and joint dysfunction and the treatment of related bones and tissues for the establishment of neural integrity and structural stability.

(*iv*) The use of physical measures, analytical instruments, nutritional advice, rehabilitative exercise, and adjustment apparatus regulated by rules promulgated under section 16423.

We conclude that the new patient examination, ultrasound therapy, and massage therapy all fell within the current definition of "practice of chiropractic" under MCL 333.16401. Regarding the new patient examination, MCL 333.16401(1)(e)(*ii*)(A) provides that general physical examinations are included under the definition of "practice of chiropractic." Therefore, this service is "[a] practice of chiropractic service" for purposes of MCL 500.3107b(b). Regarding ultrasound and massage therapy, MCL 333.16401(1)(e)(*iv*) states that the "practice of chiropractic" includes "[t]he use of physical measures, analytical instruments, nutritional advice, rehabilitative exercise, and adjustment apparatus regulated by

rules promulgated under [MCL 333.16423]." MCL 333.16423(1), in turn, states the following:

> The department, in consultation with the board,[8] shall promulgate rules to establish criteria for the performance and ordering of tests and the approval of analytical instruments and adjustment apparatus to be used for the purpose of examining and treating patients for subluxations and misalignments that produce nerve interference or joint dysfunction.

On June 1, 2010, the Michigan Department of Community Health issued a letter to chiropractic licensees outlining an approved list of analytical instruments, adjustment apparatus, tests, and physical measures falling within the broadened scope of chiropractic practice under 2009 PA 223.[9] The letter stated, in pertinent part, the following:

> With the passage of PA 223, the scope of practice for the Michigan chiropractor has expanded. The legislation indicates that it takes immediate effect but there are some areas that require the promulgation of administrative rules before all parts of the legislation can take effect. . . .
>
> * * *
>
> To assist practicing chiropractors with this new legislation, the Board of Chiropractic has reviewed and updated its list of approved analytical instruments, adjustment apparatus, tests and measurements.
>
> * * *

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[8] At the time the Legislature enacted 2009 PA 223, the "department" referred to the "state department of community health." MCL 333.1104, as amended by 1996 PA 307. MCL 333.1104 now defines "department" as "the department of health and human services." The "board" refers to the Michigan Board of Chiropractic. MCL 333.16421.

[9] Letter from Bureau of Health Professions to Chiropractic Licensees (June 1, 2010).

> **PHYSICAL MEASURES**
>
> Physical measures used for correcting or reducing subluxations, misalignments and joint dysfunctions, including, but not limited to:
>
> **Massage**—manipulation of superficial layers of muscle and connective tissue to alleviate pain and discomfort[.]
>
> * * *
>
> **Sound**—use of ultrasound to aid in the correction of muscular/skeletal problems to promote healing and restoration of function.

The Michigan Administrative Code does not specifically define "physical measures" to include ultrasound and massage therapy; however, the Code does provide a broad definition of "physical measures," which includes any "procedures or techniques used to correct or reduce subluxations, misalignments, and joint dysfunctions." 2011 Annual Admin Code Supp, R 338.12001.[10] Considering that the Department of Community Health's 2010 letter specifically included ultrasound and massage within the scope of "physical measures" for purposes of the definition of "practice of chiropractic," and that the Michigan Administrative Code broadly defined "physical measures," we conclude that ultrasound and massage therapy both fall within the definition of "practice of chiropractic" under MCL 333.16401. Therefore, each of these services is "[a] practice of chiropractic service" for purposes of MCL 500.3107b(b).[11]

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[10] The definition of "physical measures" provided in the Michigan Administrative Code has not changed since 2011. See Mich Admin Code, R 338.12001.

[11] While 2009 PA 223 broadened the definition of "practice of chiropractic," the actual services for which reimbursement is authorized are *only* those services included in the "practice of chiropractic" as it existed on January 1, 2009.

Measel argues that the ultrasound and massage therapy were not chiropractic services because the services were performed by ultrasound technicians and massage therapists, rather than by Dr. Batanjski herself. Measel's argument is unpersuasive. MCL 333.16215(1) permits a licensee to delegate tasks to another qualified individual, and provides the following:

> [A] licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision.

The Public Health Code does not define the word "delegate," but this Court has previously defined the word for purposes of MCL 333.16215 as "to commit (powers, functions, etc.) to another as agent." *People v Callon*, 256 Mich App 312, 324-325; 662 NW2d 501 (2003) (quotation marks and citation omitted). The Public Health Code defines "supervision" for purposes of MCL 333.16215 to mean "the overseeing of or participation in the work of another individual by a [licensed] health professional" when there is "[t]he continuous availability of direct communication in person" or electronically, when there are regularly scheduled opportunities for the licensee to review the individual's practice and records, to consult with, and to further educate the supervised individual, and when there are established predetermined procedures and drug protocol. MCL 333.16109(2).

At her deposition, Dr. Batanjski explained that when she does not perform therapeutic massages herself, she directs her massage therapists to perform the

massages and "explain[s] to them what to work on." Dr. Batanjski testified that she instructs the therapists regarding the pressure to apply and whether to use special techniques. She further described that she began employing massage therapists so she could control all of their treatment protocols. When asked how she directs the massage therapists to perform massages, Dr. Batanjski testified as follows:

> I will tell them what to focus on. I will tell them what to stay away from. I will tell them the contraindications to the patient. . . . They are not trained—they have their minimal training, but I have to make that final decision.
>
> I may say be careful for this or watch out for that, and they can't lay prone on the table, you have to modify your techniques. I explain why they can't do something.
>
> Basically, I give them their directions for that case.

Likewise, Dr. Batanjski explained that when she does not perform ultrasound therapy herself, her staff administers the therapy on the basis of her specific directions:

> *Q*. Would they basically be doing the same thing you would be doing, applying ultrasound, same thing?
>
> *A*. Yes. I have trained them. Before they even see the patient, I show them where on the spine to do it. I tell them how many minutes. That's my instruction, if I am not doing it myself, I tell them how to do it.

Considering Dr. Batanjski's testimony, the circuit court erred by concluding that the massage therapists and ultrasound technicians who performed some of the services in this case were not operating under the delegation of Dr. Batanjski as a licensed chiropractor. The massage therapists and ultrasound technicians were employed by Dr. Batanjski, and they regularly assisted her with patient care. Dr. Batanjski testified

that she supervised their work, directed their treatment protocols, and instructed them on how to perform the necessary treatment. Accordingly, the mere fact that Dr. Batanjski did not perform each of the disputed services herself does not take the ultrasound and massage therapy outside the definition of "practice of chiropractic" under MCL 333.16401.

Although each of the services at issue in this case was "[a] practice of chiropractic service" under MCL 333.16401, reimbursement is not required unless the service "was included in the definition of practice of chiropractic under [MCL 333.16401] . . . as of January 1, 2009." MCL 500.3107b(b). The definition of "practice of chiropractic" provided by MCL 333.16401 on January 1, 2009, stated the following:

> (b) "Practice of chiropractic" means that discipline within the healing arts which deals with the human nervous system and its relationship to the spinal column and its interrelationship with other body systems. Practice of chiropractic includes the following:
>
> (*i*) Diagnosis, including spinal analysis, to determine the existence of spinal subluxations or misalignments that produce nerve interference, indicating the necessity for chiropractic care.
>
> (*ii*) A chiropractic adjustment of spinal subluxations or misalignments and related bones and tissues for the establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health.
>
> (*iii*) The use of analytical instruments, nutritional advice, rehabilitative exercise and adjustment apparatus regulated by rules promulgated by the board pursuant to section 16423, and the use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. The practice of chiropractic does not include the performance of incisive surgical procedures, the performance of

> an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine. [MCL 333.16401(1), as amended by 2002 PA 734.][12]

In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 73-75; 535 NW2d 529 (1995), this Court addressed the extent to which a diagnostic examination fell within the former definition of "practice of chiropractic." Citing our Supreme Court's decision in *Attorney General v Beno*, 422 Mich 293; 373 NW2d 544 (1985), this Court concluded that orthopedic and neurological examinations of non-spinal areas fell outside the scope of chiropractic practice under former MCL 333.16401. *Hofmann*, 211 Mich App at 75. The Court explained as follows:

> The orthopedic and neurological examinations in question are all types of physical examinations of nonspinal areas, the purpose of which, by the plaintiffs' own testimony, is to ascertain the effects of nerve interference allegedly caused by a subluxation on other parts of the body. As the Supreme Court observed in *Beno*, however, the effects of nerve interference on other parts of the body can be ascertained only by the elimination of other causes of the symptoms, which entails differential diagnosis, a procedure that is in contravention of both the intent and history of § 16401. For this reason, the Supreme Court concluded that *a chiropractic "diagnosis" is limited to the determination of existing spinal subluxations or misalignments, which can only be located at their source, i.e., the spine.* We conclude, therefore, that orthopedic and neurological examination of nonspinal areas is outside the scope of chiropractic practice. [*Id*. (emphasis added).]

The circuit court concluded that Dr. Batanjski's new patient examination related only "to diagnosing subluxations, that is, conditions of the neck and spine."

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[12] The Legislature enacted MCL 333.16401 as part of 1978 PA 368. In 2002, the Legislature enacted 2002 PA 734, which made minimal nonsubstantive changes to the original language.

However, our Supreme Court noted in *Beno*, 422 Mich at 325, that "spinal subluxations and misalignments can only be located at their source . . . ," i.e., the spine itself. At her deposition, Dr. Batanjski testified that the purpose of the new patient examination was to consider Measel's "whole body systems," and she admitted that her examination included Measel's "whole arm." Considering Dr. Batanjski's testimony, it does not appear that she limited her examination to the source of any subluxations or misalignments—the spine. Therefore, the new patient examination exceeded the scope of the "practice of chiropractic" as it existed under MCL 333.16401 on January 1, 2009, in light of the analysis in *Beno* and *Hofmann*.

Regarding the ultrasound and massage therapies, in *Beno*, 422 Mich at 343, our Supreme Court specifically held that "the use of . . . ultrasound devices for therapeutic purposes . . . [was] outside the scope of chiropractic," as it was defined in former MCL 333.16401. Likewise, our Supreme Court explained that "[t]here is nothing in [the] wording [of former MCL 333.16401] which shows an intent to authorize the treatment of areas other than the human spine." *Beno*, 422 Mich at 317. The notes from Measel's massages indicate that during each massage, therapists spent time massaging Measel's extremities. Accordingly, the massages do not fall within the former definition of "practice of chiropractic" under MCL 333.16401 because they involved treatment to areas other than Measel's spine.

IV. CONCLUSION

Each of the disputed services was within PIP coverage under MCL 500.3107 because Auto Club admitted that the services were lawfully rendered and reasonably necessary for Measel's care. However, because

each of the disputed services was "[a] practice of chiropractic service" that did not fall within the definition of "practice of chiropractic" under MCL 333.16401 as that statute existed on January 1, 2009, reimbursement for the services was not required under Michigan's no-fault act. MCL 500.3107b(b).

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

CAVANAGH, P.J., and RIORDAN, J., concurred with GADOLA, J.

PEOPLE v BLEVINS

Docket No. 315774. Submitted March 10, 2015, at Detroit. Decided February 11, 2016, at 9:00 a.m. Leave to appeal sought.

Anton T. Blevins was convicted following a jury trial in the Wayne Circuit Court of five counts of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of second-degree murder, MCL 750.317, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. A group of friends had gone out to celebrate the college graduation of one member of the group, Carlos Spearman. They were walking in downtown Detroit when another member of their group, Zachery Easterly, while briefly separated from his friends, was confronted by a man he did not know. The man who confronted Easterly, who was later identified as Blevins's codefendant, Quintin King, punched Easterly in the face. Easterly's friends came to his aid while several other individuals joined King. During the brief confrontation between the two groups, King fired several gunshots, wounding Spearman and killing Courtney "Cortez" Smith. Some of the men in Spearman's group alleged that they had seen someone hand the gun to King. The prosecution, relying on an aiding-and-abetting theory for conviction, alleged that Blevins gave the gun to King during the confrontation. Defense counsel argued that while Blevins may have been present at the scene, he was not involved in the shooting. After he was convicted, Blevins moved for a new trial. The court, Timothy M. Kenny, J., denied the motion. Blevins appealed.

The Court of Appeals *held*:

1. A photographic identification procedure can be so suggestive as to deprive the defendant of due process. The fairness of an identification procedure is evaluated in light of the totality of the circumstances, and erroneously admitted identification testimony warrants reversal only when the error is not harmless beyond a reasonable doubt. In this case, the identification of Blevins as the person who handed the gun to King was the central issue. And while other state courts have expounded on the scientific evidence tending to show that eyewitness testimony is

inherently unreliable, it would require a highly tenuous leap of logic to extrapolate from that evidence that the identification of Blevins by the witnesses in this case was wrong. Blevins had ample opportunity to argue why the witnesses against him should have been deemed unreliable. Any infirmities either were, or could have been, presented to the jury, and the jury was properly instructed to consider these infirmities. Whether or not the photographic lineups could have somehow been conducted better, Blevins failed to establish that the trial court erred when it concluded that they were not unduly suggestive.

2. To constitute ineffective assistance, trial counsel's performance must have fallen below an objective standard of reasonableness, and there must be a reasonable probability that counsel's subpar performance affected the outcome of the proceedings, rendering the proceedings unfair or unreliable. As the trial court concluded in its decision on Blevins's motion for a new trial, defense counsel made strategic and reasonable choices in light of his trial strategy. His cross-examination of witnesses tied into the court's instructions on identification: he impeached witnesses on issues of intoxication, lighting, distance, discrepancies in descriptions, and the amount of time each witness had to make an observation. Although Blevins believes that presenting an expert on eyewitness testimony would have been helpful, the fact that counsel could conceivably have done more does not mean counsel's performance was deficient. With respect to the trial court's instruction regarding identification, seeking an alternative instruction would have been inconsistent with defense counsel's strategy, which tied into the instruction given. In any event, Blevins urged the adoption of an instruction based on authorities not binding in Michigan, and trial counsel is generally not ineffective for failing to make a novel argument.

3. Jury instructions are reviewed as a whole to see if they sufficiently protected a defendant's rights. Even if the instructions were imperfect, there was no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. Blevins argued that the aiding-and-abetting instruction given to the jury was improper, but the instruction given accurately reflected the law, under which a defendant may be convicted using an aiding-and-abetting theory if the prosecution proves that the defendant aided or abetted the commission of an offense and that the charged offense was a natural and probable consequence of the commission of the intended offense.

4. Blevins asserted that the prosecutor committed misconduct and denied him a fair trial when the prosecutor told the jury that

it could convict him using a team theory of guilt, asked for sympathy for the deceased, argued facts not in evidence, used inflammatory and religious arguments, denigrated defense counsel, and misstated the law. Regarding the team theory of guilt, the prosecutor's references to the way in which all members of a sports team share in the team's victory was obviously a metaphor. The court correctly instructed the jury that Blevins's mere presence at the scene of the crime was insufficient to find him guilty. Regarding Blevins's other assertions of prosecutorial misconduct, Blevins failed to establish any impropriety that deprived him of a fair trial.

5. Evidence is sufficient if, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. Second-degree murder is first-degree murder minus premeditation and without the perpetration or attempted perpetration of the felonies enumerated in the first-degree murder statute. To aid and abet the commission of a crime, the crime itself must be proved, and the defendant must have rendered some kind of assistance or encouragement to the commission of that crime with the intent that the crime occur or the knowledge that the principal intended for the crime to occur. Blevins contended that because King initially fired into the ground and Spearman was only incidentally injured by a ricochet, Blevins could not have had the requisite intent to cause great bodily harm. Blevins also argued that he did not intend for King to use the gun in the manner he did and, therefore, did not have the requisite intent to be convicted of aiding and abetting second-degree murder. Contrary to Blevins's argument on appeal, it could be reasonably inferred that Blevins's flashing of the gun was a threat of force and that by passing the gun to King upon King's request during the confrontation, which had already become violent, Blevins intended to do at least great bodily harm less than murder to someone in the group. Further, King was convicted of first-degree murder. The passing of the gun unambiguously rendered assistance to the commission of that crime, and indeed was an indispensable part of the crime. The likely inference is that Blevins either knew that King intended to discharge the gun or intended for King to discharge the gun. Consequently, the evidence was sufficient to support Blevins's convictions.

6. When determining whether a new trial may be granted because of newly discovered evidence, the defendant must show: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. In this case, Blevins argued that he was entitled to a new trial because of allegedly newly discovered evidence that someone else had confessed to being the shooter and had indicated that Blevins had not passed him the gun. The trial court found that the fourth requirement, the probability of a different result on retrial, had not been satisfied. The extent to which the proffered evidence was persuasive was matched by the extent to which it was dubious. The witness to the alleged confession testified in the trial court during the hearing on Blevins's motion for a new trial. Thus, the trial court had the opportunity to observe and evaluate the witness's credibility, and the trial court's decision was not outside the range of principled outcomes.

7. The trial court commits plain error when it calculates an offense variable (OV) score using facts beyond those found by the jury or admitted by the defendant if that miscalculation would change the applicable guidelines minimum sentence range. OV 5, MCL 777.35, should be scored at either 15 or zero points depending on whether serious psychological injury to the victim's family may require professional treatment. In this case, the only evidence of psychological injury to the victim's family was presented at sentencing. Consequently, OV 5 should have been scored at zero points, an issue that was preserved by Blevins at sentencing. The reduction of 15 points from Blevins's total OV score, from 105 to 90, would reduce his OV level from III to II. Because second-degree murder, MCL 750.317, is a Class M2 offense against a person, MCL 777.16p, this would reduce his minimum sentence range from 315-525 months to 270-450 months. Improperly calculated sentencing guidelines ranges are reviewed for harmlessness, which necessitated remanding for possible resentencing in accordance with *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Convictions affirmed; case remanded for further proceedings.

SHAPIRO, J., dissenting, concluded that a new trial was warranted because of errors concerning the eyewitness identification testimony and because the prosecutor's closing argument substantially misstated the legal standard under which the jury could convict Blevins on an aiding-and-abetting theory. The case

against Blevins turned entirely on the eyewitness testimony. The majority correctly observes that the evaluation of a witness's honesty is a question exclusively for the jury. The majority, however, fails to distinguish between the issues of truthfulness and reliability. Unlike truthfulness, questions of reliability turn on factors other than the good faith and subjective honesty of the witness. Scientific developments have often required the modification of evidentiary standards and trial proofs. The core function of evidentiary standards is to enhance the truth-finding process. The consistent finding in the scientific studies of human memory is that, rather than being a single function, memory is made up of multiple, intricate brain operations that govern perception, memory formation, storage, and retrieval. Each of these functions is more complex and subject to far more distortion and error than we previously knew. Memories are vulnerable to distortion, contamination, and falsification at each step. Eyewitnesses encode limited data bits, and then their brains tend to fill in the gaps with whatever else seems plausible under the circumstances. Memories rapidly and continuously decay and may be covertly contaminated by suggestive influence—including by law enforcement officers during interviewing and identification procedures. The overriding principle that has emerged is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene, or event, but is instead a constructive, dynamic, and selective process. There are several factors that are not adequately addressed in our present identification jury instruction that are of particular significance with regard to crime scenes. These inadequately addressed factors can lead to a disturbingly high error rate. First, although the stress and fear that accompany crime make it likely that the witness will remember the event, the stress and fear also interfere with the ability to encode reliable details. Second, delays in identification result in higher error rates during later recall. Third, mistaken familiarity may cause the witness to identify as the perpetrator a person who was merely present at the crime scene or who, while not present, was viewed by the witness at a lineup. The risk of misidentification leading to a wrongful conviction is significantly heightened by the fact that our present instruction directs jurors to consider how sure the witness was about the identification when, in fact, studies reveal that witness confidence is only weakly related to the accuracy of identification. Similarly, while the standard jury instruction directs the jury to consider the state of mind of the witness during the recalled event, it offers no guidance as to which states of mind are likely to result in more or less reliable memories. New Jersey has taken

the lead in addressing this problem through revised jury instructions rather than expert testimony, adopting instructions that provide jurors with sufficient guidance so as to allow them to evaluate the reliability of eyewitness identifications with greater accuracy and without the need for expert testimony. The Michigan Supreme Court may wish to direct the Committee on Model Criminal Jury Instructions to undertake the work necessary to allow the Court to refine M Crim JI 7.8 in light of generally accepted scientific principles. Until such a revision occurs, it is incumbent upon defense attorneys, particularly in cases that rest solely on eyewitness identification, to request a special jury instruction or to proffer expert testimony. In this case, the failure to present expert testimony or request a special instruction constituted ineffective assistance of counsel. Further, the prosecutor's opening statement and closing argument substantially distorted the meaning of the law so as to encourage the jury to find guilt not on the basis that Blevins provided the gun to King, but on the basis of guilt by association. The prosecutor repeatedly argued that guilt could be assigned to the entire "team" that stood with King and repeatedly analogized to the fact that every member of a team shares credit for a win or loss, even those who are just sitting on the bench. Given the facts of this case, the standard jury instruction given by the trial court was not sufficient to correct this plain error, and defense counsel's decision to agree with the prosecutor's misstatements of the law rather than to object to them and seek a corrective instruction constituted ineffective assistance of counsel. Judge SHAPIRO would have reversed and remanded for a new trial.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for defendant.

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and SHAPIRO, JJ.

RONAYNE KRAUSE, P.J. Defendant was convicted by a jury of five counts of assault with intent to do great

bodily harm less than murder, MCL 750.84, one count of second-degree murder, MCL 750.317, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to 5 to 10 years' imprisonment for each of his assault with intent to do great bodily harm less than murder convictions and to 30 to 60 years' imprisonment for the second-degree murder conviction, all to be served concurrently. The court also imposed a mandatory two-year felony-firearm sentence, to be served consecutively as provided by the felony-firearm statute. Defendant appeals his convictions and sentences. We affirm defendant's convictions but vacate his sentences and remand for resentencing.

The victims in this case were part of a group of friends who went to downtown Detroit to celebrate the graduation of Carlos Spearman. The group consisted of Spearman, Courtney "Cortez" or "Tez" Smith, DeMario Drummond, Philip Knott, Raleigh Ross, Zachery Easterly, Raymond Malone, and Ron Banks. Some of the friends were football players at Wayne State University at the time. Spearman and a few of the others were drinking, but Smith was not drinking and served as the group's designated driver that evening. After being denied access to Club Envy because the bouncer deemed Spearman too intoxicated, the group headed to a Coney Island for him to sober up. On the way, the group encountered some men handing out fliers; one of the friends recalled that among the people handing out fliers was defendant's eventual codefendant, Quintin King.[1]

[1] King was found guilty of first-degree murder, six counts of assault with intent to commit murder, and felony-firearm. His convictions are not at issue in the instant appeal.

Also on the way, Easterly decided to relieve himself in an alley in which Courtney's car was parked. Also parked there was another car, and while he was urinating, several people approached Easterly, one of whom expressed concern that Easterly was urinating on the person's car. The friends' recollections of how many people were in the approaching group varied, but several of them identified King, who proceeded to punch Easterly. Several of the friends also identified defendant as a member of the group.[2] The two groups had a brief physical struggle before separating approximately 12 feet from each other.

The two groups exchanged some words, and King said to Ross, " '[W]e got a big fellow here. Here, got something for you.' " Then defendant flashed a gun he had in his pants at the group of friends. Defendant also commanded the group of friends to back up, and they obliged. Malone then heard King say to defendant, " 'Give me the Mag. Give me the Mag.' " Defendant then apparently passed the gun to King. Smith tried to neutralize the fight once the gun was shown. King then fired a shot into the pavement, and the group of friends fled, or attempted to flee, for safety. Spearman was shot in the leg, and Smith was fatally shot through his airway. Ten .45-caliber bullet casings were found at the scene.

During the ensuing homicide investigation, several of the friends were shown multiple photographic lineups, first including King, and later including defendant. In one of the latter arrays, Malone identified defendant as the "guy that handed [King] the gun." Malone told the officer that defendant had said, " 'I advise y'all to step back.' " Malone told the officer that

[2] A significant issue at trial and on appeal is whether that identification was accurate.

defendant then lifted up his shirt and flashed the gun. Malone did not see the gun being passed, but he assumed it happened because defendant showed the gun and King shot a gun that looked identical. Ross was shown a photographic array that included defendant and identified him in the photograph, but Ross did not see defendant do anything other than be a part of the group. Knott claimed to have spoken with police and looked at photographs, but the officer in charge of the case, Derryck Thomas, did not have a record of Knott being interviewed because Knott avoided being a part of the police investigation. There are no facts in evidence that the police acted improperly or suggestively with the photographic arrays, although defendant contends that it was improper to place him in the first spot on the photographic arrays that included him.

Allante Mosley,[3] who was in jail for charges unrelated to the instant case, approached officers because he claimed to have information about a homicide. Officer Thomas and an ATF agent spoke with Mosley and concluded that he just wanted help with his current charges. They remarked that Mosley looked like King, to the point of being possible brothers or mistaken for each other. There was never a deal reached between Mosley and the prosecution. Officer Thomas saw no value in adding Mosley to a lineup with King. However, Dequan Todd, who was also in jail awaiting unrelated charges of which he was eventually acquitted, shared a cell with Mosley for a month, during which time Mosley allegedly openly claimed in the jail ward that he was responsible for " 'the Wayne State murder.' " Todd later shared a cell with King and informed King of Mosley's comments. King's lawyer

[3] Mosley is also spelled "Moseley" in jail records.

mentioned Todd's potential testimony to defendant's lawyer; however, defendant's lawyer decided that this information did not seem credible and never contacted Todd. However, after defendant was convicted, defendant moved for a new trial, asserting, *inter alia*, that Todd provided newly discovered evidence. The trial court denied the motion.

Defendant first argues that his identification by four witnesses was the product of impermissibly suggestive pretrial procedures that led to an irreparable misidentification. In particular, he argues that the photographic arrays were improper and that an expert witness should have been presented on the topic of eyewitness identification. Defendant argues that eyewitness identification is the least reliable kind of evidence in a criminal conviction, stating that there have been 250 exonerations based on DNA, 76% of which involved misidentification as a factor. Defendant relies on a recent New Jersey Supreme Court holding that discussed problems with identification testimony and a standard for how to judge the reliability of identification testimony. *State v Henderson*, 208 NJ 208; 27 A3d 872 (2011). He also argues that his in-court identification was highly unreliable and likely the product of false memories; for example, he argues, Knott identified him because he was one of the " 'only brothers sitting at the table,' " and this occurred almost two years after the incident. He argues that there was no independent basis for his identification other than unduly suggestive procedures before trial. See *People v McElhaney*, 215 Mich App 269, 286-288; 545 NW2d 18 (1996).

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left

with a definite and firm conviction that a mistake was made. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). Erroneously admitted identification testimony warrants reversal only when the error is not harmless beyond a reasonable doubt. *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984). A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

Defendant is of course correct in asserting that "identification was the key issue in this case," so we agree that the propriety thereof is highly significant. We are aware that the state of New Jersey has expounded on the scientific evidence tending to show that eyewitness testimony is inherently unreliable. See *Henderson*, 208 NJ at 248-283. However, that case is not binding on this Court. See *People v Jamieson*, 436 Mich 61, 86; 461 NW2d 884 (1990) (opinion by BRICKLEY, J.). More importantly, irrespective of whether eyewitness testimony is unreliable in general, it requires a highly tenuous leap of logic to extrapolate that *defendant's* identification *in particular* must be wrong. Furthermore, because fairness is assessed on the basis of a totality of the circumstances, it is also relevant whether defendant had a meaningful opportunity to argue to the jury why the witnesses should not be believed.

We note that Michigan is not unfamiliar with the concept that human memory and perception are fallible. The standard jury instruction, which the trial court properly gave to the jury, clearly requires the

jury to evaluate how reliable any witness's identification might have been. Defendant had ample opportunity to argue why the *specific* witnesses against him should have been deemed unreliable, including why he believed Knott's identification must be guesswork. We perceive no reason why placing defendant's photograph first in a lineup is inherently suggestive, and in a random assortment the first slot is no less likely than any other. Defendant contends that the lineups were not "double blind,"[4] so the officers conducting the lineup might have subtly or unconsciously suggested a "correct" choice to the witnesses, but this conclusion is pure speculation. The fact that not all witnesses presented identical testimony or even identified defendant is simply normal. Any infirmities either were or could have been presented to the jury, and the jury was properly instructed to consider these infirmities. Whether or not the lineups could have somehow been conducted "better," defendant has not satisfied his burden of establishing that the trial court erred by finding them not unduly suggestive.

Defendant next argues that he received ineffective assistance of counsel because trial counsel did not present an expert witness on eyewitness identification, did not object to Knott's identification of him, and agreed to an erroneous jury instruction regarding identification rather than seeking an instruction based on the New Jersey case, *Henderson*, 208 NJ 208, referred to earlier in this opinion.

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[4] "Double blind" is a scientific term referring to a manner of conducting a study in which neither the subjects *nor the experimenters* know which of multiple variables is which, generally accomplished by some kind of coding system and logged randomization that can be retrieved after the study is completed. The purpose of double-blind testing is, as defendant points out, to ensure that the experimenters' own perceptions and biases do not unconsciously affect the outcome of the test.

Trial counsel is presumed to have been effective, and defendant must prove otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). To constitute ineffective assistance, trial counsel's performance must have fallen below an objective standard of reasonableness, and there must be a reasonable probability that counsel's subpar performance affected the outcome of the proceedings, rendering the proceedings unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51, 55-56; 826 NW2d 136 (2012); *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

Trial counsel's strategy was to persuade the jury that defendant was merely present at the scene of the crime and that he had no involvement in the shooting. As the lower court found in its decision on defendant's motion for new trial, counsel made strategic and reasonable choices in light of his trial strategy. His cross-examination of witnesses worked with the court's instructions on identification: he impeached witnesses on issues of intoxication, lighting, distance, discrepancies in descriptions, and the amount of time each witness had to make an observation. Although defendant believes that additionally presenting an expert on eyewitness testimony would have been helpful, and defendant may even be right, that counsel could conceivably have done more, or that a particular trial strategy failed, does not mean counsel's performance was deficient. *People v Petri*, 279 Mich App 407, 412-413; 760 NW2d 882 (2008). Accordingly, counsel's decision to rely on cross-examination to impeach the witnesses who identified defendant does not fall below an objective standard of reasonableness.

With respect to the court's instruction regarding identification, seeking an alternative instruction would have been inconsistent with counsel's strategy, which, as already noted, tied into the instruction given. In any event, defendant urges the adoption of an instruction based on authorities not binding in Michigan, and trial counsel is generally not ineffective for failing to make a novel argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). To the extent defendant argues that counsel could have done better, it is difficult to conceive of a situation in which a trial attorney, reflecting on his or her performance in a trial, could not, with the benefit of hindsight and the luxury of ample time for consideration, find something in his or her performance that he or she could have done better. That, however, is not the standard for assessing whether trial counsel was effective. Trial counsel's strategy was reasonable in light of Michigan law, and the strategy's ultimate failure is simply not relevant.[5]

Defendant next continues his argument in favor of a new and novel jury instruction regarding identification. As noted, the New Jersey Supreme Court found its then-current instructions on identification inadequate in light of scientific advances and a growing understanding of relevant neuroscience. *Henderson*, 208 NJ 208. Defendant also notes that after this decision in New Jersey, the State Bar of Michigan formed a task force to address this issue here. The United States Court of Appeals for the First Circuit has also altered its identification instructions to inform

[5] Our dissenting colleague has provided a thorough analysis and summary of the current state of scientific knowledge regarding eyewitness identification, and properly agrees that our present jury instruction regarding eyewitness testimony remains the law. The Court of Appeals is an error-correcting court, and we are unpersuaded that it was erroneous for the trial court or defense counsel to follow the law.

jurors that scientific studies show "the reliability of an identification doesn't really depend upon how positive a person is." *United States v Jones*, 689 F3d 12, 17 (CA 1, 2012). Defendant also argues that the aiding-and-abetting instruction given to the jury was improper because it does not accurately reflect the law or does not apply to all aiding-and-abetting cases. His argument rests on an assertion that the case from which the instruction is derived, *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), is significantly distinguishable from the matter at bar and itself reflects an exception to the general rule regarding instruction on convicting a defendant under an aiding-and-abetting theory, as decided in the recent United States Supreme Court case *Rosemond v United States*, 572 US ___; 134 S Ct 1240; 188 L Ed 2d 248 (2014).

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded in part on other grounds 467 Mich 888 (2002). Jury instructions are reviewed as a whole to see if they sufficiently protected a defendant's rights. *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

We have already discussed why the standard jury instruction regarding identification was appropriate in the instant matter. Defendant distinguishes *Robinson* by asserting that the codefendants in *Robinson* were friends, whereas there was no evidence here that defendant and King even knew each other. We find such an argument unavailing in the face of evidence that defendant *handed King an apparently loaded gun*.

We find it highly unlikely that anyone would simply hand over a gun to a complete stranger during a group confrontation, and even if someone did, it would reflect the most colossal and egregious disregard for the predictable result of that gun being discharged at another person. In *Robinson*, our Supreme Court reiterated that the necessary intent for second-degree murder is "the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result." *Robinson*, 475 Mich at 14 (emphasis omitted). The Court held that a defendant may be convicted under an aiding-and-abetting theory if the prosecution proves that the defendant aided or abetted the commission of an offense and "that the charged offense was a natural and probable consequence of the commission of the intended offense." *Id*. at 15. To the extent *Rosemond* held otherwise, it limited its analysis to prosecutions for a particular statutory federal offense, which is of no relevance here. See *Rosemond*, 572 US at ___; 134 S Ct at 1245. The aiding-and-abetting instruction given in this case may have been less than ideal, but we are constrained to follow *Robinson* and therefore cannot find error in the reading of that instruction.

Defendant next argues that the prosecutor committed misconduct and denied him a fair trial when the prosecutor told the jury that it could convict him based on a team theory of guilt, asked for sympathy for the deceased, argued facts not in evidence, used inflammatory and religious arguments, denigrated defense counsel, and misstated the law. A general claim that the defendant was denied his or her due-process right to a fair trial is a claim of nonconstitutional error, and defendant has not asserted that a specific constitutional right was violated. See *People v Blackmon*, 280 Mich App 253, 261-262, 269; 761 NW2d 172 (2008).

Consequently, even if the prosecutor committed an error, we would only reverse if it appears more likely than not that the error was outcome-determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant argues that the prosecutor not only denied him a fair trial by comparing the aiding-and-abetting theory of criminal culpability to teamwork, but that when coupled with the jury instruction, the burden of proof was shifted to him. We disagree. The prosecutor's references to the way in which all members of a sports team share in the team's victory was obviously a metaphor. Importantly, the trial court clearly instructed the jury that the arguments of counsel were not evidence. Unlike the instruction in *Sandstrom v Montana*, 442 US 510, 512-513, 524; 99 S Ct 2450; 61 L Ed 2d 39 (1979), which impermissibly specified a presumption of intent, the instruction given here explicitly charged the jury with assessing whether defendant had the requisite intent and made clear that defendant could not have been merely present. The prosecutor need not speak in the "blandest of all possible terms." *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). We find no error here.

Defendant next argues that the prosecutor impermissibly asked for sympathy for the deceased. While the prosecutor used language that invoked grisly imagery of "transporting this young college student, this Wayne State University football player into a piece of meat sitting on a slab," we do not think that language exceeds the bounds of permissibility. Further, the prosecutor's argument that Knott's lack of cooperation with authorities was because of Knott's perception that "snitches end up in ditches" was a reasonable circum-

stantial inference, one that the jury may have made on its own. See *People v Bahoda*, 448 Mich 261, 282-285; 531 NW2d 659 (1995).

The prosecutor's use of a biblical reference *could* have appealed to a juror's sense of religious duties, but in context, the quotation was merely a somewhat hyperbolic reference to the deceased victim as someone who had attempted to make peace that evening. It was not a reference to any religious beliefs per se, see *People v Jones*, 82 Mich App 510; 267 NW2d 433 (1978), and it did not call upon the jurors to convict on the basis of a religious duty, *People v Rohn*, 98 Mich App 593, 596-597; 296 NW2d 315 (1980), overruled in part on other grounds by *People v Perry*, 460 Mich 55, 64-65; 594 NW2d 477 (1999). There is no impropriety in merely referring to a story from the Bible that the prosecutor may reasonably presume the jurors, irrespective of their individual religious beliefs or affiliations, will likely find familiar. *People v Mischley*, 164 Mich App 478, 482-483; 417 NW2d 537 (1987).

The prosecutor's reference to Mosley, the man who allegedly claimed responsibility for the murder while he was in jail on unrelated charges, as a "red herring" was not improper denigration of defense counsel, but rather a fair argument regarding what the jury should believe. Finally, the prosecutor's statement that "the law permits conviction on adequate identification testimony alone" as long as it "proves beyond a reasonable doubt that the defendant was the person who committed the crime" does not misstate the law. We do not find any misconduct or deprivation of a fair trial.

Defendant next argues that the evidence was insufficient to support his convictions. He concedes that the evidence was sufficient for the jury to find that he displayed the gun, fired it into the ground, and

handed it to King. However, he contends that this evidence is insufficient to prove beyond a reasonable doubt that he aided and abetted second-degree murder.[6] We disagree.

Evidence is sufficient if, when viewed in the light most favorable to the prosecution, "a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Juries, and not appellate courts, see and hear the testimony of witnesses; therefore, we defer to the credibility assessments made by a jury. *People v Palmer*, 392 Mich 370, 376; 220 NW2d 393 (1974). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Consequently, we resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). This Court has defined the intent to do great bodily harm as "an intent to do serious injury of an aggravated nature."

[6] Defendant's argument in this regard relies, in part, on his assertion, addressed and rejected earlier in this opinion, that the jury was improperly instructed.

People v Mitchell, 149 Mich App 36, 39; 385 NW2d 717 (1986). Second-degree murder is any kind of murder not otherwise specified in the first-degree murder statute. MCL 750.317. It is well established that "second-degree murder is first-degree murder *minus* premeditation" and without the perpetration or attempted perpetration of the felonies enumerated in the first-degree murder statute. *People v Carter*, 395 Mich 434, 437-438; 236 NW2d 500 (1975). To aid and abet the commission of a crime, the crime itself must be proved, and the defendant must have rendered some kind of assistance or encouragement to the commission of that crime with the intent that the crime occur or the knowledge that the principal intended for the crime to occur. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004); *Carines*, 460 Mich at 757.

Defendant contends that because King fired into the ground and Spearman was only incidentally injured by a ricochet, defendant could not have had the requisite intent to cause great bodily harm. We disagree. It can be reasonably inferred that defendant's flashing of the gun was a threat of force and that by passing the gun to King upon a request during a confrontation that had already become violent that defendant intended to do at least great bodily harm less than murder to someone in the group. Indeed, it is exceedingly difficult to imagine a scenario in which a person who is not being directly threatened or protecting others could make *any* use of a loaded gun on a city sidewalk during a confrontation without, at minimum, a serious disregard for safety. Merely pointing a loaded gun at another person is inherently dangerous; the notion that *actually shooting a gun* in the direction of another person, no matter how inaccurately, could reflect anything but an intent to cause serious harm is beyond comprehension.

We also disagree with defendant's contention that the evidence was insufficient to find him guilty of aiding and abetting second-degree murder. King was convicted of first-degree murder. The passing of the gun unambiguously rendered assistance to the commission of that crime and, indeed, was an indispensable part of the crime. We reject defendant's contention that he was unaware of what King intended to do with the gun or did not intend the gun to be used in the way that King used it. There are a limited number of conceivable reasons why an angry individual presently involved in a violent confrontation might demand that a gun be handed to him, and most of them tend not to end in the gun going unused. There are, likewise, a limited number of conceivable ways in which a loaded gun can be used. The overwhelmingly likely inference is that defendant either knew that King intended to discharge the gun or intended for King to discharge the gun. Consequently, we find that the evidence is sufficient to support defendant's convictions.[7]

Defendant's final argument regarding his convictions is that he is entitled to a new trial on the basis of newly discovered evidence from Todd regarding Mosley's alleged involvement in the crimes. Defendant contends that the evidence provided by Todd will prove the following: (1) Todd met Mosley at the Wayne County Jail, (2) Mosley admitted to Todd that he, not King, killed the football player from Wayne State, (3) Mosley told Todd that defendant was not involved, and (4) Mosley told Todd that defendant never passed Mosley the gun.

"Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence." *People v Grissom*, 492 Mich 296, 312; 821

[7] Defendant's felony-firearm charge is derivative of the other charges.

NW2d 50 (2012). This policy is consistent with requiring parties to "use care, diligence, and vigilance in securing and presenting evidence." *Id*. (quotation marks and citations omitted). When determining whether a new trial may be granted because of newly discovered evidence, "a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996), and MCR 6.508(D) (quotation marks omitted). The trial court found that the fourth requirement, the probability of a different result on retrial, had not been satisfied; consequently, the trial court impliedly found the other factors satisfied. We review the trial court's findings of fact for clear error, MCR 2.613(C), and its decision for an abuse of discretion, *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

We note first that Todd's testimony is to some extent corroborated by an official report that Mosley actually attempted to confess to a murder while in jail. However, it is undermined to an equal extent by the fact that it appears that nothing came of that purported confession. The fact that Mosley made a clear and obvious statement against his own penal interest by stating that he was responsible for " 'the Wayne State Murder' " and was the person who " 'grabbed the gun' " and " 'shot him' " tends to exonerate King, and, to the extent Mosley also stated that defendant was uninvolved, this testimony would also exonerate defendant. Furthermore, Mosley's awareness that the altercation that resulted in the murder began because " 'somebody

pissed on something' " suggests more than casual knowledge of the circumstances of the case. However, again undermining the testimony, Todd said this admission came up because everyone was calling Mosley a snitch in jail because he may have leaked information about the Wayne State murders, but Mosley told them that " 'I can't be a snitch against myself,' " implying that he committed the murders. The circumstances therefore suggest that it was strongly to Mosley's immediate benefit to claim to be a murderer rather than a snitch. We note also that the eyewitnesses were shown photographs of Mosley and denied that he was the shooter, and the jury reviewed photographs of Mosley, defendant, and King.

On its face, the proffered evidence is highly equivocal. Todd testified at the hearing on defendant's motion for a new trial, and the trial court thus had a better opportunity than this Court to observe and evaluate his credibility. See *People v Canter*, 197 Mich App 550, 560-562; 496 NW2d 336 (1992). The clear-error standard does not permit us to attempt to discover a "right" factual finding, but rather obligates us to defer to the trial court unless definitely and firmly convinced it made a mistake. See *Hill v City of Warren*, 276 Mich App 299, 308-309; 740 NW2d 706 (2007). The abuse-of-discretion standard is even more deferential. An abuse of discretion will be found only if the trial court's decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008). If we cannot say with confidence that the record discloses a clear mistake or omissions that preclude meaningful review, any doubts we might have flowing solely from the question being close must be resolved in favor of leaving the trial court's decision untouched. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). The extent to which the proffered evidence

is persuasive is matched by the extent to which it is dubious. We are therefore unable to find that the trial court made a clear error or committed an abuse of discretion.

Lastly, defendant argues that the trial court improperly enhanced his sentence by scoring Offense Variable (OV) 5 at 15 points on the basis of facts not found by the jury and that, without the improperly considered evidence, OV 5 should have been scored at zero points. The trial court commits plain error when it calculates an OV score "using facts beyond those found by the jury or admitted by the defendant" if that miscalculation "would change the applicable guidelines minimum sentence range." *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015).[8] Defendant preserved this issue in the trial court, a scenario *Lockridge* predicted would be rare. *Id*. at 394. Defendant correctly states that OV 5 should be scored at either 15 or zero points depending on whether "serious psychological injury to the victim's family may require professional treatment," MCL 777.35, and the only evidence thereof was presented by the victim's

[8] We are aware that elsewhere in the same opinion, our Supreme Court in *Lockridge* also stated "that 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 at 392 & n 28. We find it difficult to reconcile that statement with the holding that the offense variables are to be scored only on the basis of facts necessarily found by the jury or admitted by the defendant. However, we understand that in *Stokes* this Court concluded that it could reconcile the disparate statements in *Lockridge* by determining that judges may score the offense variables on the basis of facts they found independent of the jury and the defendant's admissions on the theory that doing so constitutes a departure, *Stokes*, 312 Mich App at 195-197, which now need only be justified as reasonable, *Lockridge*, 498 Mich at 392. Because we cannot state with confidence that any other interpretation of *Lockridge* is superior, we decline to declare a conflict with *Stokes*.

family at sentencing. Consequently, OV 5 should have been scored at zero points, and the reduction of 15 points from defendant's total OV score, from 105 to 90, reduces his OV level from III to II. Because second-degree murder, MCL 750.317, is a Class M2 offense against a person, MCL 777.16p, this would reduce defendant's minimum sentence range from 315-525 months to 270-450 months. MCL 777.61.

Even though defendant's minimum sentence of 360 months lies within both the scored and the corrected minimum sentence ranges, because the sentence range itself has changed, our Supreme Court's historical interpretation of the sentencing guidelines would constrain us to vacate defendant's sentence and remand for resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006). However, in the wake of *Lockridge*, improperly calculated sentencing guidelines ranges are reviewed for harmlessness, which necessitates remanding for possible resentencing in accordance with *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as described in *Lockridge*. See *Stokes*, 312 Mich App at 197-203.

We affirm defendant's convictions, but we remand, consistently with *Crosby*, for possible resentencing. We do not retain jurisdiction.

K. F. KELLY, J., concurred with RONAYNE KRAUSE, P.J.

SHAPIRO, J. (*dissenting*). Late on May 5, 2011, there was a brief but deadly confrontation between two groups of young men in downtown Detroit. As the two groups faced each other, a man from one group fired eight to ten gunshots at the other group. The shots struck two men, killing Courtney "Cortez" Smith and wounding Carlos Spearman.

Following the incident, defendant Anton Blevins and codefendant Quintin King were charged with first-degree premediated murder, MCL 750.316, several counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

The prosecution presented evidence that King fired the shots that killed Smith and wounded Spearman. He was convicted as charged.[1] The charges against Blevins were based on evidence that he initially displayed the gun and then handed it to King. The defense theory put forth by Blevins's counsel was that although Blevins was present, he was not the man who handed the gun to King.

Blevins was convicted of second-degree murder, MCL 750.317, multiple counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and felony-firearm. Blevins raises several issues on appeal. I conclude that a new trial is merited because of errors arising out of the eyewitness identification testimony and because the prosecutor's closing argument substantially misstated the legal standards by which the jury could convict Blevins on an aiding-and-abetting theory.

I. EYEWITNESS IDENTIFICATION TESTIMONY

It is undisputed that this case turned exclusively on the jury's evaluation of eyewitness identification testimony. There was no forensic evidence linking Blevins to the gun, no evidence of robbery, and no

[1] King is not a party to this appeal. A separate panel of this Court affirmed his convictions, but remanded for resentencing in light of *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and MCL 769.25. *People v King*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2015 (Docket No. 315953).

evidence of any prior bad blood between Blevins and the victims. Although Blevins's attorney conceded that Blevins was among the group of men standing with King, there was no evidence that anyone in the group, other than the man who handed him the gun, did anything to assist King in the crimes. Thus, the question of identification was not whether Blevins was present. Instead, the question was whether Blevins was the man who displayed a gun and then gave it to King before the shooting. I agree with the majority that the evaluation of a witness's honesty is one exclusively for the jury; they, not we, hear and see the witnesses and are in the best position to make such determinations. However, the majority fails to distinguish between the issues of truthfulness and reliability. Unlike truthfulness, questions of reliability turn on factors other than the good faith and subjective honesty of the witness.

A. PRINCIPLES OF EYEWITNESS IDENTIFICATION

The reliability of eyewitness identifications has generally been understood to turn on external factors, such as those referred to in M Crim JI 7.8, including distance, time of exposure, and lighting. However, in the last several decades, the nature and functioning of memory have become subjects of advanced research and peer-reviewed scientific publications.[2] This research has demonstrated beyond question that the

[2] "[O]ver two thousand studies on eyewitness memory have been published in a variety of professional journals over the past 30 years. . . . Even more remarkable is the high degree of consensus that the researchers report in their findings." *State v Henderson*, Report of the Special Master, issued June 18, 2010 (NJ Docket No. A-8-08), p 9, available at <https://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20PDF%20(00621142).PDF> (accessed September 29, 2015) [https://perma.cc/R6L5-XNYZ].

reliability of eyewitness testimony is not limited to external factors or even to individual matters such as the quality of a witness's eyesight. For better or for worse, much of what these studies have revealed is highly inconsistent with our intuition about how memory functions. The studies show that our "common sense" beliefs about memory—i.e., the intuitive presumptions that nearly all jurors (and judges) will bring to bear—are grossly incomplete and often in error. Again, these conclusions are supported by a wealth of scientific studies[3] and have passed muster as admissible under both the *Daubert*[4] and *Frye*[5] tests.[6]

Scientific developments have often required the modification of evidentiary standards and trial proofs. The core function of evidentiary standards is to en-

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In addition to the Report of the Special Master, which cites many such studies, a literature review can be found in Note, *State v Henderson: A Model for Admitting Identification Testimony*, 84 U Colo L Rev 1257 (2013), and in Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 How LJ 237 (1995).

[3] Dr. Colleen Seifert, a professor of cognitive psychology at the University of Michigan who has published extensively in the field, submitted an affidavit in support of Blevins's motion for a new trial. Seifert's affidavit states that there is now a "generally accepted body of scientific research" in this area that is based on the "[*t*]*hree to four hundred peer-reviewed articles . . . published each year* in professional research journals *that demonstrate the social and cognitive factors affecting eyewitness accuracy*," and that the researchers' findings have been "*replicated*" *across* "*hundreds of studies*" involving the "test[ing of] thousands of individuals" with "*statistically reliable results*." (Emphasis added.)

[4] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[5] *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

[6] For a summary of state and federal law on this issue, see Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 Am J Crim L 97, 136-138 (2011).

hance the truth-finding process.[7] When scientific advances allow for a significant increase in the accuracy of that process, the judiciary should investigate and use those advances, rather than merely reiterate its faith in longstanding practices. The development of fingerprint evidence, blood typing, and DNA matching each presented challenges to the conduct of both investigations and trials. While these scientific developments upset preexisting mechanisms of truth-finding, their use was ultimately recognized by the Michigan courts, and we now rely on them as critical mechanisms to enhance the likelihood of conviction of the guilty and acquittal of the innocent. It is now time for the law to take into account what is known about memory formation, storage, and retrieval.

The consistent finding in the scientific studies of human memory is that, rather than being a single function, memory is made up of multiple, intricate brain operations that govern perception, memory formation, storage, and retrieval. Each of these functions is more complex and subject to far more distortion and error than we previously knew.

> *The overriding principle that has emerged is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event, but is instead a constructive, dynamic and selective process.* Memories must endure the complex processing required for encoding, storage, and retrieval. In the encoding or acquisition stage, the witness perceives an event and enters the information into memory. The storage or

[7] "[T]he primary objective of procedural rules should be to facilitate the discovery of truth. . . . [T]ruth must be the goal of any rational procedural system . . . ." Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure—Part I*, 32(3) Wayne L Rev 1007, 1011-1012 (1986) (citation omitted).

> retention stage is the period between when the memory is encoded and when the witness attempts to retrieve it. The retrieval stage represents the witness's attempt to recall the stored information from memory. Memories are vulnerable to distortion, contamination, and falsification at each step. Eyewitnesses encode limited data bits and then their brains tend to fill in the gaps with whatever else seems plausible under the circumstances. Memories rapidly and continuously decay and may be covertly contaminated by suggestive influence—including by law enforcement officers during interviewing and identification procedures. [Note, *State v Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U Colo L Rev 1257, 1264 (2013) (emphasis added; quotation marks and citations omitted).]

Contrary to our intuition, neuroscience and cognitive studies demonstrate that what is stored in a person's memory can be changed over time, particularly when there are repeated retrieval attempts as a result of prompting. The gaps in memory can be filled in with information that is subjectively experienced as if it were part of the initial memory of the event.

There are several factors that are not adequately addressed in our present jury instruction that are of particular significance with regard to crime scenes. These inadequately addressed factors can lead to a disturbingly high error rate. First, although the stress and fear that accompany these experiences make it likely that the witness will remember the event, the stress and fear also serve to "interfere with the ability to encode reliable details." *Id*. at 1275 (quotation marks and citation omitted). "[*A*] *meta-analysis incorporating twenty-seven independent studies found that . . . only 39 percent* [*of eyewitnesses*] *made a correct identification after a high-stress situation.*" *Id*. (emphasis added); see also Deffenbacher et al, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness*

Memory, 28 Law & Hum Behav 687 (2004). Second, delays in identification result in higher error rates during later recall. Studies of the decay rate of memory show that 20% of memory quality is lost after two hours, 30% within a day, and 50% within a month. *State v Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U Colo L Rev at 1277. "Longer intervals between the event and identification are associated with fewer correct identifications." *Id*. Third, mistaken familiarity may cause the witness to identify as the perpetrator a person who was merely present at the crime scene or who, while not present, was viewed by the witness at a lineup. *Id*. at 1277-1278.

Unfortunately, our "common sense" belief that identification errors are rare is false. Cognitive studies have demonstrated that identification errors are likely commonplace. "[A] review of published scientific research suggests that *one-third to one-half of eyewitness identifications are simply wrong*." *Id*. at 1260 (emphasis added). As a result, eyewitness misidentification has been "widely recognized as the single greatest cause of wrongful convictions in this country." *State v Delgado*, 188 NJ 48, 60; 902 A2d 888 (2006). Not surprisingly, therefore, the majority of postconviction DNA exonerations have involved eyewitness misidentifications. *State v Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U Colo L Rev at 1260.

The risk of misidentification leading to a wrongful conviction is significantly heightened by the fact that our present instruction directs jurors to consider "how sure the witness was about the identification . . . ."[8] Indeed, studies have repeatedly demonstrated that the

[8] M Crim JI 7.8(3).

degree of certainty expressed by the identifying witness is considered by jurors to be a strong sign of reliability. This belief is common, but it is in error. Studies have repeatedly revealed that "witness confidence is only weakly related to the accuracy of the identifications." Penrod & Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52(4) Law & Contemp Probs 43, 83 (1989). Thus, although a juror is far more likely to accept the testimony of an eyewitness who states that he or she is "100% certain" of an identification, the likelihood that the identification is accurate is no greater than that of an identification expressed with much less certainty. Put simply, this aspect of the standard jury instruction given in this and nearly all cases is factually erroneous and grossly misdirects the jury.[9]

Similarly, while the standard jury instruction directs the jury to consider the "state of mind" of the witness during the recalled event, it offers no guidance regarding which states of mind are likely to result in more or less reliable memories.[10] How is a juror to know whether a person who is surprised, angry, frightened, or otherwise stressed is more or less likely to accurately perceive, store, and recall information?[11]

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[9] Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, 8 U Bridgeport L Rev 15 (1987) (concluding that traditional jury instructions on eyewitness testimony are of minimal effect).

[10] M Crim JI 7.8(3).

[11] In her affidavit in support of Blevins's motion for new trial, Seifert offered this criticism of our present jury instruction:

> While well intentioned, the instructions [do] not provide guidelines to the jurors about how to apply them; for example, what amount of time passing since the incident is likely to lead to correct identification, and what states of mind lead to less accuracy? Further, these instructions do not include warnings about other known biasing factors, such as the presence of a

Advising the jurors simply that they are to consider the witness's state of mind without informing them of the generally accepted research-based knowledge about the objective effect of that state of mind on memory is nothing more than an invitation to jury speculation. We currently leave that to the arguments of counsel, who may each tell the jury their version of what "common sense" dictates and whose attempts at persuasion are not restrained by actual scientific knowledge.[12]

States have taken various approaches to permitting expert testimony about the factors relevant to assessing the reliability of eyewitness identifications. According to a recent article in the American Journal of Criminal Law, the overwhelming majority of state courts and federal circuits allow such testimony at the discretion of the trial judge. Fourteen states and two federal circuits have rules that either encourage or require its admission when eyewitness testimony is the only evidence of guilt. Six states and one federal circuit generally bar such testimony altogether, although one of these states permits it when eyewitness identification is the sole evidence of guilt. Vallas, *A Survey of Federal and State Standards for the Admis-*

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weapon during the crime, discussion among witnesses about the suspects, and effects of [police] instructions . . . .

[12] We generally do not allow jurors to apply their intuition when there is available scientific evidence to the contrary. For example, in a medical-malpractice case, a plaintiff's lawyer may seek to take advantage of a lay person's intuition that a catastrophic injury resulting from a medical procedure is proof that the procedure was incorrectly performed. We do not shield the jurors from scientific information that shows this "common sense" conclusion to be incorrect. We permit the defense to introduce expert testimony to the contrary and even instruct jurors that an adverse outcome is not, in and of itself, sufficient to show negligence. M Civ JI 30.04. The general principle of reliance on the common sense of jurors is not an excuse to ignore demonstrable scientific data that runs counter to that common sense.

sion of Expert Testimony on the Reliability of Eyewitnesses, 39 Am J Crim L 97, 136-138 (2011).

New Jersey has taken the lead in addressing this problem through revised jury instructions rather than expert testimony. In *State v Henderson*, 208 NJ 208, 217-219, 296-299; 27 A3d 872 (2011), the New Jersey Supreme Court appointed a special master to review the relevant scientific literature. After a review of more than 200 published scientific articles submitted by the parties and 10 days of testimony, the special master issued a highly detailed report in which he concluded that the research "abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications." *State v Henderson*, Report of the Special Master, issued June 18, 2010 (NJ Docket No. A-8-08), pp 72-73. The special master further concluded that the traditional mechanisms for considering the reliability of eyewitness testimony "neither recognize[] nor systematically accommodate[] the full range of influences shown by science to bear on the reliability of such testimony." *Id*. at 76.

Following its receipt of the report of the special master, the New Jersey Supreme Court issued its opinion in *Henderson* and later adopted jury instructions intended to provide jurors with sufficient guidance so as to allow them to evaluate the reliability of eyewitness identifications with greater accuracy and without the need for expert testimony. See *Henderson*, 208 NJ at 296-297;[13] New Jersey Judiciary, *Press*

[13] The New Jersey Supreme Court ultimately adopted two instructions. One addresses out-of-court identifications, and the other addresses in-

Release: Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012).[14]

There is scant Michigan caselaw concerning this issue. The sole published case appears to be *People v Hill*, 84 Mich App 90, 95-97; 269 NW2d 492 (1978), in which we held that expert testimony regarding eyewitness identification may be proper in some cases and left the matter to the trial court's discretion.[15] However, the need to address the reliability of eyewitness identification has not gone wholly unaddressed. The Michigan State Bar established the Michigan Eyewitness Identification Task Force,[16] which issued two reports in 2012: *Prosecutor Eyewitness Identification Training Guide* and *Law Enforcement and Eyewitness Identifications: A Policy Writing Guide*. These reports highlighted that the problem of potential misidentification creates the greatest risk of a miscarriage of justice when "there is minimal or no circumstantial

court identifications. Each informs the jurors that they are to determine whether the identification is sufficiently reliable. The instructions offer brief general information about memory and list numerous variables, indicating whether the presence of those variables tends to increase or decrease the reliability of an eyewitness identification. See New Jersey Judiciary, *Revised Eyewitness Identification Jury Instructions* (July 19, 2012), available at <https://www.judiary.state.nj.us/pressrel/2012/jury_instruction.pdf> (accessed September 30, 2015) [https://perma.cc/L2YH-GVRZ].

[14] Available at <https://www.judiary.state.nj.us/pressrel/2012/pr120719a.html> (accessed September 30, 2015) [https://perma.cc/CQ5E-SVN5].

[15] The *Hill* Court reversed the defendant's conviction and remanded for a new trial on the basis of a separate challenge to two in-court identifications and the lower court's failure to conduct a necessary evidentiary hearing regarding those identifications. *Hill*, 84 Mich App at 92-95.

[16] The task force was co-chaired by Nancy Diehl, former Chief of the Trial Division of the Wayne County Prosecutor's Office, and Valerie Newman, a staff attorney with the State Appellate Defender Office. Members of the task force included four trial judges, two appellate judges, several prosecutors, and several defense attorneys.

evidence to support a witness or witness's identification in a stranger situation . . . ." State Bar of Michigan, *Prosecutor Eyewitness Identification Training Guide* (2012), p 1 (emphasis omitted). In such a situation, "*extreme caution must be taken due to the possibility of misidentification*." *Id*. (emphasis added). After listing multiple factors to consider related to identification reliability, the report cites *Henderson* for a "detailed explanation defining each of [the] factors and explaining how they affect reliability." *Id*. at pp 3-4 & n 1. The guide sets forth detailed, step-by-step research-based methods to ensure accurate identifications. *Id*. at pp 1-4. Implementation of these methods, at the point before a prosecution begins, may substantially reduce the number of cases in which the reliability of an eyewitness account is seriously questioned by ensuring that the identifications were initially made under reliable conditions.

Once a trial begins, however, it remains for the jury to perform its truth-finding role. Accordingly, the jury must be reasonably informed of the scientific understanding of how memory functions and what factors research has shown to be indicative of reliability or a lack thereof. The Supreme Court may wish to direct the Committee on Model Criminal Jury Instructions or some other body suited to the task to undertake the work necessary so as to allow the Court to refine M Crim JI 7.8 in light of generally accepted scientific principles. This approach would provide consistency and would avoid the inefficient presentation of expert testimony on a case-by-case basis.[17]

At the present time, however, M Crim JI 7.8 remains as our standard instruction on eyewitness testimony,

[17] See generally *United States v Hall*, 165 F3d 1095, 1118-1120 (CA 7, 1999) (Easterbrook, J., concurring).

and until such a revision occurs, it is incumbent upon defense attorneys, particularly in cases that rest solely on eyewitness identification, to request a special jury instruction or to proffer expert testimony.

At the *Ginther*[18] hearing in this case, defense counsel stated that he was generally unaware of the literature on witness identification, that he had not thought there were any issues to be made about the photo arrays, and that he was not familiar with the State Bar's 2012 eyewitness identification policy-writing guide for law enforcement. He stated that he did not consult with an expert nor consider requesting a special or modified instruction on identification.

It is with these issues in mind that we should conduct our review of the eyewitness testimony in this case.

B. THE EYEWITNESS IDENTIFICATION TESTIMONY

All the witnesses traveled to downtown Detroit to celebrate Spearman's college graduation. In addition to Spearman, the witnesses were: Zachery Easterly, Phillip Knot, Raleigh Ross, DeMario Drummond, and Raymond Malone. Of these six eyewitnesses, two did not recall Blevins being present. Three others identified Blevins as present among the group of six or seven individuals with King, but did not see Blevins pass a gun to King. Two witnesses testified that Blevins gave King a gun. The witnesses' testimony will be summarized seriatim.

1. SPEARMAN

Spearman was shot and wounded in the incident. He testified that he never saw the man who shot him,

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

and he could not identify Blevins as having passed the gun or even as having been present during the incident.

2. EASTERLY

Easterly testified that, except for himself and decedent Smith, all the members of his group had been drinking. He stated that the incident began at about 11:30 p.m. when he walked some distance away from his group and urinated in a parking lot. He said a "[d]ark skin[ned]" black male, whom he identified as King, confronted him about urinating. He said that King and a second man—who was not Blevins—cornered him against a wall. He testified that King punched him in the nose, causing him to bleed profusely. Shortly thereafter, the rest of Easterly's group rejoined him, and, seeing his injury, they started "walking up on" King and a group of four or five men with whom King was standing.

Easterly testified that he was about 25 feet from the men in King's group when he saw a "light skinned" black man take a silver gun out of his waistband and fire one shot at the ground.[19] Easterly testified that he immediately hid behind a car and that he heard additional shots fired, but did not see who fired them. Easterly did not identify Blevins as the man who drew or fired the gun. He did not identify Blevins even as having been present during the incident. He testified that it was "too far back to recall."

Easterly also testified regarding the pretrial identification procedures. He stated that four days after the shooting, the police showed him a photo array made up

[19] The other witnesses testified that King fired all the shots, including the one at the ground.

of headshots[20] of six individuals. Though neither Blevins's nor King's photos were in this array, Easterly selected two individuals, both of whom the police determined were not suspects. Two weeks later, Easterly was shown a second photo array of headshots. This array included King, whom Easterly selected as possibly being the shooter. Several weeks later, on June 10, Easterly was shown another array of six headshots. Blevins's photo was in this set, but Easterly did not select it.

3. KNOT

Because he did not appear when subpoenaed for the preliminary examination, Knot testified pursuant to subpoena and under the threat of being detained as a material witness. His testimony was inconsistent with that of the others in several respects and, unlike the other witnesses, was challenged on cross-examination on the basis of a lack of credibility.

Knot testified that he had been shown as many as 60 photographs by the police, although the record did not reveal whose photos he was shown or when the photo lineups occurred. He stated that when shown the photos he did not see anyone he recognized from the incident. He testified that thereafter he refused to cooperate with the police investigation.

At trial, nearly two years after the shooting, he identified the two black men sitting at the defense table as the assailants.[21] He testified that King

[20] The photos showed the individuals from the neck up.

[21] In *People v Kachar*, 400 Mich 78, 92 n 16; 252 NW2d 807 (1977), our Supreme Court noted the weakness of such testimony:

> "Ordinarily, when a witness is asked to *identify* the assailant or thief, or other person who is the subject of his testimony, the

punched Easterly, that King then ran off, and that the groups then confronted each other. He testified that Ross, who was one of several big college football players in Knot's group, began walking toward the other group, and that Blevins pulled out a gun and said, " 'I got something for your big [ass].' " He described the man with the gun as "light-skinned," about "six one," and "skinny," in the range of "190, 185" pounds. Police testimony established, however, that Blevins actually weighed 245 pounds. According to Knot, the man who displayed the gun addressed Smith by his nickname and appeared to know him. He testified, "The guy with the gun was talking to Cortez [Smith], and Cortez was trying to break it up. And he told Cortez, . . . '[Tez], you good, but you know [fuck] them.' " No other witness testified that the man who displayed the gun, or indeed anyone in King's group, called Smith by his nickname or spoke to him at all. Moreover, there was no evidence offered that Blevins and Smith knew each other or had ever met.

Knot testified that King then returned with a gun and began firing, at which point Knot hid and ran. He testified, consistently with his on-scene statement to the police, that he saw two separate guns but that only one was fired.

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witness's act of pointing out the accused (or other person), then and there in the courtroom is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. (Emphasis in original.)" 4 Wigmore on Evidence (3d ed, Supp), § 1130, quoted in Comment, *Erroneous Eyewitness Identification at Lineups—The Problem and Its Cure*, 5 U San Fran L Rev 85, 90 (1970) (emphasis in original). *See also United States v Toney*, 440 F2d 590, 592 (CA 6, 1971) (McCree, J., concurring), for discussion of courtroom identification as highly suggestive.

4. ROSS

Ross testified that he had consumed a couple of shots of vodka shortly before the shooting. He recalled hearing Easterly calling out and then finding him bleeding from the nose after being punched. He stated that King's group numbered between six and eight, none of whom he knew previously. He identified Blevins as being in that group. Ross recalled that unfriendly words were exchanged between the two groups. He said he began walking toward the other group, asking why Easterly had been attacked. He heard a man say, "I got something for you," and saw him lift a gun from his waist and point it at him. He testified that the man who spoke and held the gun was *not* Blevins and described the man as approximately 180 pounds.[22]

Ross explained that he backed up, turned around, and immediately heard a shot. He did not think that there was time for the man with the gun to have passed the gun to anyone else. He said he ran and hid behind a dumpster and heard eight to ten gunshots.

Ross testified that he did not see Blevins with a gun, nor did he believe Blevins fired any shots. On June 10, he was shown a photo array that included Blevins. He wrote next to Blevins's photo that he had "seen him at the scene with the group." When asked by the police what he saw Blevins do, he stated "I didn't see him do anything other than stand there[.]"

5. DRUMMOND

Drummond initially testified that he had no alcohol on the evening of the incident. However, after being

[22] As already noted, Blevins weighed 245 pounds.

shown his preliminary examination testimony, he conceded that he had consumed a couple of drinks that evening and that "it did slip my mind."

Drummond testified that he saw King punch Easterly after Easterly urinated. He testified that another, lighter-skinned man was with King at that time, but that this second man was not Blevins. Drummond stated that, believing that "they got a fight going on," he punched King's companion and then the four "tussle[d]" for about 30 seconds. Almost immediately after, the two groups stood opposite each other: 7 in his group and 6 or 7 in the other group. He testified that Blevins and King were in the other group. According to Drummond, "[E]verybody in [my] group [was] upset. . . . I think it's about to be a fight." Drummond stated that Smith then began walking toward the other group, trying to get everyone to calm down. Then a man he identified at trial as Blevins pulled out a gun and said something like " 'you don't want this' " or " 'this ain't what y'all want[.]' " Drummond said that when he saw the gun, he froze and put his hands up to show he did not mean to take things any further. However, Ross and Knot kept walking "aggressive, like" toward the other group despite his verbal warning to them that there was a gun. Drummond testified that he saw Blevins hand the gun to King, but said he did not hear any words pass between them. Within a few seconds, King fired one shot at the ground and then a few seconds later, he fired in the direction of Drummond and his friends. Drummond testified that as soon as King fired the first shot, everyone in both groups, including Blevins, began to run. Only King remained in place.

Drummond testified that the police showed him several headshot photo arrays at several different

times. On May 9, he was shown an array in which King and Blevins were not pictured. He selected one photograph from this group, but the person he selected was not a suspect. He was shown another array on May 23, from which he selected two men: King and one other (not Blevins) as possibly being the shooter. On June 9, he picked out two other men from an array, neither of whom became suspects. On June 11, Drummond was shown yet another array of headshots, and in this one he identified Blevins from "the night of the shooting" and wrote that Blevins "pass[ed] the shooter the gun." At trial Drummond stated that he was "100 percent" sure that Blevins displayed and passed the gun. He agreed on cross-examination that on the night of the shooting, he told the police the man who drew the gun was "skinny."

6. MALONE

Malone testified that he saw King and Easterly get in a scuffle, but did not see anyone with King at that time. When he saw King hit Easterly, he and his friends were "all approaching to go fight," and, as they did, Blevins, who was in the group with King, "showed us the gun," and "we all backed up." Malone explained that by "showed us the gun" he meant that Blevins "lifted his shirt up to show us." Malone testified that King then said, "[g]ive me the mag," and shortly thereafter King started firing. He surmised that Blevins passed King the gun, but he did not see it actually being passed. He first identified Blevins in a June 11 headshot photo array. On cross-examination, Malone agreed that on the night of the incident he told the police that the man who displayed the gun was 6 feet 3 inches tall and only 145 to 150 pounds, i.e., 100 pounds less than Blevins's actual weight. He also

agreed that at the preliminary examination he had testified that the gun was a revolver because it had a rotating cylinder, although the gun was, in fact, an automatic. Malone explained that the situation "happened pretty quickly" and that he had seen more than 100 people on the night of the shooting.

7. SUMMARY OF TESTIMONY

There were six witnesses to the shooting, several of whom had been drinking. The first four gave testimony that did not implicate Blevins as a shooter or as the person who supplied King with the gun. Spearman remembered nothing. Easterly remembered saying that there were two "light skinned" males in the other group and that the one involved in the fistfight with him was not Blevins. He testified that he could not place Blevins at the scene at all, let alone as the man who passed the gun to King. Knot offered testimony that varied substantially from all the other witnesses. Unlike every other witness, he testified that the man who displayed the gun knew Smith personally and called him by his nickname, that two men had guns at the scene but only one of them fired, and that no gun was passed. Although it had been nearly two years since the incident and he had never before identified Blevins or King, Knot identified them at trial as the men with the guns. He testified that only King fired. Ross testified that Blevins was in the opposing group, but he could not say whether Blevins displayed or passed a gun. Drummond and Malone testified that Blevins was the man who displayed the gun and provided it to King. However, on the night of the shooting, each told the police that the man in question was very skinny, and their initial identifications were based on headshot photos that did not reveal build.

There was no evidence presented from either side regarding the number of photo arrays examined by Malone or whether Malone made any selections from those arrays. Although Drummond had selected several photos of nonsuspects before and after he selected Blevins, he nevertheless told the jury that he was "100 percent positive" that Blevins was the man who passed the gun to King.

C. GROUNDS FOR REVERSAL AND NEW TRIAL

Given the state of scientific knowledge concerning eyewitness identifications and the factors that increase or lessen their reliability, I would conclude that defense counsel was ineffective in this case. At the *Ginther* hearing, defense counsel agreed that he made no effort to learn about or make use of the available science. He explained that he did not do so because he did not think that jurors convict defendants on the basis of eyewitness identifications, a view that is difficult to square with his testimony that the entire case came down to identification and that the only evidence in this case was that of the eyewitnesses. He also testified that he did not request a modified identification instruction because he had never done so in his 40-year career, which is not surprising given his lack of familiarity with the advances in cognitive science.[23]

Given the facts of this case, I would conclude that counsel's strategy was not reasonable, and that the failure to present expert testimony or request a special instruction constituted ineffective assistance of coun-

[23] Defense counsel is a highly regarded and sought-after trial attorney. However, even excellent attorneys make serious errors from time to time, and while there are great benefits to experience, it can sometimes lead to complacency regarding the need to stay abreast of newer developments.

sel.[24] At least in cases in which the evidence of guilt consists exclusively of eyewitness identification testimony, a failure to request a special instruction regarding that evidence or to offer expert testimony describing generally accepted scientific findings about eyewitness memory constitutes ineffective assistance of counsel. It risks conviction of an actually innocent defendant and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings . . . ." *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted); see also *People v Carines*, 460 Mich 750, 753; 597 NW2d 130 (1999). Like fingerprint, blood typing, and DNA evidence, eyewitness identification testimony can greatly assist the truth-finding process, but only when a jury understands its scientific basis and its limitations.

For this reason, I would reverse and remand for a new trial. For the same reasons, I respectfully propose that our Supreme Court consider whether and how to revise the relevant jury instructions to embrace the scientific advances concerning eyewitness testimony.

II. THE ARGUMENTS OF TRIAL COUNSEL

Blevins's appellate brief also asserts that two aspects of the prosecutor's closing argument constituted misconduct, or alternatively, that defense counsel's failure to object constituted ineffective assistance of counsel. I agree that the prosecutor's arguments were

[24] Seifert's affidavit states that she reviewed the preliminary examination and trial transcripts, the police reports, and the photographic identification materials. She opined that the methods of identification used in this case involved "factors [that] have each been shown in scientific studies to impair eyewitness accuracy and to affect decision-making by triers of fact."

improper in both respects, but conclude that only one of them rises to the level of error requiring reversal.

A. MISSTATEMENT OF AIDING-AND-ABETTING LAW

It is well settled that mere presence is insufficient to establish guilt as an aider and abettor. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). However, the prosecution's opening statement and closing argument substantially distorted the meaning of the law, so as to encourage the jury to find guilt not on the basis that Blevins provided the gun to King, but on the basis of guilt by association, an argument which was of unique import given the facts of this case.

The prosecution argued, both implicitly and explicitly, that guilt should be assigned on a group or "team" basis, a metaphor particularly powerful in this case given that two groups of young men, one of which contained several members of the Wayne State University football team, lined up against each other. The prosecutor repeatedly argued that guilt could be assigned to the entire "team" that stood with King and repeatedly analogized to the fact that every member of a team shares credit for a win or loss, even those who are just sitting on the bench.

In his opening statement the prosecutor said:

> You'll hear these groups kind of pair off facing each other. Words are exchanged. Some people try to do some peacemaking. But then you'll hear that *in the defendant*[*s'*] *group* a gun is produced. [Emphasis added.]

He continued with this theme by asserting that "all the shots that [were] fired that night were fired by *the defendants' group*." (Emphasis added.) Further, the notion of group liability was again emphasized in the context of the two groups being two opposing teams:

> [T]he evidence is going to show you that night they were acting as a team. Unfortunately far more effective than my Michigan Wolverines were last night . . . .
>
> They were together during the confrontation. . . . These groups pair off like rival time. Gun was displayed, not in Mr. Smith's team or anybody of that team but by this other side.

This line of argument was repeatedly emphasized during the prosecution's closing argument. In discussing the concept of aiding and abetting, the prosecutor said, "The Judge has talked to you about aiding and abetting. I'm not going to go over all the instructions with you, but *what I think you need to look at is this whole team* [*concept*] *that comes into play*." (Emphasis added.) He went on to say:

> [A] football team gets credit for [a] touchdown when the defense recovers the ball in the fumble, in the end zone. Even if we can't see who recovered the ball, may be a dispute between us and our friend as to exactly who got the ball. Everyone on the team from the start[er] to the bench warmer gets the same ring if that team wins the championship. Because every one of them in a larger or smaller way contributed to that championship. Like Bo Schlembecker [sic] said back in 1983, "everything is the team. The team."

Describing what happened after King punched Easterly, the prosecutor argued:

> Then [Easterly's] friends come to intervene. Mr. Blevins comes to Mr. King's aid with some other people. The gun is displayed. As the groups pair off, words are exchanged. Smith comes in trying to calm people down. I think Mr. Drummond said he was trying to kind of hold Mr. Ross back. Told you shots are fired at Mr. Smith's group. Mr. Smith is hit dead. Mr. Spearman is left wounded. The defendants flee.

> And even if there are some discrepancies of exactly who did what when, there is no doubt that they acted together to bring about this deadly mayhem. Teammates. They deserve the same credit for the crime.

The prosecutor's words did not merely suggest that the shooter and whoever handed him the gun were a team, but that they were members of a team made up of everyone who stood with them. He argued that the defendants "acted together *as part of* a deadly assaultive team." (Emphasis added.) And when noting the absence of self-defense, the prosecutor again referred to the "group" that committed the crime, stating that "[n]ot at issue is did *those people in the group that killed Mr. Smith* or wounded Mr. Spearman and shot at the others act in some kind of lawful self-defense[.]" (Emphasis added.)

A prosecutor's misstatement of law can necessitate reversal when it deprives the defendant of a fair trial. *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). The comments of the prosecutor would not have been improper in a case in which the primary actor was accompanied only by the individual charged with abetting him. In this case, however, there is a larger group that the prosecutor repeatedly refers to as a unit and suggests that they all "get[] equal credit." They were not mere bystanders in the sense that they just happened to be nearby when someone fired a gun. The evidence demonstrated that they chose to stand with King when the other group approached him. However, there was no evidence that any of them engaged in violence or urged King to do so. Only one member of their "team"—the one who handed the gun to King—took an action that aided King in committing his crime. The evidence of who handed the gun to King was highly contested; but there was no doubt that Blevins was part of King's "team" along with four or

five others. Juror doubts regarding the identification could easily have been tempered by the knowledge that even if they could not be sure that Blevins handed King the gun, they could be sure that he was a member of the "team" that shares the "credit." Under these circumstances, I cannot conclude that the standard instructions given by the trial court were sufficient to correct the plain error. Moreover, defense counsel should have carefully rebutted this argument and sought a curative instruction specifically to clarify that even if Blevins was part of the group that stood with King, he could only be convicted if the jury concluded that he provided or fired the weapon. He did neither. Indeed, in his closing argument defense counsel agreed with the prosecutor's statements when he stated:

> I don't know what to tell you about the team concept . . . .
>
> The team concept notion of aiding and abetting, all that's accurate.

Because the prosecutor's comments went to the heart of what constitutes criminal conduct, I would find that that the defense counsel's decision to agree with the prosecutor's statements rather than to object to them and seek a corrective instruction constituted ineffective assistance of counsel.

B. INVOKING SYMPATHY

The defense also argues that the prosecution's argument improperly invoked sympathy by repeatedly describing the victim as a "peacemaker." There was a factual basis for this description because, in the prosecutor's words, the victim had attempted to get everyone at the scene to "chill out." Reference to the facts is not improper, and in and of itself, it represented only a

brief, nonprejudicial reference to the victim's good character. However, in my view, the prosecutor's argument was improper because of the manner in which he addressed this fact.

The prosecutor's argument began with a three-page discourse comparing the victim to renowned peacemakers who had been assassinated. "A prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). "Nor may a prosecutor urge the jury to convict . . . on the basis of its prejudices." *Id*. In this case, the prosecutor compared the victim to Yitzhak Rabin and Anwar Sadat and discussed the Nobel Peace Prize several times. He spoke at length about the murder of Abraham Lincoln and how, as a result of the killing of that peacemaker, "[w]e suffered the consequence for over 100 years." He argued that "in our society peacemakers are considered people that deserve recognition." None of these observations had anything to do with the factual determination that the jury was to make. These statements were clearly intended to heighten emotions and sympathy and, in effect, to lower the prosecution's factual burden of proof. In my view, such comments cannot be cured by a trial judge's standard one-sentence instruction that the jury should not allow sympathy to enter into their decision.

There was no objection to this argument, however, and unlike the prosecutor's "team" references, I do not believe that allowing these comments rose to the level of "plain error," nor that the failure to object constituted ineffective assistance of counsel.

III. CONCLUSION

I would reverse and remand for a new trial because defense counsel provided ineffective representation on

the issue of eyewitness identification and by failing to object to the prosecution's closing argument based on "team" responsibility.

NEXTEER AUTOMOTIVE CORPORATION v
MANDO AMERICA CORPORATION

Docket No. 324463. Submitted February 5, 2016, at Lansing. Decided February 11, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 955.

Nexteer Automotive Corporation (Nexteer) filed suit in the Saginaw Circuit Court against Mando America Corporation (Mando) after a series of high-level employees resigned from Nexteer and began working for Mando, Nexteer's competitor. The case involved a number of individual defendants, third parties, and a counterclaim, but those parties and that claim are not involved in the instant appeal. During the five months before Nexteer filed its complaint, the parties considered a joint endeavor to sell steering products. Each party signed a nondisclosure agreement containing an arbitration provision for resolving any disputes. The parties stipulated a case-management order indicating that the arbitration agreement contained in the nondisclosure agreement was not applicable to the instant matter. Mando filed a motion for summary disposition on several grounds. The court, M. Randall Jurrens, J., granted the motion for several claims, but several claims remained. Mando filed a motion to compel arbitration on Nexteer's remaining claims. Nexteer opposed Mando's request for arbitration and contended that Mando had waived its right to arbitration when it agreed to the case-management order. The court concluded that Nexteer's claims were arbitrable. According to the court, Mando had not waived its right to arbitration because the specific language in the nondisclosure agreement indicated only that arbitration was "not applicable." The court further concluded that the presumption in favor of arbitration outweighed any prejudice Nexteer might suffer if Mando's motion to compel arbitration was granted. Nexteer appealed by leave granted.

The Court of Appeals *held*:

The trial court erred by ordering this dispute to arbitration because Mando expressly waived its right to arbitration when it affirmatively agreed that the arbitration clause in the parties' nondisclosure agreement was not applicable to the remaining disputes between the parties reflected in Nexteer's complaint. A

party waives a right when the party knowingly and intentionally relinquishes the right. Mando and Nexteer stipulated in a case-management order that the arbitration clause was not applicable to the dispute between the parties involving, among other things, Nexteer's allegations of tortious interference and breach of contract. The stipulation constituted an express waiver of the right to arbitration because the stipulation clearly indicated that Mando did not intend to pursue arbitration. It was not an implied waiver that required Nexteer to show that it would be prejudiced if the waiver were not upheld.

Reversed and remanded.

ARBITRATION — EXPRESS WAIVER OF RIGHT TO ARBITRATION — STIPULATION THAT ARBITRATION CLAUSE IS NOT APPLICABLE.

A party's affirmative declaration that an arbitration clause does not apply to a dispute constitutes an express waiver of that party's right to arbitration; waiver is the intentional relinquishment of a known right; in the case of an express waiver, a party need not show prejudice; in contrast, a party seeking to enforce an implied waiver must show that prejudice would result if the waiver were not upheld.

Foley & Lardner, LLP (by *John R. Trentacosta*, *John F. Birmingham*, and *Scott T. Seabolt*), for plaintiff.

Giarmarco, Mullins & Horton, PC (by *William H. Horton* and *Andrew T. Baran*), and *Cohen & Gresser, LLP* (by *Alexandra S. Wald* and *Mark Spatz*), for defendant.

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

O'CONNELL, P.J. Plaintiff Nexteer Automotive Corporation (Nexteer) appeals by leave granted the trial court's order compelling arbitration after the court concluded that Nexteer was not prejudiced by the request of defendant Mando America Corporation (Mando) to arbitrate after the parties had stipulated that an arbitration provision was "not applicable." We reverse and remand.

I. FACTUAL BACKGROUND

Nexteer and Mando are both steering system manufacturers. Nexteer and Mando are competitors, but between April 2013 and August 2013, the parties considered operating jointly to sell steering products. The parties each signed a nondisclosure agreement providing that, in the event of conflict, they would arbitrate the dispute in Switzerland. In August 2013, the parties stopped pursuing the joint operation agreement.

In September 2013, a series of Nexteer's high-level employees resigned and began working for Mando. Nexteer contended that the employees had acted in concert to divulge trade secrets to Mando. Each of the individual employees had previously signed employment agreements with Nexteer. The agreements prohibited the employees from disclosing any trade secrets and, for twelve months after ending their employment, from inducing any other employees to leave Nexteer for another business venture. The employment agreements did not contain arbitration provisions.

Nexteer filed its complaint on November 5, 2013. On November 25, 2013, the parties stipulated to a case management order. In pertinent part, the parties stipulated that "[a]n agreement to arbitrate this controversy . . . exists [but] is not applicable."

In December 2013, Mando moved for summary disposition on a variety of grounds. The trial court granted summary disposition to Mando on many of Nexteer's claims, but several claims remained. In May 2014, Mando filed a motion to compel arbitration on Nexteer's remaining claims.

Nexteer opposed Mando's demand to arbitrate, contending that Mando had waived its right to arbitration

when it stipulated to the case management order. At a hearing on the motion, the trial court summarized the conflict as follows: "Can you retract what may or may not be a waiver?" The court further framed the issue as a question whether a party is able to "unwaive" a waiver and "reassert a waived arbitration provision months into a litigation[.]"

Mando contended that even if it waived arbitration, Nexteer was not prejudiced by the request to arbitrate. Nexteer responded that it was prejudiced by the waste of time, money, and discovery. Stating that it was concerned about the effect of "affirmative acknowledgment that the arbitration clause does not apply" and the potential prejudice to Nexteer if Mando was permitted to demand arbitration, the trial court requested supplemental briefing.

Following supplemental briefing, the trial court concluded that Nexteer's claims were arbitrable. It determined that, while the parties had collectively and consciously agreed that the arbitration provision did not apply, Mando had not waived arbitration because the specific language of the order was that arbitration was "not applicable." It also concluded that any prejudice to Nexteer caused by Mando's late request for arbitration did not overcome the presumption in favor of arbitration.

II. STANDARDS OF REVIEW

This Court reviews de novo questions of law, including the existence and enforceability of an arbitration agreement. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). We also review de novo "whether the relevant circumstances establish a waiver of the right to arbitration . . . ." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d

526 (2001). "[W]e review for clear error the trial court's factual determinations regarding the applicable circumstances." *Id*. A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

III. ANALYSIS

Nexteer contends that the trial court erred because Mando's stipulation that the arbitration provision "was not applicable" was an express waiver that prevented Mando from later requesting to arbitrate Nexteer's claims, not an implied waiver that required a showing of prejudice. We agree.

Generally, courts disfavor the waiver of a contractual right to arbitration. *Madison Dist Pub Sch*, 247 Mich App at 588. However, a party may waive any contractual rights, including the right to arbitration. *Joba Constr Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986). A waiver of the right to arbitration may be express or implied. *Id*.; *Bielski v Wolverine Ins Co*, 379 Mich 280, 286; 150 NW2d 788 (1967).

A waiver is an intentional relinquishment or abandonment of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). An affirmative expression of assent constitutes a waiver. *Id*. at 378. In contrast, a failure to timely assert a right constitutes a forfeiture. *Id*. at 379.

"A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). To waive a right, the language of a stipulation

must show an intent to plainly relinquish that right. *Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964). However, the use of specific key words is not required to waive a right. See *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 463 n 16; 473 NW2d 249 (1991) (holding that the word "waiver" is not required to waive a right, even when a statute requires "clear and unmistakable" evidence of waiver).

In this case, in November 2013, Mando stipulated that the arbitration provision in the nondisclosure agreement between Nexteer and Mando did not apply to the parties' controversy. The language of the stipulation showed Mando's knowledge of an arbitration provision and a clear expression of intent not to pursue arbitration. We conclude that the trial court erred when it determined that Mando's statement was not an express waiver because the stipulation directly indicated an intent to not pursue arbitration, which was the same right that Mando sought to assert six months later.

Mando contends that in this case it did not know that it had a right to arbitration, so it could not have knowingly relinquished that right. It also contends that holding the parties to case management orders to which the parties agreed early in the proceedings leads to harsh results. These arguments are not persuasive.

Courts have long held parties to agreements they make, regardless of the harshness of the results. See, e.g., *Balogh v Supreme Forest Woodmen Circle*, 284 Mich 700, 707; 280 NW 83 (1938) ("The insured was an able lawyer, and had a large experience in insurance matters and must have understood and appreciated the legal consequences of his act. If he did not, although the result is harsh, we cannot rewrite his

contract so as to create a liability where none existed."). In this case, Mando was aware of the arbitration clause in the nondisclosure agreement, and it was aware of Nexteer's general allegations in its complaint. It had the ability to apply the language of the arbitration clause to the complaint in order to decide whether it should pursue arbitration. After stipulating that the arbitration provision did not apply, Mando may not now argue that the arbitration provision does in fact apply.

As an alternative ground for affirmance, Mando contends that even if it waived its right to arbitration, the trial court properly ordered arbitration because its demand to arbitrate did not prejudice Nexteer. We disagree. A party attempting to enforce an implied waiver must show prejudice:

> The party arguing there has been a waiver of this right bears a heavy burden of proof and must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts. [*Madison Dist Pub Sch*, 247 Mich App at 588 (quotation marks and citations omitted).]

However, where there is an express waiver, the party seeking to enforce the waiver need not show prejudice. See *Quality Prods*, 469 Mich at 378-379 (stating that discussion of implied waivers is unnecessary if an express waiver exists). An implied waiver requires a failure to timely assert a right to arbitrate coupled with an inconsistent course of conduct. That is not what happened in this case. Here, Mando expressed an explicit intent to not pursue arbitration. Because we conclude that Mando expressly waived its right to arbitration when it stipulated that the arbitration

provision did not apply, we do not reach issues of implied waiver and prejudice.

We reverse and remand. As the prevailing party, Nexteer may tax costs. MCR 7.219(A). We do not retain jurisdiction.

OWENS and BECKERING, JJ., concurred with O'CONNELL, P.J.

PEOPLE v MORRIS

Docket No. 323762. Submitted February 2, 2016, at Lansing. Decided February 11, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 855.

Jay B. Morris was convicted after a jury trial in the Calhoun Circuit Court of one count of resisting or obstructing a police officer, MCL 750.81d(1). Two police officers had been dispatched to a gas station in response to a report of a potentially suicidal man armed with a gun. Seeing defendant near the cash register, one officer approached him and determined that he did not have a gun in his hands. The officer grabbed defendant and placed his hands behind his back, then turned him over to the other officer. Concerned that defendant might have a gun in his clothing, they decided to handcuff him. Defendant stiffened and broke their grip. When a struggle ensued, the officers ordered defendant to the ground, and when he did not comply, they forced him down. Defendant also refused to put his arms behind his back, so the officers forced him into handcuffs. At trial, defendant testified that he had psychotic episodes, had been off his medication for six months before the incident, and had been drinking. According to defendant, when he heard that he was being placed in handcuffs, he asked why and told the officers that he just wanted help. He agreed that a struggle had occurred but testified that he had complied as much as possible. The court, Conrad J. Sindt, J., sentenced defendant to six months in jail. Defendant appealed, arguing that the statute was unconstitutional because it was both facially overbroad and void for vagueness and asserting that his conviction was against the great weight of the evidence.

The Court of Appeals *held*:

1. MCL 750.81d(1) provides that an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person the individual knows or has reason to know is performing his or her duties is guilty of a felony. Under MCL 750.81d(7)(b), the persons covered by the statute include police officers. MCL 750.81d(7)(a) defines "obstruct" as including the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

2. Defendant argued that MCL 750.81d(1) is facially overbroad because nothing in the statute limits how an individual can be said to have resisted, obstructed, or opposed a police officer, making it possible that asking simple questions of an officer, conduct that would typically be protected by the First Amendment and Const 1963, art 1, § 5, could be construed as criminal. A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that may legitimately be regulated. A defendant arguing that a statute regulates both speech and conduct must demonstrate that the overbreadth is both real and substantial, that is, that there is a realistic danger that the statute will significantly compromise the recognized First Amendment protections of parties not before the court. A statute will not be found to be facially overbroad if it has been or could be afforded a narrow and limiting construction by courts or if the unconstitutionally overbroad part of the statute can be severed. The first step in overbreadth analysis is to construe the challenged statute. MCL 750.81d was designed to protect from physical interference or force or the threat of physical interference or force various persons (such as police officers) lawfully engaged in conducting the duties of their occupations. To fall under MCL 750.81d(1), the defendant must assault, batter, wound, resist, obstruct, oppose, or endanger such an individual, actions that all share a common element of physical interference. The statute is not facially overbroad because a person cannot be arrested and convicted under the statute for only using constitutionally protected words in opposition to the actions of a police officer.

3. MCL 750.81d is not void for vagueness. Crimes must be defined with appropriate definiteness to avoid convicting persons for conduct that is constitutionally protected. The law must provide ascertainable standards of guilt. A statute may be challenged for vagueness on three grounds: (1) that it does not provide fair notice of the conduct proscribed, (2) that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and (3) that its coverage is overbroad and impinges on First Amendment freedoms. Defendant argued that MCL 750.81d was unconstitutional on the second basis. Because a statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words, however, defendant's argument failed. MCL 750.81d(1) generally prohibits the use or threatened use of physical interference or force in opposing a police officer from performing his or her lawful duties. While the

trial court did not specifically define the terms "resist" or "oppose" for the jury, a person of ordinary intelligence would not be forced to guess about their meanings but would know that an individual who used some form of force to prevent a police officer from performing an official and lawful duty had violated MCL 750.81d(1).

4. The jury's verdict was not against the great weight of the evidence. To convict a defendant under MCL 750.81d(1), the prosecution must prove (1) that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer and (2) that the defendant knew or had reason to know that the person assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties. The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Generally, a verdict is against the great weight of the evidence only if it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. The general rule is that conflicting testimony, or a question about the credibility of a witness, is not a sufficient ground for granting a new trial. Accordingly, a trial court may not grant a new trial on the ground that it disbelieves the testimony of witnesses for the prevailing party. Defendant argued (1) that the incident occurred in a short amount of time and that he never ran, (2) that he was intoxicated and seeking help, and (3) that he never assaulted the police officers. However, it was not necessary for the jury to find that defendant actually ran away from the officers or physically assaulted them. All that was necessary was to find that he took the requisite physical action to prevent a police officer from performing his lawful duties. Additionally, the duration of the resistance or the mental state of defendant at the time was of no import because resistance can occur in even the briefest of moments. The jury apparently found credible both the officers' testimony that defendant refused to comply with loud and clear commands and defendant's admission that he quite probably was uncooperative with the officers. The jury also presumably believed the officers' testimony that defendant tightened his body in response to their commands and pulled his arm away, which necessitated their grabbing him. Defendant himself stated that he and the officers were "tousling," which could reasonably have been understood to mean some level of physical struggling.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jessica Zimbleman*) for defendant.

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

MURRAY, J. Defendant was convicted after a jury trial of one count of resisting/obstructing a police officer, in violation of MCL 750.81d(1). Defendant was sentenced to six months in the county jail. In this appeal, defendant challenges the factual support for his conviction as well as the constitutionality of the statute. For the reasons expressed below, we affirm.

I. FACTUAL BACKGROUND

In the early morning hours of April 19, 2014, Battle Creek Police Officer Trevor Galbraith and Sergeant John Chrenenko were separately dispatched to a Battle Creek gas station in response to a report that a potentially suicidal man was at the gas station armed with a gun.[1] Galbraith arrived at the station first and, once inside, saw defendant near the cash register. Galbraith approached defendant with his gun drawn until he realized that defendant did not have a gun in his hands. Galbraith grabbed defendant and placed his hands behind his back. Defendant was then turned over to Chrenenko. At this point, both officers knew

[1] Defendant acknowledged at trial that he in fact had called the police department to inform the police that he was at the gas station, was suicidal, and had a gun.

that defendant did not have a gun in either hand, but in light of the initial call they remained concerned that he might still have a gun in his clothing. Chrenenko testified that for this reason he wanted to put defendant in handcuffs. Both officers testified that once outside the gas station's enclosed building, defendant stiffened up and broke their grip. A struggle ensued in which the officers commanded defendant to go to the ground, and when defendant did not comply, the officers forced him down. According to both officers, defendant also refused to comply with commands to put his arms behind his back, so they had to force him into handcuffs. Both officers also smelled alcohol on defendant, but Chrenenko did not believe defendant was too intoxicated. No weapon was found on defendant.

Defendant testified that he suffers from psychotic episodes, had been off his medication for six months prior to the night of the incident, and had been drinking. According to defendant, when he heard that he was being placed in handcuffs, he asked why and told the officers he just wanted help. Defendant agreed that a struggle ensued (which he described as "tousling"), but also stated that he complied as much as possible. He also claimed to have blacked out for parts of the encounter.

After hearing the evidence, the jury convicted defendant, and then defendant was sentenced, as outlined above. We now turn to the issues raised.

II. ANALYSIS

A. CONSTITUTIONALITY OF MCL 750.81d

Defendant contends that MCL 750.81d is unconstitutional as being both overbroad and vague. Defendant did not raise these constitutional challenges at any

point during the trial court proceedings, rendering the issues unpreserved. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). We therefore review these unpreserved issues for a plain error affecting substantial rights. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

In relevant part, MCL 750.81d reads as follows:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> * * *
>
> (7) As used in this section:
>
> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.
>
> (b) "Person" means any of the following:
>
> (*i*) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

Recognizing the stringent standards applicable when reviewing the constitutionality of a statute is critical to properly resolving these issues. We expressed those standards in *People v Vandenberg*, 307 Mich App 57, 62; 859 NW2d 229 (2014), which we apply with equal force to this case:

> When considering the constitutionality of a statute, we begin with the presumption that statutes are constitutional and we construe statutes consistent with this presumption unless their unconstitutionality is readily ap-

parent. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The party challenging a statute's constitutionality bears the burden of proving its invalidity. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010) [overruled in part on other grounds by *People v Jackson*, 498 Mich 246, 262 n 5; 869 NW2d 253 (2015)].

1. FACIALLY OVERBROAD CHALLENGE

Citing *People v Rapp*, 492 Mich 67; 821 NW2d 452 (2012), defendant argues that MCL 750.81d(1) is facially overbroad because nothing in the statute limits how an individual can be said to have "resisted," "obstructed," or "opposed" a police officer,[2] and so it is possible that asking simple questions of an officer could be construed as criminal.[3] And, of course, asking an officer "simple questions" is typically—though not always[4]—protected by the First Amendment to the

[2] We use the term "police officer" because police officers were involved in this case and fall within the definition of a "person" who is protected by the statute. MCL 750.81d(7)(b). But police officers are not the only officials falling within that definition.

[3] At issue in *Rapp* was a Michigan State University ordinance providing that " '[n]o person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University.' " *Rapp*, 492 Mich at 71 n 4. The ordinance was held to be facially overbroad because it did not specify the types of disruptions covered by the ordinance and, thus, allowed enforcement of "even *verbal* disruptions." *Id*. at 76. The Court went on to state that the verbal disruptions the statute prohibited were not limited to fighting words or obscene language. *Id*. Thus, because the statute could be understood as providing police with the " 'unfettered discretion to arrest individuals for *words* or *conduct* that annoy or offend them,' " it was facially unconstitutional. *Id*. at 79, quoting *Houston v Hill*, 482 US 451, 465; 107 S Ct 2502; 96 L Ed 2d 398 (1987).

[4] The Free Speech Clause prevents government restrictions on all speech "except for certain narrow categories deemed unworthy of full First Amendment protection—such as obscenity, 'fighting words,' and libel . . . ." *Eichenlaub v Indiana Twp*, 385 F3d 274, 282-283 (CA 3,

United States Constitution and Article 1, § 5 of the Michigan Constitution of 1963.

The test for reviewing a constitutional challenge to a statute on the basis that it is overbroad was set forth in *People v Gaines*, 306 Mich App 289, 320-321; 856 NW2d 222 (2014):

> A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that it may legitimately regulate. *People v McCumby*, 130 Mich App 710, 714; 344 NW2d 338 (1983). Under the overbreadth doctrine, a defendant may "challenge the constitutionality of a statute on the basis of the hypothetical application of the statute to third parties not before the court." *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). Defendant argues that the statute regulates both speech and conduct. Therefore, defendant must demonstrate that the overbreadth of the statute is both real and substantial—there is a " 'realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.' " *Id*. at 96, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). The statute will not be found to be facially invalid on overbreadth grounds, however, "where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed." *Rogers*, 249 Mich App at 96.

Thus, even if a criminal statute has a "legitimate application," and virtually all do, it is nevertheless unconstitutional if it stretches so far that it makes "unlawful a substantial amount of constitutionally

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2004), citing *R A V v St Paul*, 505 US 377, 382-390; 112 S Ct 2538; 120 L Ed 2d 305 (1992). Consequently, not *all* comments or questions to police are entitled to full constitutional protection. See, e.g., *People v Philabaun*, 461 Mich 255, 263; 602 NW2d 371 (1999).

protected conduct." *Houston v Hill*, 482 US 451, 459; 107 S Ct 2502; 96 L Ed 2d 398 (1987). In order to balance the competing interests of protecting free speech and "the free exchange of ideas" with the interest of upholding laws "directed at conduct so antisocial that it has been made criminal," a reviewing court is required to find "that a statute's overbreadth be *substantial*" in order to justify invalidation. *United States v Williams*, 553 US 285, 292; 128 S Ct 1830; 170 L Ed 2d 650 (2008). See also *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 494; 102 S Ct 1186; 71 L Ed 2d 362 (1982).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 533 US at 293. Not surprisingly, in interpreting a statute we are first and foremost guided by the words of the statute itself. *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006). We must also keep in mind the context within which the words are found, *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001) (opinion by MARKMAN, J.), such as the Legislature placing the statute within Chapter XI of the Michigan Penal Code, MCL 750.81 *et seq*., which compiles the listed crimes under the heading "Assaults."

For several reasons we conclude that the terms of the statute are clear and have a narrow application that does not run afoul of the state or federal Constitutions. First, this Court has determined that "the unambiguous language of [MCL 750.81d(1)] . . . shows that the Legislature intended that the statute encompass all the duties of a police officer as long as the officer is acting in the performance of those duties." *People v Corr*, 287 Mich App 499, 505; 788 NW2d 860

(2010). So, to fall under the statute, the individual must assault, batter, wound, resist, obstruct, oppose, or endanger an officer who is performing his duties. Second, the terms challenged by defendant are clear and well defined. Indeed, in *Vasquez*, 465 Mich at 89-91 (opinion by MARKMAN, J.), a plurality of the Court defined among others the terms "resist," "oppose," "assault," and "wound" under another resisting/obstructing statute, MCL 750.479:

> In the present case, the statute uses the word "obstruct" as part of a list containing five other words, namely, "resist, oppose, assault, beat [and] wound." The meaning of the word "obstruct" should be determined in this particular context, and be given a meaning logically related to the five surrounding words of the statute. "Resist" is defined as "to withstand, strive against, or oppose." *Random House Webster's College Dictionary* (1991) at 1146. "Resistance" is additionally defined as "the opposition offered by one thing, force, etc." *Id*. "Oppose" is defined as "to act against or furnish resistance to; combat." *Id*. at 949. "Assault" is defined as "a sudden violent attack; onslaught." *Id*. at 82. "Beat" is defined as "to strike forcefully and repeatedly; . . . to hit repeatedly as to cause painful injury." *Id*. at 120. "Wound" is defined as "to inflict a wound upon; injure; hurt." *Id*. at 1537. Each of these words, when read together, clearly implies an element of threatened or actual *physical* interference.

The *Vasquez* plurality struggled to define the term "obstruct," as several possible definitions potentially fit in the context of the statute's subject matter. *Vasquez*, 465 Mich at 90-91 (opinion by MARKMAN, J.).[5] But a year after *Vasquez*, the Legislature defined the term "obstruct" to mean "the use or threatened use of

[5] In the end, both the lead opinion and the separate opinion of Justice KELLY agreed that "obstruct" required some element of physical interference or the threat of physical interference. See *Vasquez*, 465 Mich at 90 (opinion by MARKMAN, J.); *id*. at 115 (opinion by KELLY, J.).

physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a), as added by 2002 PA 266.[6]

We see no reason to provide definitions different from those articulated by the *Vasquez* plurality. For one, the aforementioned terms are the same as those employed in MCL 750.81d, and thus are used in the same context of resisting and obstructing. Additionally, we often engage in the presumption that the Legislature is aware of definitions given to terms by the judiciary, and that the reenactment of those same terms in the same context without providing any definitions is an acceptance of the meaning provided by the courts. See, e.g., *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 347; 871 NW2d 136 (2015), and *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994) ("[W]hen the Legislature codifies a judicially defined requirement without defining it itself, a logical conclusion is that the Legislature intended to adopt the judiciary's interpretation of that requirement."). Here, the Legislature enacted MCL 750.81d the year after *Vasquez* was decided, and only provided a definition for "obstruct," the term the *Vasquez* Court had struggled to define, and left undefined the other terms defined by the

[6] As recognized by the United States Court of Appeals for the Sixth Circuit, albeit in a different context, in 2002 the Legislature enacted MCL 750.81d in apparent response to *Vasquez*. *United States v Mosley*, 575 F3d 603, 606 (CA 6, 2009). The definition of "obstruct" provided in MCL 750.81d(7)(a) in part includes a "knowing failure to comply" component, which the *Mosley* court said was not a "crime of violence" for purposes of federal sentencing. *Id*. at 607. But for our purposes, it is enough to say that obstructing an officer through a "knowing failure to comply with a lawful command" requires some physical refusal to comply with a command, as opposed to a mere verbal statement of disagreement. See, e.g., *People v Chapo*, 283 Mich App 360, 367-368; 770 NW2d 68 (2009).

Court. We therefore conclude that the Legislature approved the Court's definitions when employing their use in this later statute, and we adopt those as controlling under MCL 750.81d.

The terms "batter" and "endanger" are not defined in the statute, nor were they defined by the *Vasquez* Court, so we must consult a dictionary or similar source to give the terms their plain and ordinary meaning. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). "A battery is the wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). See also M Crim JI 17.2(2). The transitive verb "endanger" means "to bring into danger or peril[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Any interpretation of the meaning of these two terms must also be mindful both of where they have been placed in the statutory scheme (i.e., Chapter XI of the Michigan Penal Code, which contains assaultive crimes) and that the Legislature listed them in a group of words that includes "assaults," "wounds," and "obstructs," each of which contains an element of physical action. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003) (" 'It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.' ") (citation omitted); *Vasquez*, 465 Mich at 89 (opinion by MARKMAN, J.) (" 'Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: "[i]t is known from its associates," see Black's Law Dictionary (6th ed), at 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting.' '[I]n seeking meaning, words

and clauses will not be divorced from those which precede and those which follow.' ") (citations omitted) (alterations in original).

In light of these definitions and the context in which the words are used, we conclude that MCL 750.81d is designed to protect persons in the identified occupations, MCL 750.81d(7)(b), who are lawfully engaged in conducting the duties of their occupations, from physical interference or the threat of physical interference. As we have noted, the *Vasquez* Court came to the same conclusion when addressing the meaning of many of these same terms under a similar statute, MCL 750.479, and held that the six words together revealed a legislative intention "to proscribe both violent and nonviolent physical interference; physical interference being the only element common to all six words." *Id*. at 91 (opinion by MARKMAN, J.). See also *People v Baker*, 127 Mich App 297, 299-300; 338 NW2d 391 (1983) (noting that "[t]he purpose of the resisting arrest statute [MCL 750.479] is to protect police officers from physical violence and harm").

The same holds true with MCL 750.81d. The listed terms all have the common element of physical interference, and the meaning of the additional terms contained in MCL 750.81d that were not in MCL 750.479 ("endanger" and "batter") only reinforce that conclusion. Accordingly, because we must test the statute according to the construction provided by the courts, see *Gaines*, 306 Mich App at 321, we hold that the statute is not facially overbroad because state actors cannot under this statute arrest and convict persons for *only* utilizing constitutionally protected words in opposition to the actions of, for example, a police officer. See *Bourgeois v Strawn*, 501 F Supp 2d 978, 988 (ED Mich, 2007) ("Merely to voice one's

objection to an officer's belief as to who is the guilty party does not amount to a proscribed act under [MCL 750.81d] . . . ."). Properly construed, MCL 750.81d is not constitutionally overbroad.

2. VOID FOR VAGUENESS CHALLENGE

In order to avoid convicting persons for conduct that is constitutionally protected, "crimes must be defined with appropriate definiteness." *Pierce v United States*, 314 US 306, 311; 62 S Ct 237; 86 L Ed 226 (1941). The law must provide "ascertainable standards of guilt" because "[m]en of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v New York*, 333 US 507, 515; 68 S Ct 665; 92 L Ed 840 (1948). In *People v Tombs*, 260 Mich App 201, 218; 679 NW2d 77 (2003), we stated that

> [a] statute may be challenged for vagueness on three grounds: (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; (3) its coverage is overbroad and impinges on First Amendment freedoms.

Defendant's argument is targeted at the second challenge, i.e., that the statute as applied to him gave the trier of fact unstructured and unlimited discretion to determine whether he had committed an offense. Because " '[a] statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words,' " *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000), defendant's argument fails.[7] (Citation omitted.)

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[7] Our Court previously considered a void for vagueness challenge to MCL 750.81d, but to a different part of the statute. In *People v Nichols*,

As stated, MCL 750.81d(1) generally prohibits the use of, or threat to use, physical interference or force in opposing an officer from performing his or her lawful duties. While it is true that the trial court did not specifically define the terms "resist" or "oppose" for the jury, a person of ordinary intelligence would not be forced to guess about their meaning. As described above, resorting to the dictionary or Supreme Court decisions makes clear the meaning of these common and straightforward words. Thus, a person of ordinary intelligence would know that an individual using some form of force to prevent a police officer from performing an official and lawful duty is in violation of MCL 750.81d(1).[8] And, as discussed below, there was ample evidence supporting the jury's determination that defendant acted contrary to the statute.

B. GREAT WEIGHT OF THE EVIDENCE

Defendant also raises an unpreserved challenge to the verdict based on a great-weight-of-the-evidence challenge. To convict a defendant under MCL 750.81d(1), the prosecution must prove: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the

262 Mich App 408, 413-415; 686 NW2d 502 (2004), we held that the phrase "knows or has reason to know" in MCL 750.81d(1) was "fairly ascertainable by persons of ordinary intelligence and may be easily applied in the context of resisting arrest under" the statute.

[8] Although the trial court did not specifically state that all 12 jurors had to be in agreement on which officer defendant resisted, obstructed, or opposed, the trial court did instruct the jurors that it was a necessary element that defendant knew the person he was resisting, obstructing, or opposing was a police officer. The jury's guilty verdict shows that regardless of which officer each member of the jury had in mind, all 12 jurors determined that defendant had knowledge he was resisting or obstructing a police officer.

person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *Corr*, 287 Mich App at 503.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Generally, a verdict is against the great weight of the evidence only when "it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id*. The general rule is that in most cases, " ' "conflicting testimony or a question as to the credibility of a witness is not sufficient grounds for granting a new trial." ' " *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998), quoting *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992) (citation omitted). And, as a result of that rule, a trial court may not grant a new trial on the ground that it disbelieves the testimony of witnesses for the prevailing party. *Lemmon*, 456 Mich at 636.

In support of his contention that the verdict was against the great weight of the evidence, defendant emphasizes that (1) the incident occurred in a short amount of time and that he never ran, (2) he was intoxicated and seeking help, and (3) he never assaulted the police officers. However, to convict defendant it was not necessary for the jury to find that defendant actually ran away from the officers or physically assaulted them. All that was necessary was to find that he was taking the requisite physical action to prevent a police officer from performing his lawful duties. Additionally, the duration of the resistance or

the mental state of defendant at the time is of no import, as resistance can occur in even the briefest of moments, and the statute does not require that defendant be found to be free of any mitigating motivation.[9]

The jury apparently found credible both the officer's testimony that defendant refused to comply with loud and clear commands and defendant's admission that he quite probably was uncooperative with the officers. The jury also presumably believed the officers when they testified that, in response to their commands, defendant tightened his body. Galbraith also testified that defendant "pull[ed] his arm away, at which time we both ha[d] to grab him." Defendant himself stated that he and the officers were "tousling," which can be reasonably understood to mean some level of physical struggling. And at no point before the trial court or on appeal has defendant made any argument that the police officers were not lawfully engaged in the exercise of their official duties or that he did not know or have reason to know that they were police officers. In light of all this evidence, it cannot be said that the jury's verdict was against the great weight of the evidence.

Affirmed.

BOONSTRA, P.J., and K. F. KELLY, J., concurred with MURRAY, J.

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[9] Defendant also points to his testimony that he complied as much as possible and that any noncompliance was accredited to intoxication, general confusion, and blackouts related to a psychotic episode. Such arguments are merely assertions that defendant's version of events should have been believed over the version of events described by the police officers. A reviewing court may not grant a new trial on the grounds that it disbelieves the testimony of witnesses for the prevailing party. *Lemmon*, 456 Mich at 636.

PEOPLE v BOOKER

Docket No. 329055. Submitted January 13, 2016, at Detroit. Decided February 18, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 857.

Rahim D. Booker was charged with one count of possessing a firearm while under the influence of alcohol. Defendant moved to suppress the results of a preliminary breath test (PBT) conducted at the time of defendant's arrest. He contended that the language in the statute prohibiting a person from possessing a firearm while under the influence of alcohol, MCL 750.237, indicated that the collection and testing methods involving a PBT must comply with the methods of collection and testing outlined in the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*. Because MCL 750.237 referred to the MVC, defendant argued that the admissibility of his PBT results was also bound by the limitations on admissibility contained in MCL 257.43a. That is, a PBT ought only be admissible under the three circumstances listed there and not to establish defendant's intoxication. The 47th Judicial District Court, Marla E. Parker, J., granted defendant's motion to suppress the results of the PBT conducted at the time of defendant's arrest. The prosecution appealed the district court's decision in the Oakland Circuit Court. The circuit court, Rae Lee Chabot, J., affirmed the district court's suppression of defendant's PBT results. The prosecution appealed.

The Court of Appeals *held*:

The lower courts erred by suppressing the results of defendant's PBT. MCL 750.237(8) requires that the collection and testing of breath, blood, and urine specimens must comply with the MVC. The language used in MCL 257.625a regarding collection and testing does not limit the admissibility of PBT results in all cases. PBT results are admissible against a defendant in cases other than drunk driving. In this case, defendant was charged with possessing a firearm while under the influence of alcohol, a crime that is not a drunk-driving offense and in which the results of defendant's PBT were admissible.

Reversed and remanded.

FIREARMS — POSSESSION WHILE UNDER THE INFLUENCE OF ALCOHOL — ADMISSIBILITY OF PRELIMINARY BREATH TEST (PBT) RESULTS.

A defendant's PBT results are admissible against him or her in cases involving offenses other than drunk driving.

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.

The Goldman Law Firm, PLC (by *Jeffrey H. Goldman*), for defendant.

Before: STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] an order of the Oakland Circuit Court affirming the 47th District Court's order suppressing the results of defendant's preliminary breath test (PBT). Defendant had been charged with one count of possession of a firearm while under the influence of alcohol, MCL 750.237. We reverse and remand.

On October 31, 2014, members of the Farmington Hills Police Department were dispatched to an apartment complex to investigate a robbery. While the officers were searching the parking lot of the complex for the suspect, they observed two individuals, defendant and an unidentified woman, seated in the backseat of a vehicle. When the officers asked defendant and the woman to exit the vehicle, they observed multiple alcoholic beverages in the vehicle. Defendant advised that he had a concealed pistol license and

[1] *People v Booker*, unpublished order of the Court of Appeals, entered October 16, 2015 (Docket No. 329055).

directed officers to a firearm located in the pocket on the back of the driver's seat.

The officers subsequently administered a PBT to defendant. The results of the test showed 0.15 grams of alcohol per 210 liters of breath. Shortly thereafter, the officers received a call regarding the robbery they were investigating and had to leave the scene. Before they left, the officers confiscated defendant's weapon. Defendant was informed of the charge against him when he went to the police station to retrieve his weapon.

Defendant filed a motion in the district court to suppress the results of his PBT. Defendant argued that the results of the test were inadmissible as proof of his intoxication at the time he possessed his firearm. Defendant reasoned that because MCL 750.237 requires PBTs to be administered in the manner set forth in the Michigan Vehicle Code, the vehicle code's rule prohibiting the admission of PBT results as proof of a defendant's intoxication must apply to MCL 750.237. The prosecution argued that MCL 750.237 only refers to the collection and testing methods set forth in the vehicle code, not the code's admissibility requirements. The district court agreed with defendant and granted his motion to suppress the results of the PBT, reasoning that if the Legislature had wanted to create a different admissibility standard for PBTs in cases of possession of a firearm while under the influence of alcohol (MCL 750.237), it would have expressly done so. The prosecution then appealed in the Oakland Circuit Court. The circuit court agreed with the district court and affirmed its ruling, reasoning that the rules regarding collection and administration of PBTs would be rendered nugatory if the results were only admissible for one class of crimes and not others. This Court then

granted plaintiff leave to appeal the circuit court's order affirming the ruling of the district court.

The prosecution's sole contention on appeal is that the plain language of MCL 750.237 only restricts the collection and testing of breath specimens to the manner found in the vehicle code but does not impose the same limitations on the admissibility of PBTs. We agree.

" 'Questions of law relevant to a motion to suppress evidence are reviewed de novo.' Similarly, . . . statutory construction involves questions of law that are also reviewed de novo." *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007) (citation omitted).

Defendant was charged under MCL 750.237(1), which criminalizes the possession of a firearm while under the influence of alcohol. Under the statute, "[a] peace officer who has probable cause to believe an individual violated [MCL 750.237(1)] may require the individual to submit to a chemical analysis of his or her breath, blood, or urine." MCL 750.237(5). "The collection and testing of breath, blood, or urine specimens . . . shall be conducted in the same manner that breath, blood, or urine specimens are collected and tested for alcohol- and controlled-substance-related driving violations under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923." MCL 750.237(8). The Michigan Vehicle Code recognizes a PBT as a proper form of chemical analysis of an individual's breath. MCL 257.43a(a) defines a "[p]reliminary chemical breath analysis" as the "on-site taking of a preliminary breath test from the breath of a person for the purpose of detecting the presence of . . . [a]lcoholic liquor."

Defendant, as well as the district and circuit courts, believes that the admissibility requirements set forth for PBTs in the Michigan Vehicle Code also apply to

MCL 750.237. MCL 257.625a(2)(b) states the admissibility requirements for PBTs as follows:

> (b) The results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:
>
> (*i*) To assist the court or hearing officer in determining a challenge to the validity of an arrest . . . .
>
> (*ii*) As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered under subsection (6).
>
> (*iii*) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered under subsection (6).

Therefore, under the Michigan Vehicle Code, the results of a PBT are only admissible to challenge the validity of an arrest or to rebut testimony regarding a defendant's breath alcohol content at the time of the offense.

However, as the prosecution points out, MCL 750.237(8) only states that the "collection and testing" methods are to be adopted from the Michigan Vehicle Code; the statute does not speak to the admissibility of the tests taken. More significantly, MCL 257.625a(2)(b) specifically states that its admissibility rules only apply to criminal prosecutions for those crimes enumerated in MCL 257.625c(1) or in an administrative hearing for specified purposes. These enumerated crimes consist solely of drunk driving offenses and do not include possession of a firearm while under the influence of alcohol.

This Court recognized as much in *People v Tracy*, 186 Mich App 171; 463 NW2d 457 (1990). In *Tracy*, the Court analyzed whether the results of a PBT are sufficient to establish probable cause in an affidavit for a search warrant. *Id*. at 174. The Court recognized the admissibility limitations in regard to PBTs; however, it noted that these limitations only apply "in specified proceedings." *Id*. at 176. The Court noted that "[t]he statute does not, for example, limit the use of PBT results in civil proceedings or in criminal proceedings in which the charge is not a drunk driving offense." *Id*. The circuit court was correct that this Court deemed PBTs to be "comparatively unreliable," but the Court was clear that despite any potential unreliability as compared to breath, blood, and urine tests, PBTs are admissible in cases involving offenses other than drunk driving. *Id*. at 179. Therefore, the circuit court erred by affirming the district court's order granting defendant's motion to suppress the results of his PBT.

Reversed and remanded to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ., concurred.

PEOPLE v JOHNSON

Docket No. 324768. Submitted February 5, 2016, at Lansing. Decided February 18, 2016, at 9:05 a.m.

Defendant pleaded no contest in the Grand Traverse Circuit Court to assault with the intent to commit criminal sexual conduct involving sexual penetration. The court, Philip E. Rodgers, J., sentenced defendant to 17 months to 10 years of imprisonment and ordered him to pay various costs, including a fine of $200. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

The trial court erred by imposing on defendant a $200 fine because neither of the applicable statutes, MCL 750.520g(1) and MCL 769.1k(1)(b)(*i*), authorized the court to order the fine.

Vacated in part and remanded.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Robert Cooney*, Prosecuting Attorney, and *Noelle R. Moeggenberg*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus*) for defendant.

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

PER CURIAM. Defendant Marion Johnson pleaded no contest to assault with the intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1). The trial court sentenced defendant to serve 17 months to 10 years in prison. He was also ordered to pay various costs, including a $200 fine,

which is the subject of this appeal.[1] Defendant appeals by delayed leave granted.[2] We vacate the portion of the judgment of sentence imposing the fine and remand for correction of the judgment of sentence.

Defendant argues that the trial court erred by imposing the $200 fine. MCL 769.1k(1)(b)(*i*) authorizes the trial court to impose "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty."[3] Defendant pleaded no contest to a violation of MCL 750.520g(1); that statute does not authorize the trial court to impose a fine.[4] The prosecution concedes, and we agree, that the imposition of the fine was erroneous. Because the trial court's imposition of a $200 fine violated MCL 769.1k(1)(b)(*i*), we vacate the portion of the judgment of sentence imposing a fine, and we remand this matter for correction of the judgment of sentence to reflect this change.

Vacated in part and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

O'CONNELL, P.J., and OWENS and BECKERING, JJ., concurred.

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[1] Defendant had appealed the trial court's upward departure from the sentencing guidelines, but he has since withdrawn that issue.

[2] *People v Johnson*, unpublished order of the Court of Appeals, entered March 27, 2015 (Docket No. 324768).

[3] MCL 769.1k was amended after defendant's sentencing in this case; however, this Court has already determined that the amended statute applies retroactively to judgments on appeal at the time of the Court's decision in *People v Konopka (On Remand)*, 309 Mich App 345, 357; 869 NW2d 651 (2015).

[4] As noted in *People v Cunningham*, 496 Mich 145, 149-151, 154-158; 852 NW2d 118 (2014), which interpreted the former version of MCL 769.1k dealing with court costs, a court may only impose certain financial obligations at the time of sentencing or at other times authorized by statute.

HAKSLUOTO v MT CLEMENS REGIONAL MEDICAL CENTER

Docket No. 323987. Submitted February 3, 2016, at Detroit. Decided February 18, 2016, at 9:10 a.m. Leave to appeal granted 500 Mich 892.

Jeffrey and Carol Haksluoto filed a medical malpractice claim in the Macomb Circuit Court against Mt. Clemens Regional Medical Center, General Radiology Associates, P.C., and Dr. Eli Shapiro for injuries Jeffrey sustained after he was misdiagnosed in Mt. Clemens's emergency room. Jeffrey's claim arose on December 26, 2011. Plaintiffs filed a Notice of Intent (NOI) on December 26, 2013, the last day of the two-year statutory period of limitations, and they filed their complaint on June 27, 2014. Defendants moved for summary disposition under MCR 2.116(C)(7), claiming that plaintiffs' complaint was barred by the applicable two-year statute of limitations. The court, Peter J. Maceroni, J., denied defendants' motion. Defendants filed this interlocutory appeal.

The Court of Appeals *held*:

The trial court erred by denying defendants' motion for summary disposition. Plaintiffs did not file their complaint until after the statutory period of limitations had expired. Plaintiffs filed their complaint 183 days after they filed their NOI. However, the 183rd day was not a day tolled by filing the NOI because plaintiffs filed the NOI on the last day of the statutory period of limitations. According to plaintiffs, because the running of the statutory period of limitations was tolled at the time the NOI was filed, filing the NOI on the last remaining day of the period of limitations preserved that single day of the limitations period so that a complaint filed on the 183d day after the NOI would be considered timely. However, counting days for a period of time that is measured in days begins on the day following the date of filing. Therefore, the period of limitations expired on the day before the notice period began. There were no days remaining in the two-year statutory period of limitations to add to the end of the notice period. Accordingly, plaintiffs' complaint was untimely, the trial court had to be reversed, and the case had to be remanded for entry of an order granting defendants' motion for summary disposition under MCR 2.116(C)(7).

Reversed and remanded.

MEDICAL MALPRACTICE — STATUTE OF LIMITATIONS — NOTICE OF INTENT (NOI) AND COMPLAINT.

A plaintiff who files an NOI on the last day of the two-year statutory period of limitations for medical malpractice cases is unable to file a timely complaint because the 182-day notice period begins on the day following expiration of the period of limitations; there being no days remaining in the statutory period of limitations at the time the NOI is filed, no tolling of the limitations period occurs.

Hertz Schram PC (by *Steve J. Weiss*, *Steven P. Jenkins*, and *Daniel W. Rucker*) for plaintiffs.

Giarmarco, Mullins & Horton, PC (by *LeRoy H. Wulfmeier, III*, *Jared M. Trust*, and *Christopher J. Ryan*), for defendants.

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM. Defendants, Mt. Clemens Regional Medical Center a/k/a McLaren Macomb, General Radiology Associates, P.C., and Eli Shapiro, D.O., appeal by leave granted the trial court order denying their motion for summary disposition under MCR 2.116(C)(7) (statute of limitations). We reverse and remand for entry of an order granting summary disposition in favor of defendants.

I. FACTUAL BACKGROUND

The substantive facts of plaintiffs' medical malpractice claim are not significant to the issue raised by defendants on appeal. Briefly stated, however, plaintiff Jeffrey Haksluoto presented at defendant Mt. Clemens Regional Medical Center's emergency room on December 26, 2011, complaining of abdominal pain, nausea, vomiting, and diarrhea. Jeffrey was given a CT scan, which was interpreted by defendant Eli Shapiro, D.O. Plaintiffs allege that Dr. Shapiro misinterpreted the CT scan and failed to recognize the severity of Jeffrey's

condition. When Jeffrey returned to the emergency room on January 6, 2012, his condition was correctly diagnosed, and emergency surgery was performed. Plaintiffs allege that Jeffrey sustained ongoing injuries from the delay in receiving the correct diagnosis and appropriate treatment. Plaintiff Carol Haksluoto brought a claim for loss of consortium.

On December 26, 2013, pursuant to MCL 600.2912b, plaintiffs served defendants with a notice of intent (NOI) to file a medical malpractice claim. Plaintiffs subsequently filed their complaint on June 27, 2014. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7),[1] arguing that plaintiffs' complaint was untimely because it was filed after the statutory period of limitations had expired. According to defendants, because the NOI was served exactly two years after plaintiffs' claim accrued, zero days remained in the two-year period of limitations after the NOI's 182-day period had run. Thus, defendants contended that plaintiffs were required to file the complaint no later than June 26, 2014, which was the 182d day after the NOI was served, because otherwise the statutory period of limitations would have expired the day after the 182-day tolling period expired.

Plaintiffs argued in response that the complaint was timely filed because MCL 600.5856 provides that the period of limitations was tolled "at the time" the NOI was mailed. Consequently, plaintiffs asserted that the statutory period of limitations was immediately tolled on December 26, 2013, the date on which the NOI was mailed, so that the final day of the limitations period still remained available to file a complaint following

[1] Defendants also moved for summary disposition under Subrules (C)(8) (failure to state claim on which relief could be granted) and (C)(10) (no genuine issue of material fact), neither of which is relevant to this appeal.

the expiration of the 182-day notice period. In other words, the day on which plaintiffs mailed the NOI was not counted for purposes of computing the expiration of the two-year limitations period, meaning that one day remained for plaintiffs to file the complaint after the 182-day tolling period ended. The trial court ruled:

> The [c]ourt finds that when read as a whole, MCL 600.5856(c) provides that the statute of limitations is tolled immediately "at the time notice is given" and remains tolled for 182 days beginning "after the date notice is given." MCL 600.5856(c). In other words, although tolling of the statute of limitations occurs the moment the Notice of Intent is served, neither the final provision of MCL 600.5856(c) [n]or MCR 1.108(1) counts the first of the 182 days until the next full day is complete. This interpretation does not transform the 182-day notice period to 183 days. Rather, this interpretation preserves MCL 600.5856(c)'s mandate that the statute of limitations be tolled "at the time notice is given," and reconciles this provision with the second portion of the statute and MCR 1.108(1).
>
> In this case, plaintiffs mailed their Notice of Intent on December 26, 2013, the last date of the two year statute of limitations. The statute of limitations was immediately tolled, and that final day of the limitations period still remained available to file a complaint after the 182-day notice period expired. The 182-notice [sic] period on December 27, 2013. MCL 600.5856(c); MCR 1.108(1). When the notice period expired on June 26, 2014, the period of limitations resumed running. Therefore, plaintiffs properly filed their complaint on June 27, 2014, the last day remaining under the statute of limitations following the 182-day tolling period. Accordingly, defendants' motion for summary disposition is properly denied.

We subsequently granted defendants' interlocutory application for leave to appeal the order denying their summary disposition motion.[2]

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[2] *Haksluoto v Mt Clemens Regional Med Ctr*, unpublished order of the Court of Appeals, entered December 3, 2014 (Docket No. 323987).

II. STANDARD OF REVIEW

"Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence." *Id*. "If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine." *Id*. at 523.

In this case, the relevant facts are not in dispute and resolution of the issue presented depends on the correct application of statutes and court rules governing the filing of medical malpractice actions. The interpretation and application of statutes and court rules present questions of law, which we review de novo. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

III. DISCUSSION

The issue on appeal is whether a medical malpractice complaint filed 183 days after the date on which the NOI was served, and after the two-year period of limitations has expired, is timely. We agree with defendants that plaintiffs' complaint was untimely, but for reasons other than those asserted by defendants.

A. PRINCIPLES OF STATUTORY INTERPRETATION

This issue involves the interplay between MCL 600.2912b, which governs service of the NOI and the subsequent notice period, and MCL 600.5856, which

governs the tolling of the limitations period for medical malpractice actions during the statutory notice period. "Our function in construing statutory language is to effectuate the Legislature's intent." *Velez v Tuma*, 492 Mich 1, 16; 821 NW2d 432 (2012). If the statutory language is plain and clear, it must be enforced as written. *Id*. at 16-17. MCR 1.108 (computation of time) is also relevant to this analysis. Court rules are interpreted using the same principles that govern statutory interpretation. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

B. ANALYSIS

The limitations period for a medical malpractice action is generally two years. MCL 600.5805(6); *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 79; 869 NW2d 213 (2015). However, medical malpractice actions also are subject to procedures governing the service of a plaintiff's NOI to file the action. MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.[3]

The two-year statutory limitations period is tolled after service of the NOI if the following conditions are met:

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[3] MCL 600.2912b(7) addresses a prospective defendant's written response to an NOI. If the prospective defendant does not provide a response within 154 days of receiving the NOI, the plaintiff may commence the action after the 154-day period has expired. MCL 600.2912b(8).

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled no longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [MCL 600.5856(c).][4]

MCR 1.108 provides specific rules for computing time periods set forth in statutes, court rules, and court orders. It provides, in pertinent part:

> In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:
>
> (1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.
>
> * * *

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[4] Before its amendment in 2004, MCL 600.5856 provided, in relevant part:

> The statutes of limitations and repose are tolled:
>
> * * *
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

> (3) If a period is measured by months or years, the last day of the period is the same day of the month as the day on which the period began. If what would otherwise be the final month does not include that day, the last day of the period is the last day of that month. For example, "2 months" after January 31 is March 31, and "3 months" after January 31 is April 30.

Here, the parties agree that plaintiffs' claim accrued on December 26, 2011. Thus, it is undisputed that, absent tolling, the two-year limitations period applicable to plaintiffs' malpractice claim expired on December 26, 2013, the day on which plaintiffs served the NOI. MCR 1.108(3); MCL 600.5805(6); MCL 600.5827. Cf. *Dunlap v Sheffield*, 442 Mich 195, 198-200; 500 NW2d 739 (1993).

Under these facts, defendants argue that plaintiffs should have filed their complaint on June 26, 2014—which was the 182d day of the notice period—because there were zero days remaining in the limitations period when plaintiffs served the NOI, and as a result, zero days remaining in the limitations period after the 182-day notice period expired. Thus, defendants assert, the statute of limitations expires, at the most, 2 years and 182 days after the date of accrual. Plaintiffs argue that their complaint would have been premature if it had been filed on the 182d day, and thus the statute of limitations should expire on the day after the 182d day of the statutory tolling period, i.e., June 27, 2014.

Both parties argue that resolution of this dispute requires the examination of two questions: (1) whether an NOI served on the last day of the statutory limitations period tolls the limitations period until the 182d or 183d day after the NOI is served, and (2) whether a medical malpractice plaintiff may, in fact, file the complaint on the 182d day of the tolling period.

However, we find that consideration of the second question is not necessary here because, based on the interplay of the relevant statutes and court rules, plaintiffs' service of the NOI was ineffective to toll the statutory period of limitations in light of the language of MCL 600.5856(c).

The parties agree, as do we, that the time at which the 182-day notice period begins is the calendar day after the NOI is filed for the purpose of calculating the expiration of that period and, consequently, the tolling and expiration of the statutory limitations period for purposes of MCL 600.2912b(1). Applying to this case the language of MCR 1.108(1) that "[t]he day of the act, event, or default after which the designated period of time begins to run is not included" in computing a period of time demarcated by days, the 182-day notice period began on December 27, 2013—the day *after* plaintiffs served the NOI on December 26, 2013—and expired on June 26, 2014.

This date is significant in light of MCL 600.5856(c), which expressly provides that the statute of limitations is tolled "[*a*]*t the time notice is given* in compliance with the applicable notice period under section 2912b, ***if during that period*** *a claim would be barred by the statute of limitations or repose*[.]" (Emphasis added.) It is undisputed that the two-year statute of limitations expired on December 26, 2013. However, December 27, 2013—and not December 26, 2013—is the pertinent date for determining whether plaintiffs' claim would have been barred by the statute of limitations during the 182-day notice period because the notice period began on December 27, 2013, under MCR 1.108(1). Because the notice period did not commence until one day *after* the limitations period had expired according to the rules of computa-

tion under MCR 1.108, we are constrained to conclude that filing the NOI on the last day of the limitations period was not sufficient to toll the statute of limitations "at the time notice [was] given," because, in order to toll the statute of limitations at that time, the limitations period must have been scheduled to expire *during* the 182-day notice period. See MCL 600.5856(c). Stated differently, when the 182-day period ended, the statute of limitations did not resume running because there was no time to toll during the 182-day period following the expiration of the period of limitations on December 26, 2013. Thus, the filing of plaintiffs' complaint on June 27, 2014, was untimely, and the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(7).

We recognize that our analysis means that a plaintiff who serves an NOI on the last day of the limitations period is legally incapable of filing a timely complaint and is, in effect, deadlocked from timely filing a suit in compliance with both the statutory notice period and the statute of limitations. To avoid this result, plaintiffs argue that the phrase "[a]t the time notice is given" compels the conclusion that the limitations period was immediately tolled on the day the NOI was served, which would mean that serving an NOI reserved the entire day, or the portion of the day remaining after service was effected, for tolling during the notice period. However, plaintiffs' interpretation is problematic because it requires us to infer from the statute a legal fiction that service occurs at the beginning of the day, leaving a full day in the remaining limitations period. Alternatively, plaintiffs' reading is problematic because, contrary to MCR 1.108, it would subdivide the day on which notice is served; the court rule does not provide for divisions or fractions of days.

It is well established that this Court "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (quotation marks and citation omitted).

While we also recognize that this Court should avoid an interpretation that would render any part of the statute surplusage or nugatory, *Badeen v Par, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014), our analysis does not disregard MCL 600.5856's language that tolling begins "[a]t the time notice is given." Tolling will begin at the time notice is given *only* "*if* during th[e notice] period a claim would be barred by the statute of limitations or repose[.]" MCL 600.5856(c) (emphasis added). Again, in light of the language of MCR 1.108 regarding the computation of the time at which the 182-day notice period begins, we must conclude that the statutory period of limitations was not tolled in this case due to the fact that it expired one day *before* the notice period began.

Additionally, as plaintiffs emphasize, we recognize the Michigan Supreme Court's admonition against "[e]xceedingly exacting interpretations of the NOI mandates" that "requir[e] plaintiffs to take extraordinary measures to satisfy the goal of providing advance notice" because such interpretations "frustrate the legislative goal of achieving prompt resolution of medical-malpractice claims without long and expensive litigation." *DeCosta v Gossage*, 486 Mich 116, 123; 782 NW2d 734 (2010). However, we do not believe that timely filing an NOI consistent with the application of the relevant statutes and court rules "requir[es] plaintiffs to take extraordinary measures" to provide the requisite notice. In addition, the *DeCosta* Court clarified that the statutory period of limitations is tolled

despite defects in an NOI "*if an NOI is timely*." *Id*. at 123 (emphasis added). Cf. *Tyra*, 498 Mich at 90-92 (discussing the application of MCL 600.2301 and the effect of failing to comply with the NOI statute). Again, "we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute," *Robinson*, 486 Mich at 15 (quotation marks and citation omitted), and our analysis is consistent with the language of the relevant statutes and court rules.

IV. CONCLUSION

Under the facts of this case, plaintiffs' service of the NOI was not sufficient to toll the statutory period of limitations, which expired on December 26, 2013. Pursuant to MCR 1.108(1), the 182-day notice period did not begin until December 27, 2013, and, as a result, the NOI did not toll the statute of limitations as provided under MCL 600.5856(c). Thus, the trial court erred in denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting summary disposition in favor of defendants. We do not retain jurisdiction.

CAVANAGH, P.J., and RIORDAN and GADOLA, JJ., concurred.

GARRETT v WASHINGTON

Docket No. 323705. Submitted January 13, 2016, at Detroit. Decided February 23, 2016, at 9:00 a.m. Convening of special panel declined 314 Mich App ___.

Plaintiff, Gary S. Garrett, filed a complaint in the Wayne Circuit Court for personal protection insurance (PIP) benefits under Michigan's no-fault act, MCL 500.3101 *et seq*. Plaintiff was injured in an automobile accident involving plaintiff and Darita Washington. Washington was not a party in that case. The parties mutually accepted a case-evaluation award settling the original action for PIP benefits. On the day the parties accepted the case-evaluation award, plaintiff filed a third-party complaint against Washington for negligence and against defendant State Farm Mutual Automobile Insurance Company for breach of contract. Plaintiff moved to consolidate the two cases. The court, Susan C. Borman, J., denied plaintiff's motion and dismissed the original action with prejudice. Defendant filed an answer to plaintiff's third-party complaint and asserted that plaintiff's claim for uninsured motorist (UM) benefits was barred by the doctrine of res judicata. Defendant moved for summary disposition on three grounds—MCR 2.116(C)(4) (lack of subject-matter jurisdiction), MCR 2.116(C)(7) (claim barred as a matter of law), and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). In his response to defendant's motion, plaintiff asserted that his claims met the monetary threshold of the court's subject-matter jurisdiction because the total amount in controversy against all defendants exceeded $25,000. Plaintiff also contended that his claim for UM benefits was not barred by res judicata because his claim for UM benefits was fundamentally different from his claim for PIP benefits. Finally, plaintiff argued that the compulsory joinder rule did not require him to join in the original action his UM claim with his claim for PIP benefits. The court apparently agreed with plaintiff on the issue of the amount in controversy but ruled that plaintiff's UM claim was barred by the doctrine of res judicata. The court dismissed with prejudice plaintiff's claim against defendant. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by ruling that res judicata barred plaintiff's claim for UM benefits. The Court of Appeals reached this conclusion because it was bound by its previous decision in *Adam v Bell*, 311 Mich App 528 (2015). The Court declared a conflict with *Adam* because *Adam* required an outcome contrary to the Court's desired outcome. In keeping with the *Adam* Court's opinion, the Court in this case concluded that plaintiff's claim for UM benefits was not barred by res judicata. Although the parties were the same and the claims arose from the same transaction—that is, the operative facts involved were related in time, space, origin, or motivation, and they formed a convenient trial unit—the *Adam* Court concluded that there were significant differences between a claim for PIP benefits and a claim for UM benefits. First, a plaintiff is required to show fault to receive UM benefits. Second, a plaintiff is required to establish a threshold injury—an injury that impaired an important body function affecting the plaintiff's general ability to lead his or her normal life—which often requires the passage of time to evaluate the nature and extent of the plaintiff's injuries and to predict the plaintiff's prognosis. Third, there are fundamental differences in the remedial purposes of a claim for UM benefits and one for PIP benefits—PIP benefits are immediately necessary and available to cover expenses related to the plaintiff's care and recovery, while UM benefits involve compensation for past and future pain and suffering and other economic and noneconomic losses. Because of the differences between a claim for UM benefits and a claim for PIP benefits, the *Adam* Court declined to apply res judicata to bar the plaintiff's claims in that case, and this Court was obligated to follow *Adam*.

2. Had it not been bound by *Adam*, the Court would have affirmed the trial court's grant of defendant's motion for summary disposition because the Court believed that plaintiff's claim for UM benefits was barred by res judicata. According to the Court, plaintiff's claim for UM benefits should have been barred because (1) plaintiff's receipt of PIP benefits was the result of a case evaluation, which is the equivalent of a consent judgment and therefore a decision on the merits, (2) both plaintiff's claim for PIP benefits and his claim for UM benefits involved the same parties and arose from the same transaction, and (3) the question whether plaintiff was entitled to UM benefits could have been resolved with the original claim for PIP benefits.

3. The Court was bound by *Adam* to hold that plaintiff's failure to join his claim for PIP benefits with his claim for UM benefits did not violate MCR 2.203(A) because, as *Adam* con-

cluded, PIP benefits and UM benefits may arise from the same automobile accident, but the benefits do not necessarily arise from the "same transaction."

Reversed and remanded.

The Lobb Law Firm (by *Joseph R. Lobb* and *Daniel S. Zick*) and *Law Offices of Larry A. Smith* (by *Larry A. Smith*) for plaintiff.

Hewson & Van Hellemont, PC (by *Michael J. Jolet* and *Grant O. Jaskulski*), for defendant.

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order of voluntary dismissal of the claim against Darita Washington (Washington) without prejudice, which followed its order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company (State Farm) in this no-fault action. Because we are bound under MCR 7.215(J)(1) to follow this Court's decision in *Adam v Bell*, 311 Mich App 528; 879 NW2d 879 (2015), we reverse the trial court's decision to grant summary disposition in favor of State Farm and remand for further proceedings consistent with this opinion. However, were it not for this Court's decision in *Adam*, we would affirm the trial court's decision to grant summary disposition in favor of State Farm. Therefore, we declare a conflict with *Adam* pursuant to MCR 7.215(J)(2).

I. FACTS AND PROCEDURAL HISTORY

This case arises from a January 4, 2013 automobile accident involving plaintiff and Washington. At the time of the accident, plaintiff had a no-fault insurance

policy with State Farm. On June 3, 2013, plaintiff filed a complaint against State Farm that sought personal protection insurance (PIP) benefits, thus instituting the "original action." The original action proceeded to case evaluation and was ultimately settled by mutual acceptance of the case evaluation award, as indicated in a February 20, 2014 notice of the results of the case evaluation. The trial court subsequently dismissed the action at a settlement conference on April 22, 2014. On the same day, plaintiff filed a third-party complaint in the instant case, alleging a negligence claim against Washington and a breach of contract claim against State Farm for uninsured motorist (UM) benefits in the amount of $20,000. Plaintiff filed a motion to consolidate the original action and the instant action. On May 5, 2014, the trial court entered a final order in the original action, which denied plaintiff's motion to consolidate the two cases and dismissed the original action with prejudice. On May 28, 2014, State Farm filed an answer in this case and asserted, as an affirmative defense, that plaintiff's claim for UM benefits was barred by the doctrine of res judicata.

On June 10, 2014, State Farm moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction), MCR 2.116(C)(7) (claim barred as a matter of law), and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). State Farm argued that (1) the trial court lacked subject-matter jurisdiction over the claim against State Farm since plaintiff only requested $20,000 in UM benefits, (2) plaintiff's claim for UM benefits could have been resolved in the original action and was, therefore, barred by res judicata, and (3) plaintiff's claim was barred under the compulsory joinder rule, MCR 2.203(A). Plaintiff filed a response on July 11, 2014, contending that (1) the trial court had subject-matter jurisdiction

since the *total amount* in controversy against *all* defendants exceeded $25,000, (2) plaintiff's claim for UM benefits was not barred by res judicata because the claim for UM benefits was fundamentally different from the claim for PIP benefits, and (3) the compulsory joinder rule did not require plaintiff to join his claim for UM benefits in the original action. The trial court held a hearing on State Farm's motion for summary disposition on July 18, 2014. Plaintiff's attorney argued that the trial court had subject-matter jurisdiction over the case because the claims against both State Farm and Washington exceeded $25,000, to which the trial judge eventually responded, "Okay." The trial court determined that plaintiff's claim for UM benefits was barred by the doctrine of res judicata. The trial court followed the reasoning in this Court's unpublished decision in *Graham v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2014 (Docket No. 313214), and granted summary disposition in favor of State Farm. The trial court entered an order on July 22, 2014, dismissing the case against State Farm with prejudice. On August 27, 2014, the trial court entered an order of voluntary dismissal without prejudice with regard to the remaining claim against Washington, which constituted the final order in the case.

II. RES JUDICATA

On appeal, plaintiff argues that the trial court erred by determining that res judicata barred his claim for UM benefits. We are required to reverse and remand on the basis of this Court's decision in *Adam*. However, we believe that *Adam* was wrongly decided.

We review de novo both a trial court's decision on a motion for summary disposition and its application of

the legal doctrine of res judicata. *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

" 'The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation.' " *Bryan*, 304 Mich App at 715 (citation omitted). For res judicata to preclude a claim, three elements must be satisfied: "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "[T]he burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Both parties to this action were parties to the original action, and it is undisputed that the original action was decided on its merits. In any event, "acceptance of a case evaluation is essentially a consent judgment," *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 555; 640 NW2d 256 (2002), and "[r]es judicata applies to consent judgments," *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). The dispute in this matter involves the third element of res judicata, i.e., whether plaintiff's claim for UM benefits is a claim that *could have been* litigated in the original action. See *Adair*, 470 Mich at 121.

Our Supreme Court "has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, *exercising reasonable diligence*, could have raised but did not." *Adair*, 470 Mich at 121 (emphasis added). Accordingly, when examining factors for the third element of res judicata, Michigan courts employ the broad, pragmatic "same transaction test," often referred to as the "transactional test," rather than the narrower "same evidence test." *Id*. at 123-125. Thus, while the question whether the same evidence is necessary to support claims "may have some relevance, the determinative question is whether the claims in the instant case arose as part of the same transaction as did [the plaintiff's] claims in" the original action. See *id*. at 125. Under the transactional test, " 'a claim is viewed in "factual terms" and considered "coterminous with the transaction, regardless of the number of substantive theories, *or variant forms of relief flowing from those theories*, that may be available to the plaintiff[.]" ' " *Id*. at 124 (citation omitted; emphasis added). The Court explained that " '[t]he "transactional" test provides that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." ' " *Id*. at 124 (citation omitted). " 'Whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . .' " *Id*. at 125 (alteration in original), quoting 46 Am Jur 2d, Judgments, § 533, p 801.

In deciding this case, the trial court followed the reasoning in *Graham*, rather than the contrary reason-

ing in *Miles v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2014 (Docket No. 311699). Since the trial court decided this matter, however, this Court explicitly adopted in *Adam* much of the reasoning from *Miles*. See *Adam*, 311 Mich App at 533-536. The plaintiff in *Adam* "was injured when she was struck by a vehicle driven by Susan Bell." *Id*. at 530. Adam subsequently filed a complaint against her no-fault insurer asserting a claim for PIP benefits and, after settling that claim with her insurer, stipulated to the entry of an order of dismissal with prejudice. *Id*. Roughly two months later, Adam "filed a third-party complaint alleging negligence against Susan Bell, a claim of owner liability against [the owner of the vehicle involved in the accident], and a claim of breach of contract against [the insurer] with respect to uninsured motorist (UM) benefits." *Id*. at 530-531. The insurer moved for summary disposition, arguing that Adam's UM claim was barred by res judicata, and the trial court agreed. *Id*. at 531. There was "no dispute . . . that the prior action for PIP benefits involved the same parties and was decided on the merits." *Id*. at 532. Thus, the only dispute was "whether the two actions arose from the same transaction such that [the] plaintiff in the exercise of reasonable diligence could have raised [her] UM claim during the prior action." *Id*. The *Adam* Court applied the transactional test for res judicata and decided that, despite her previous action against the insurer for PIP benefits, res judicata did not bar the plaintiff's new claims:

> Using this pragmatic approach, we conclude that although plaintiff's PIP action and her tort and contract action both arose from the same automobile accident, the actions also have significant differences in the motivation and in the timing of asserting the claims, and they would not have

> formed a convenient trial unit. Further, applying res judicata to the facts of this case would not promote fairness and would be inconsistent with the Legislature's intent expressed through the no-fault act. The no-fault act provides for the swift payment of no-fault PIP benefits. On the other hand, it severely restricts the right to bring third-party tort claims that would form the basis for a UM contract claim. [*Id*. at 533.]

In reaching the decision, this Court noted that it found *Miles* both "instructive and persuasive," expressly adopting the following pertinent portions of the reasoning from *Miles*:

> It is plain that both Miles' claim for PIP benefits and his claim for [UM] benefits arise from the same accident and involve the same injuries and insurance policy. For that reason, there is a substantial overlap between the facts involved with both claims. But that being said, there are also significant differences between the two types of claims.
>
> A person injured in an accident arising from the ownership, operation, or maintenance of a motor vehicle as a motor vehicle is immediately entitled to PIP benefits without the need to prove fault. See MCL 500.3105(2); MCL 500.3107. The PIP benefits are designed to ensure that the injured person receives timely payment of benefits so that he or she may be properly cared for during recovery. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Moreover, the injured person has a limited period within which to sue an insurer for wrongfully refusing to pay PIP benefits. See MCL 500.3145(1). Because an injured person is immediately entitled to PIP benefits without regard to fault, requires those benefits for his or her immediate needs, and may lose the benefits if he or she does not timely sue to recover when those benefits are wrongfully withheld, the injured person has a strong incentive to bring PIP claims immediately after an insurer denies the injured person's claim for PIP benefits.

> In contrast to a claim for PIP benefits, in order to establish his or her right to [UM] benefits, an injured person must—as provided in the insurance agreement—be able to prove fault: he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 465-466; 430 NW2d 636 (1988). Significantly, this means that the injured person must plead and be able to prove that he or she suffered a threshold injury. *Id*. at 466, citing MCL 500.3135(1). Except in accidents involving death or permanent serious disfigurement, an injured person will therefore be required to show that his or her injuries impaired an important body function that affects the injured person's general ability to lead his or her normal life in order to meet the threshold. MCL 500.3135(1) and (5). This in turn will often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life. See *McCormick v Carrier*, 487 Mich 180, 200-209; 795 NW2d 517 (2010). Thus, while an injured person will likely have all the facts necessary to make a meaningful decision to pursue a PIP claim within a relatively short time after an accident, the same cannot be said for the injured person's ability to pursue a claim for [UM] benefits. Finally, an injured person's claim for [UM] benefits involves compensation for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses related to the injured person's care and recovery. See *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 408-410; 808 NW2d 240 (2010) (discussing the nature of the economic and noneconomic damages that are awarded in negligence actions). Consequently, a claim for PIP benefits differs fundamentally from a claim for uninsured motorist benefits both in the nature of the proofs and the motivation for the claim. [*Id*. at 534-535 (quotation marks and citation omitted).]

The *Adam* Court found that conclusion to be further supported by the "base one-year limitations period" and the "one-year-back rule" applicable to PIP claims under MCL 500.3145(1), which has been found unreasonable as applied to contractual claims for UM benefits. *Id*. at 536-537. Therefore, the *Adam* Court ultimately held that "applying res judicata to essentially require mandatory joinder of a mere potential UM claim with a PIP claim would be inconsistent with the very divergent statutory treatment of these two very different types of no-fault claims." *Id*. at 537-538. Accordingly, the *Adam* Court reversed the trial court's grant of summary disposition to the insurer and remanded the matter for further proceedings in the trial court. *Id*. at 538.

Adam is controlling over the instant case. In both cases, the plaintiff initially filed a lawsuit for PIP benefits, which was settled before the plaintiff filed a claim for UM benefits. See *id*. at 530-531. Thus, the *Adam* Court's holding that the doctrine of res judicata does not bar a claim for UM benefits that was filed after settlement of a claim for PIP benefits also applies in this case. See *id*. at 536. Accordingly, we are compelled to conclude that the doctrine of res judicata does not bar plaintiff's claim for UM benefits. See *id*.

However, we disagree with the holding in *Adam*, and we would conclude that the claim for UM benefits in this case is barred by the doctrine of res judicata were we not bound to follow *Adam*. The two claims in this case arise from a single group of operative facts. See *Adair*, 470 Mich at 124. The PIP and UM claims stem from the same automobile accident and involve all of the same parties. Furthermore, the claim for PIP benefits and the claim for UM benefits are related in

time, space, origin, and motivation, and the combination of the two claims forms a convenient trial unit since they involve the same parties, the same automobile accident, and the same body of law. See *id*. at 125. Furthermore, application of the doctrine of res judicata in this case would relieve the parties of the costs and vexation of multiple lawsuits involving the same parties and the same automobile accident, would conserve judicial resources, and would encourage the finality of litigation. See *Bryan*, 304 Mich App at 715. Accordingly, we would conclude that the two claims constitute the same transaction if we were not bound to follow *Adam*. See *Adair*, 470 Mich at 124.

In addition, we are not persuaded that there are significant differences in the timing and motivation for asserting the claims that would prohibit the application of res judicata. Plaintiff filed the UM benefits case approximately two months after settling the PIP benefits case and approximately two weeks before the final order was entered in the PIP benefits case. Additionally, the UM benefits case was filed on the day that the trial court determined that it would dismiss the PIP benefits case following the case evaluation settlement. The fact that plaintiff filed the UM benefits case approximately two months after settling the PIP benefits case indicates that if he had exercised reasonable diligence, plaintiff could have sought to amend the complaint in the original action to include a claim for UM benefits before accepting the case evaluation award. There is no indication that plaintiff attempted to amend his complaint in the original action to include a claim for UM benefits. Instead, he filed a separate complaint after settling the PIP benefits case and attempted to consolidate the two cases. The timing of the two cases also undercuts plaintiff's argument that he did not have all of the information necessary to

bring a UM claim at the time of the original action because plaintiff brought the claim for UM benefits only two months after settling the PIP benefits case. Although plaintiff argues that he could not have known the nature and extent of his injuries at the time he filed his PIP lawsuit, he fails to substantiate his argument. On the basis of the times at which the claims were filed in these two cases, we are not persuaded that plaintiff had insufficient information about his physical condition to warrant the filing of a UM benefits claim at the time of the PIP benefits claim. See *Adair*, 470 Mich at 125.

We are also unpersuaded by plaintiff's argument that the two claims differed in terms of the form of relief granted. As the Michigan Supreme Court clarified in *Adair*, the same transaction test applies "regardless of the number of substantive theories, or variant forms of relief flowing from those theories[.]" *Adair*, 470 Mich at 124 (quotation marks and citation omitted). The fact that the PIP benefits claim and the UM benefits claim involved different forms of relief did not affect the analysis with regard to whether the two claims constituted the same transaction for res judicata purposes. See *id*. Plaintiff points out in his brief on appeal that he could not have known that he was entitled to UM benefits at the time he filed the original action and would not have been able to obtain the requisite proof to sustain a UM benefits case. Plaintiff essentially argues that the doctrine of res judicata does not apply since the two claims involved different evidence. See *id*. (" '[T]he same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs.' ") (citation omit-

ted). However, the "same evidence" test was rejected in favor of the "same transaction" test in Michigan. See *id*. at 124-125. Under the same transaction test, the requirement is that a single group of operative facts gives rise to the claims for relief. *Id*. at 124. As discussed above, the PIP benefits claim and the UM benefits claim were part of the same transaction. Consequently, under the broad approach to determining whether a claim is barred by res judicata, we conclude that the matter of plaintiff's UM benefits in the instant case could have been brought in the original action involving the PIP benefits claim. See *id*. at 121. However, because we are bound by this Court's decision in *Adam*, we are compelled to reverse and remand for further proceedings. See *Adam*, 311 Mich App at 537-538.

III. MOOTNESS

State Farm asserts two alternative grounds for affirmance: mootness and compulsory joinder under MCR 2.203(A). First, State Farm contends that the issue raised by plaintiff in this appeal is moot because when he voluntarily dismissed Washington from this action in the trial court, plaintiff foreclosed any opportunity to gain a judgment against Washington, which he must do in order to collect UM benefits from State Farm. We disagree.

We review de novo whether an issue is moot. See *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013). This Court does not decide moot issues. *Id*. "A matter is moot if this Court's ruling 'cannot for any reason have a practical legal effect on the existing controversy.' " *Id*. (citation omitted). "In order to appeal, a party must be an aggrieved party." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144,

147; 799 NW2d 579 (2010). "On appeal, the litigant must demonstrate that he or she is affected by the decision of the trial court." *Id*. "An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Id*.

The trial court's order dismissing Washington from this action clearly denotes that the dismissal was without prejudice. " 'A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought.' " *Grimmer v Lee*, 310 Mich App 95, 102; 872 NW2d 725 (2015), quoting *McIntyre v McIntyre*, 205 Mich 496, 499; 171 NW 393 (1919). "[T]he term 'without prejudice' signifies 'a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be *res adjudicata* of the merits.' " *Grimmer*, 310 Mich App at 102, quoting *McIntyre*, 205 Mich at 499. Thus, Washington's dismissal from this action—without prejudice—would not prevent plaintiff from asserting his negligence claim against her at some point in the future. See *id*. State Farm's argument regarding mootness necessarily fails as a result.

IV. COMPULSORY JOINDER

State Farm further argues that, under the compulsory joinder rule, MCR 2.203(A), plaintiff's claim for UM benefits in this action is barred because he failed to join that claim in the original action. Because we are bound to follow this Court's decision in *Adam*, we disagree.

We review de novo the proper interpretation and application of a court rule. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). State Farm

argued that summary disposition was proper under MCR 2.116(C)(8). " 'A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint.' " *Diallo v LaRochelle*, 310 Mich App 411, 414; 871 NW2d 724 (2015) (citation omitted). " 'The motion should be granted if no factual development could possibly justify recovery.' " *Id*. (citation omitted). MCR 2.203(A) provides:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party *at the time of serving the pleading*, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. [Emphasis added.]

"The term 'pleading' is specifically and narrowly defined" by MCR 2.110(A) to include certain documents, including complaints. See *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 572; 840 NW2d 375 (2013). In determining whether two claims arise out of the same transaction or occurrence for purposes of MCR 2.203(A), res judicata principles should be applied. See *Marketplace of Rochester Hills v Comerica Bank*, 309 Mich App 579, 586; 871 NW2d 710 (2015) (construing MCR 2.203(A) using res judicata principles), vacated in part on other grounds 498 Mich 934 (2015); *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 394 n 12; 596 NW2d 153 (1999) (TAYLOR, J., dissenting) ("MCR 2.203(A) requires, consistent with res judicata principles, a party to join every claim that the pleader has against the opposing party.").

As explained above, under *Adam*, plaintiff's claims for PIP benefits in the original action, and his later claim for UM benefits in this action, were not part of

the same "transaction." See *Adam*, 311 Mich App at 532-536. Thus, because we are bound to follow *Adam*, we conclude that the claims did not arise out of the same transaction or occurrence for purposes of MCR 2.203(A). See *id*. As such, compulsory joinder is not a viable alternative ground to affirm the trial court's ruling. However, were we not bound to follow *Adam*, we would conclude that plaintiff's failure to join his UM benefits claim with the original action at the time that the original action was initiated violates MCR 2.203(A). Plaintiff filed a complaint in the original action that pleaded a claim for PIP benefits, but did not include a claim for UM benefits. He later filed a complaint that included a claim for UM benefits and moved to have the two cases consolidated. The trial court denied plaintiff's request. Thus, plaintiff failed to join his UM claim at the time he served the complaint in the original action, which violates MCR 2.203(A). However, since we are compelled to follow *Adam*, we hold that plaintiff's actions did not violate MCR 2.203(A).

For the reasons discussed above, we are compelled to reverse and remand for further proceedings consistent with this opinion because of this Court's decision in *Adam*. We do not retain jurisdiction.

RIORDAN, P.J., and JANSEN and FORT HOOD, JJ., concurred.

AK STEEL HOLDING CORPORATION v DEPARTMENT OF TREASURY

Docket Nos. 327175, 327251, 327313 through 327331, 327333, and 327334. Submitted January 13, 2016, at Detroit. Decided February 25, 2016, at 9:00 a.m.

AK Steel Holding Corporation and others brought separate actions in the Court of Claims against the Department of Treasury, seeking tax refunds for tax years 2005 through 2007 premised on use of the equally weighted three-factor apportionment formula set forth in the Multistate Tax Compact (the Compact), former MCL 205.581 *et seq*. Defendant had refused plaintiffs' refund requests, asserting that the only apportionment method available to plaintiffs was the three-factor formula provided under the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*., which weighted the sales factor of the apportionment formula more heavily than the payroll and property factors. In each action, the Court of Claims, MICHAEL J. TALBOT, J., granted summary disposition in favor of defendant. Plaintiffs appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. During the tax years at issue, former MCL 208.41 of the SBTA provided that a taxpayer whose business activities were taxable both within and without this state was required to apportion his or her tax base as provided in Chapter 3 of the SBTA. During the relevant period, the Compact permitted a taxpayer subject to an income tax to elect to use a party state's apportionment formula or the Compact's formula. Because the SBTA mandated the use of one apportionment formula, while the Compact provided for the discretionary use of a different apportionment formula, the statutes were in apparent conflict. The statutes, however, could be harmonized. The Compact's election provision and MCL 208.41 of the SBTA had to be construed *in pari materia* because they shared the common purpose of setting forth the methods of apportionment of a taxpayer's multistate business income. Under the Compact, the Legislature provided a multistate taxpayer with a choice between the apportionment method contained in the Compact or the apportionment method

required by Michigan's tax laws. If a taxpayer elects to apportion its income through the Compact, the Compact mandates that the taxpayer do so using the Compact's three-factor apportionment formula. Alternatively, if the taxpayer does not make the Compact election, then the taxpayer must use the apportionment formula set forth in Michigan's governing tax laws. In 2014 PA 282, the Legislature clarified that it had intended to impliedly repeal the Compact when it enacted the Michigan Business Tax Act (MBTA) in 2007 PA 36 and that this intent was further revealed by the express repeal of the Compact's election provision through 2011 PA 40. But the Legislature said nothing in 2014 PA 282 regarding the validity of the Compact's election provision for multistate taxpayers subject to the SBTA before the effective date of the MBTA. Accordingly, the Legislature left open for use the Compact's apportionment formula during tax years Michigan businesses were subject to the SBTA. Therefore, the Court of Claims erred when it concluded that the SBTA impliedly repealed the Compact's apportionment-election provision.

2. Plaintiff Johnson Matthey Inc. additionally challenged the constitutionality of 2014 PA 282. Johnson Matthey's numerous state and federal constitutional challenges were identical in all relevant respects to the arguments raised by some of the plaintiffs in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015), which rejected those challenges. Accordingly, Johnson Matthey's constitutional challenges to 2014 PA 282 were devoid of merit.

3. On cross-appeal, defendant challenged the Court of Claims' conclusion that the single business tax was an income tax for purposes of the Compact's election provision. The Compact defined the term "income tax" as a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions. The single business tax fit that definition. Because the single business tax was calculated by beginning with federal taxable income, which consists of gross income minus federally allowed deductions, and because some deductions allowed under the federal tax code were not added back to the single-business-tax tax base, it followed that the single business tax was measured by an amount arrived at through the deduction of expenses from gross income. Therefore, the Court of Claims properly determined that the single business tax qualified as an income tax as defined by the Compact because it taxed a variation of net income. While other labels have been

used to describe the single business tax in other contexts, no definitive characterization of the single business tax was required. It was sufficient to determine that it was an "income tax" under the Compact's broad definition of that term.

4. Defendant further argued on cross-appeal that the explicit repeal of the Compact by 2014 PA 282 extended to the tax years in question. Defendant's argument was contravened by the language of the first enacting section of 2014 PA 282, which plainly indicated that the Compact was expressly repealed beginning January 1, 2008. The SBTA was no longer in effect on January 1, 2008. Moreover, the first enacting section of 2014 PA 282 indicates that the Legislature's explicit repeal of the Compact was intended to effectuate the Legislature's original intent concerning the application of MCL 208.1301, a section of the MBTA, and to clarify that the Compact's apportionment-election provision was not available under the Income Tax Act of 1967. There is no language in that enacting section that suggests a legislative intent to repeal the Compact with respect to tax years affected by the SBTA or with respect to single-business-tax taxpayers. The language in 2014 PA 282 stating that the Compact was repealed effective beginning January 1, 2008, is properly understood as indicating that the express repeal of the Compact applies to tax years beginning on January 1, 2008.

Reversed in part and remanded for further proceedings.

1. TAXATION — SINGLE BUSINESS TAX — MULTISTATE TAX COMPACT.

The tax imposed by the Single Business Tax Act, MCL 208.1 *et seq*., is an income tax for purposes of the Multistate Tax Compact, MCL 205.581 *et seq*.

2. TAXATION — SINGLE BUSINESS TAX — MULTISTATE TAX COMPACT — INCOME APPORTIONMENT.

The mandatory apportionment provision set forth in former MCL 208.41 of the Single Business Tax Act, MCL 208.1 *et seq*., did not repeal by implication the apportionment-election provision set forth in the Multistate Tax Compact, MCL 205.581 *et seq*.

3. TAXATION — MULTISTATE TAX COMPACT — REPEAL.

The language in the first enacting section of 2014 PA 282 stating that the Multistate Tax Compact, MCL 205.581 *et seq*., was repealed effective beginning January 1, 2008, is properly understood as indicating that the express repeal of the compact applied to tax years beginning on January 1, 2008.

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin* and *Daniel L. Stanley*) for AK Steel Holding Corporation and Johnson Matthey Inc.

Miller, Canfield, Paddock and Stone, PLC (by *Gregory A. Nowak*, *Colin Battersby*, and *Maria Baldysz*), for EMCO Enterprises, Inc., Cargill Meat Solutions Corporation, Watts Regulator Company, SLBP Holdings Corporation, Renewal by Andersen Corporation, Andersen Windows, Inc., Sid Tool Co., Inc., Martin Sprocket & Gear, Inc., United Stationers Supply Company, Rodale Inc., Goodyear Tire & Rubber Company, Leslie Controls, Inc., Hoke, Inc., Spence Engineering, Inc., Circor Energy Products, Inc., Circor Aerospace, Inc., GTECH Corporation, Cambrex Charles City, Inc., and EMC Corporation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Zachary C. Larsen*, *Jessica A. McGivney*, *Randi M. Merchant*, *Scott L. Damich*, *Michael R. Bell*, and *Emily C. Zillgitt*, Assistant Attorneys General, for the Department of Treasury.

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

I. INTRODUCTION

In these 23 consolidated appeals,[1] plaintiffs are taxpayers that, respectively, appeal as of right orders granting summary disposition in each case to defendant, the Michigan Department of Treasury. Each

[1] *AK Steel Holding Corp v Dep't of Treasury*, unpublished order of the Court of Appeals, entered November 24, 2015 (Docket Nos. 327175 et al).

appeal raises common issues challenging the Court of Claims' holding that the mandatory apportionment provision of the Single Business Tax Act (SBTA), former MCL 208.1 *et seq*.,[2] impliedly repealed a provision of Michigan's enactment of the Multistate Tax Compact (the Compact), former MCL 205.581 *et seq*.[3] That provision of the Compact had allowed multistate taxpayers to apportion their tax base using an equally weighted three-factor formula set forth in the Compact. Plaintiffs further contend that an implied repeal of the Compact's election provision violates the terms of the Compact—which, according to plaintiffs, was binding on subsequent legislatures—and violates state and federal constitutional provisions. Additionally, in Docket No. 327251, plaintiff Johnson Matthey Inc. also argues that it was entitled to apportion its Michigan business tax (MBT)[4] base pursuant to the Compact apportionment formula, and that the retroactive repeal of the Compact by 2014 PA 282 violated the terms of the Compact and various constitutional provisions.

In cross-appeals in all of the cases except for *Cambrex Charles City, Inc v Dep't of Treasury* (Docket No. 327330), and as alternative grounds for affirmance in all of the cases, defendant argues that the single business tax (SBT) is not an income tax under the apportionment-election provision of the Compact and

[2] The entire SBTA was repealed by 2006 PA 325 and replaced with the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*. For ease of reference, subsequent citations of SBTA provisions, MCL 208.1 *et seq*., should be understood to refer to the former SBTA provisions.

[3] The Compact was expressly and retroactively repealed by 2014 PA 282, effective beginning January 1, 2008. For ease of reference, subsequent citations of the Compact, MCL 205.581 *et seq*., should similarly be understood to refer to the Compact's former provisions.

[4] See MCL 208.1101 *et seq*.

that the retroactive repeal of the Compact by 2014 PA 282 barred plaintiffs from asserting their respective SBT refund claims.

Because we conclude that the SBTA did not impliedly repeal the Compact's apportionment-election provision, we reverse in part and remand for further proceedings consistent with this opinion.

II. HISTORICAL BACKGROUND AND PROCEDURAL POSTURE[5]

Plaintiffs in the present cases are claiming SBT refunds for at least one tax year between 2005 and 2007. In particular, plaintiffs seek to reduce their SBT liability for the tax years at issue by apportioning their income through the equally weighted three-factor apportionment formula provided in the Compact rather than the three-factor formula provided in the SBTA, which weighted the sales factor of the formula more heavily. As the Court of Claims stated, the principal issue in these cases is "whether the SBT apportionment formula for the tax years in question is mandatory or whether an SBT taxpayer may elect to apportion its tax base to Michigan using the Compact's equally weighted, three-factor apportionment formula."

A. THE SBTA

From January 1, 1976, until its repeal effective December 31, 2007, the SBTA governed the taxation of

[5] In summarizing the historical development of the law in Michigan, we rely heavily on the Court of Claims' comprehensive and well-written recitation of the relevant legal background in its opinion issued in *EMCO Enterprises, Inc v Dep't of Treasury* (Docket No. 327313). See *EMCO Enterprises, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued April 21, 2015 (Case No. 12-000152-MT).

business activity in Michigan. See 1975 PA 228; 2006 PA 325. Under the SBTA, a tax base was calculated by beginning with a business's federal taxable income and then adding back compensation, depreciation, and other factors, as well as making other adjustments. See *Trinova Corp v Mich Dep't of Treasury*, 498 US 358, 366-367; 111 S Ct 818; 112 L Ed 2d 884 (1991) (*Trinova II*). Throughout its history, the SBT was apportioned using a three-factor formula consisting of payroll, property, and sales. As the Court of Claims explained in its opinion, this formula originally weighted the three factors equally, in accordance with previous business taxes in Michigan and the nearly universal practice of other states at the time. However, in later years, many states moved away from an equally weighted three-factor formula by more heavily weighting the sales factor. Following this trend, the Michigan Legislature abandoned uniform apportionment and began to more heavily weight the sales factor in 1991. See 1991 PA 77. Subsequent amendments continued to weigh the sales factor even more heavily. For tax years 1999 through 2005, the sales factor was weighted at 90%, and for 2006 and 2007, the sales factor was weighted at 92.5%. See 1995 PA 282; 1995 PA 283; 2005 PA 295; MCL 208.45a(1)(c) and (2)(c), repealed by 2006 PA 325.

B. THE COMPACT

The Compact originally was adopted by seven states in 1967. The Michigan Legislature adopted the Compact provisions effective in 1970. See 1969 PA 343. While Congress never approved the Compact, it was upheld against constitutional challenges. See *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978). The Compact established the

Multistate Tax Commission (the Commission), but each state remained free to adopt or reject the Commission's rules and regulations and remained free to withdraw from the Compact at any time. See *id*. at 473. Most relevant to this appeal, Article IV of the Compact set forth a three-factor apportionment formula that equally weighted property, payroll, and sales factors. MCL 205.581, art IV(9). Article III of the Compact provided that a taxpayer subject to an income tax "in 2 or more party states may elect to apportion and allocate his income in the manner provided . . . by the laws of such states . . . without reference to this compact, or may elect to apportion and allocate in accordance with article IV." MCL 205.581, art III(1).

On May 25, 2011, 2011 PA 40 became effective. The act amended the Compact so that a multistate taxpayer subject to the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., or the Income Tax Act of 1967, MCL 206.1 *et seq*., could not elect the Compact apportionment formula beginning January 1, 2011. Then, on September 12, 2014, 2014 PA 282 became effective, retroactively repealing the Compact provisions effective January 1, 2008, and mandating the use of a single sales-factor apportionment formula for the purpose of calculating the MBT and the corporate income tax, MCL 206.601 *et seq*. As the Court of Claims explained:

> [2014] PA 282 thus amended the MBT to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581. The effect of the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT and the [corporate income tax].

C. THE COURT OF CLAIMS' DECISION

In one of the present appeals, *EMCO Enterprises, Inc v Dep't of Treasury* (Docket No. 327313), the Court of Claims issued a 29-page opinion addressing the plaintiff's claims and granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). In summarizing its decision, the Court of Claims stated:

> The Court, in fulfilling its duty to ascertain and apply the intent of the Legislature, finds that the taxpayer is required to use the apportionment formulas mandated under the SBTA for the tax years in question, and is not entitled to elect a different apportionment formula under the Compact. Though the SBT is an income tax within the meaning of the Compact, future legislatures were not bound by the policies of the legislature that enacted 1969 PA 343. The purpose of state tax uniformity as embedded in both the Compact's apportionment elective provision by the 1969 legislature, and the SBTA's equally weighted, three-factor apportionment formula as originally enacted by the 1975 legislature, is not consistent with the purpose of later amendments made to apportionment formulas by the Legislature. Under traditional rules of statutory construction, the apportionment formula under the SBTA for the tax years in question must control.

More specifically, in its *EMCO* opinion, the Court of Claims concluded that the Compact was advisory and did not bind future legislatures, that the Compact was not a binding contract under Michigan law, and that the Legislature was therefore free to mandate the use of apportionment formulas that deviated from the formula set forth in the Compact. The court further determined that the SBTA in effect during the tax years at issue conflicted with the Compact's apportionment-election provision by requiring the use of a different apportionment formula from that provided in the Compact and that these provisions could

not be harmonized. The Court of Claims concluded that the SBTA apportionment provision was controlling and had impliedly repealed the Compact's apportionment-election provision. Further, the court rejected arguments that denying plaintiffs the right to elect the Compact's equally weighted three-factor apportionment formula violated the Commerce and Due Process Clauses of the United States Constitution.

In the remaining appeals, the Court of Claims entered essentially identical orders in each case, granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(1) on the basis of the reasoning in the *EMCO* opinion.[6]

III. STANDARD OF REVIEW

A trial court's decision to grant summary disposition pursuant to MCR 2.116(I)(1) is reviewed de novo. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 405; 878 NW2d 891 (2015). MCR 2.116(I)(1) provides, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the

[6] In *Johnson Matthey Inc v Dep't of Treasury* (Docket No. 327251), the Court of Claims' order also included language referring to the Court of Claims' opinions in two other cases holding that 2014 PA 282 negated the plaintiffs' claims for refunds under the MBTA. The two cases were *Yaskawa America, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Case No. 11-000077-MT), and *Ingram Micro, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Case No. 11-00035-MT), both of which were part of the 50 consolidated appeals that were the subject of this Court's recent published opinion in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394; 878 NW2d 891 (2015), which is discussed later in this opinion.

court shall render judgment without delay."[7] We also review de novo issues involving statutory interpretation as well as constitutional questions. *Gillette*, 312 Mich App at 405.

IV. IMPLIED REPEAL OF THE COMPACT'S ELECTION PROVISION

The central issue in this case is whether the Court of Claims erred by concluding that the SBTA's mandatory apportionment provision impliedly repealed the Compact's apportionment-election provision for the tax years at issue (i.e., 2005, 2006, and 2007). We agree with plaintiffs and hold that the SBTA did not impliedly repeal the Compact's apportionment-election provision.

A. BACKGROUND LAW

"When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of

[7] The Court of Claims' opinion in *EMCO* stated that it was granting summary disposition to defendant pursuant to MCR 2.116(I)(2), which states, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." However, there was no summary disposition motion before the court in *EMCO*, and the orders in the other 22 consolidated cases stated that summary disposition was granted to defendant pursuant to MCR 2.116(I)(1). The issues raised in these cases concern questions of law. As such, whether defendant is entitled to summary disposition is a matter of law. Thus, we conclude that review under MCR 2.116(I)(1) is proper. It is well settled that regardless of the subrule cited by the trial court in granting summary disposition, this Court will review the court's order under the correct subrule. See *Spiek v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

the statute surplusage or nugatory." *Id*. Statutory language must be read in context, and undefined words are to be given their plain and ordinary meanings. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

In general, "repeals by implication are disfavored." *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996). It is generally presumed "that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly." *Id*. When presented with a claim that two statutes conflict, a court must endeavor to construe the statutes harmoniously if possible. *Id*.

> [R]epeal by implication will not be found if any other reasonable construction may be given to the statutes, such as reading *in pari materia* two statutes that share a common purpose or subject, or as one law, even if the two statutes were enacted on different dates and contain no reference to one another. However, a repeal of a statute may be inferred in two instances: (1) where it is clear that a subsequent legislative act conflicts with a prior act; or (2) when a subsequent act of the Legislature clearly is intended to occupy the entire field covered by a prior enactment. [*Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 36-37; 687 NW2d 319 (2004) (citations omitted; italicization added).]

Similarly, the Michigan Supreme Court previously explained, "[I]f the provisions of a later statute are so at variance with those of an earlier act, or a part thereof, that both cannot be given effect[,] then the later enactment controls and there is a repeal by implication. In such a case it must be presumed that

the legislature intended a repeal." *Jackson v Mich Corrections Comm*, 313 Mich 352, 357; 21 NW2d 159 (1946). "Repeals by implication are not favored, but do happen, and, when clear, must be given effect." *Id*. (quotation marks and citation omitted). Therefore, "if there is such repugnance that both [statutes] cannot operate, then the last expression of the legislative will must control." *Id*. at 356. "[T]he latter act operates *to the extent of the repugnancy*, as a repeal of the first . . . ." *Id*. at 357-358 (quotation marks and citation omitted). See also *Metro Life Ins Co v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936) ("It is the rule that where two laws *in pari materia* are in irreconcilable conflict, the one last enacted will control or be regarded as an exception to or qualification of the prior statute."). Notably, "when faced with two statutes that bear on the same subject, our task is not to discern the most logical construction of the more recent statute, but to labor to permit the survival of both enactments if possible." *House Speaker v State Admin Bd*, 441 Mich 547, 571-572; 495 NW2d 539 (1993) (quotation marks and citation omitted).

B. ANALYSIS

During the tax years at issue in this case, § 41 of the SBTA provided that "[a] taxpayer whose business activities are taxable both within and without this state, *shall* apportion his tax base as provided in [Chapter 3 of the SBTA, MCL 208.40 through MCL 208.69]." MCL 208.41 (emphasis added). As previously discussed, for tax years before 1991, the SBTA prescribed an equally weighted three-factor apportionment formula composed of property, payroll, and sales factors. Beginning with the 1991 tax year, however, the SBTA required the sales factor to be weighted more heavily than the

other factors, and the weight of the sales factor was further increased in later tax years by legislative amendments to the act. See MCL 208.45; MCL 208.45a. For the 2005 tax year, the sales factor was weighted at 90%. MCL 208.45a(1)(c). For the 2006 and 2007 tax years, the sales factor was weighted at 92.5%. MCL 208.45a(2)(c).

On the other hand, during the tax years at issue, the Compact's apportionment-election provision stated:

> Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV . . . . [MCL 205.581, art III(1).]

As explained earlier in this opinion, Article IV of the Compact set forth an equally weighted three-factor apportionment formula composed of property, payroll, and sales factors. MCL 205.581, art IV(9). Thus, the Compact's election "provision allow[ed] a taxpayer subject to an income tax to elect to use a party state's apportionment formula or the Compact's [equally weighted] three-factor apportionment formula." *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 653; 852 NW2d 865 (2014) (*IBM*) (opinion by VIVIANO, J.).

The Court of Claims correctly concluded that an apparent conflict exists between the language of the SBTA and the Compact's election provision. Under § 41 of the SBTA, a multistate taxpayer "*shall* apportion his tax base as provided in [Chapter 3 of the SBTA]." MCL 208.41 (emphasis added). "The Legislature's use of the

word 'shall' generally indicates a mandatory directive, not a discretionary act." *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013). The SBTA apportionment formula for the tax years at issue weighted the sales factor more heavily than the other factors, MCL 208.45a(1)(c) and (2)(c), and there is no language in the SBTA indicating that a taxpayer was permitted to use an apportionment formula other than the one provided in Chapter 3 of the SBTA. By contrast, the language of the Compact allowed a taxpayer to choose the equally weighted three-factor formula in the Compact. MCL 205.581, arts III(1) and IV(9). As the Court of Claims explained, "[b]ecause the SBTA during the tax years in question mandates the use of one apportionment formula, while the Compact provides for the discretionary use of another apportionment formula, the statutes are in apparent conflict."

However, we disagree with the Court of Claims that the two statutes cannot be harmonized. Rather, we find persuasive the reasoning of the lead opinion in *IBM*, 496 Mich at 650-662 (opinion by VIVIANO, J.),[8] concerning the interplay between the MBT and the Compact. Consistent with that analysis, we hold that it is possible to reasonably construe § 41 of the SBTA and Articles III(1) and IV(9) of the Compact in harmony with each other.

The lead opinion explained:

> [W]here the intent of the Legislature is claimed to be unclear, it is our duty to proceed on the assumption that

[8] Because a majority of the justices in *IBM* did not agree on the implied-repeal analysis contained in the lead opinion, the lead opinion's holding on that issue is not binding authority. See *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995); *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992).

> the Legislature desired both statutes to continue in effect unless it manifestly appears that such view is not reasonably plausible. Repeals by implication will be allowed only when the inconsistency and repugnancy are plain and unavoidable. We will construe statutes, claimed to be in conflict, harmoniously to find *any other* reasonable construction than a repeal by implication. Only when we determine that two statutes are so incompatible that both cannot stand will we find a repeal by implication. [*IBM*, 496 Mich at 651-652 (opinion by VIVIANO, J.) (quotation marks and citations omitted).]

In attempting to find a harmonious construction, courts should consider all statutes addressing the same general subject matter as part of one system. *Id.* at 652, citing *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW 35 (1938). "Further, '[s]tatutes *in pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each . . . .' " *IBM*, 496 Mich at 652 (opinion by VIVIANO, J.) (alteration in original), quoting *Rathbun*, 284 Mich at 544.

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and

> subsequent sessions. [*IBM*, 496 Mich at 652-653 (opinion by VIVIANO, J.), quoting *Rathbun*, 284 Mich at 543-544 (quotation marks omitted).]

Thus, the Compact's election provision and § 41 of the SBTA should be construed together as statutes *in pari materia* because they share, like the Compact and the MBTA, "the common purpose of setting forth the methods of apportionment of a taxpayer's multistate business income . . . ." *IBM*, 496 Mich at 653 (opinion by VIVIANO, J.).[9]

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[9] We recognize that the rule of *in pari materia* "does not permit the use of a previous statute to control by way of former policy the plain language of a subsequent statute . . . ." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922). However, neither the *IBM* lead opinion, nor our opinion in this case, effectively resolves the conflict between the MBT or the SBT *in favor* of the Compact, i.e., the earlier-enacted statute, or permits the use of the apportionment provision in the Compact in a way that contradicts the plain language of a subsequent statute. Rather, as explained in this opinion, we conclude that the apportionment provisions of the SBTA and the Compact can be read harmoniously.

Additionally, we recognize that "the interpretive aid of the doctrine of *in pari materia* can only be utilized in a situation where the section of the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392; 590 NW2d 560 (1999) (italicization added), citing *Voorhies*, 220 Mich at 157; see also *In re Indiana Mich Power Co*, 297 Mich App 332, 344; 824 NW2d 246 (2012). However, this principle does not preclude the use of the doctrine in this case. Although the language of § 41 of the SBTA arguably may be unambiguous when read in isolation, the interpretation and construction of that section—or a determination of the applicability of that section on its own—is not at issue here. Rather, we are inescapably required to consider *the effect of MCL 208.41 on the Compact's election provision*, which, in this case, clearly requires consideration of the statutes together in the context of the statutory scheme as a whole. Cf. *KTS Indus*, 263 Mich App at 36-37 ("[R]epeal by implication will not be found if any other reasonable construction may be given to the statutes, such as reading *in pari materia* two statutes that share a common purpose or subject, or as one law, even if the two statutes were enacted on different dates and contain no reference to one another.") (italicization added; citation omitted).

In reviewing the statutes *in pari materia*, we conclude that the following reasoning, employed by the lead opinion in *IBM* with regard to the MBTA and the Compact, is equally applicable in this case:

> [T]he Compact's election provision, by using the terms "may elect," contemplates a divergence between a party state's mandated apportionment formula and the Compact's own formula—either at the time of the Compact's adoption by a party state or at some point in the future. Otherwise, there would be no point in giving taxpayers an election between the two. In fact, reading the Compact's election provision as forward-looking—i.e., contemplating the future enactment of a state income tax with a mandatory apportionment formula different from the Compact's apportionment formula—is the only way to give meaning to the provision when it was enacted in Michigan. Viewed in this light, the [MBT's] mandatory apportionment language may plausibly be read as compatible with the Compact's election provision.
>
> * * *
>
> Because the Legislature gave no clear indication that it intended to repeal the Compact's election provision, we proceed under the assumption that the Legislature intended for both to remain in effect. After reading the statutes *in pari materia*, we conclude that a reasonable construction exists other than a repeal by implication. Under Article III(1) of the Compact, the Legislature provided a multistate taxpayer with a choice between the apportionment method contained in the Compact or the apportionment method required by Michigan's tax laws. If a taxpayer elects to apportion its income through the Compact, Article IV(9) mandates that the taxpayer do so using a three-factor apportionment formula. Alternatively, if the taxpayer does not make the Compact election, then the taxpayer must use the apportionment formula set forth in Michigan's governing tax laws. In this case, IBM's tax base arose under the [MBT]. Had it not elected to use the Compact's apportionment formula, IBM would have

> been required to apportion its tax base consistently with the mandatory language of the [MBT]—i.e., through the [MBT's] sales-factor apportionment formula. Thus, we believe the [MBT] and the Compact are compatible and can be read as a harmonious whole. [*Id*. at 656-658 (citations omitted).]

In the context of the instant case, the Legislature provided plaintiffs with a choice, through Article III(1) of the Compact, between the apportionment method contained in the Compact or the apportionment method required by the SBTA. If a taxpayer elects to apportion its income as provided by the Compact, Article IV(9) requires that the taxpayer do so using a three-factor apportionment formula. Alternatively, if the taxpayer does not elect the apportionment method under the Compact, then the taxpayer is required to use the apportionment formula set forth in the applicable tax laws. There is a reasonable construction that harmonizes the two statutes. Therefore, the presumption against implied repeals has not been rebutted here. See *IBM*, 496 Mich at 660 (opinion by VIVIANO, J.) ("[B]ecause there is a presumption *against* implied repeals, it is our task to determine if there is *any other reasonable construction* that would harmonize the two statutes and avoid a repeal by implication.") (citation omitted).

The lead opinion in *IBM* also determined that its conclusion—that the Compact's apportionment provision was not impliedly repealed—was consistent with the development of Michigan tax law, stating that a "review of the statutes *in pari materia* indicates a uniform and consistent purpose of the Legislature for the Compact's election provision to operate alongside Michigan's tax acts." *Id*. at 656. The opinion noted that the Legislature, despite its full knowledge of the Compact, left the Compact's election provision intact while repealing or amending other acts that were inconsis-

tent with provisions concerning business taxation. *Id*. at 657. Likewise, the opinion also noted the Legislature's retroactive amendment of the Compact effective January 1, 2011, which did not apply to all tax years subject to the MBTA, in ascertaining the Legislature's intent to keep the Compact's provisions intact despite the enactment and amendment of the MBTA. *Id*. at 658-659 (discussing 2011 PA 40).

We acknowledge the first enacting section of 2014 PA 282, which provides, in pertinent part:

> 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. *It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581,* and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713. [2014 PA 282, enacting § 1 (emphasis added).]

Through 2014 PA 282, the Legislature clarified—contrary to the lead opinion's conclusion in *IBM*—that it had intended to impliedly repeal the Compact when it enacted the MBT through 2007 PA 36, and that this intent was further revealed by its subsequent express repeal of the Compact's election provision, effective January 1, 2011, under 2011 PA 40.

However, in clarifying its legislative intent, the Legislature included nothing in 2014 PA 282 regarding

the validity of the Compact's election provision for multistate taxpayers subject to the SBTA before the effective date of the MBTA. Accordingly, the Legislature left open for use the Compact's apportionment formula during tax years Michigan businesses were subject to the SBTA. If it so chose, the Legislature easily could have closed this door. Instead, it chose not to, and it is not our role to second-guess its reasoning for not doing so. Thus, we conclude, consistent with the lead opinion's analysis in *IBM*, that

> the Legislature, in enacting [and amending] the [SBTA], had full knowledge of the Compact and its provisions. Even with such knowledge on [multiple] occasions, the Legislature left the Compact's election provision intact [with regard to the SBTA]. By contrast, the Legislature expressly repealed or amended other inconsistent acts regarding the taxation of businesses[, including its repeal of the Compact with regard to tax years Michigan businesses were subject to the MBTA]. Had the Legislature believed that the Compact's election provision no longer had a place in Michigan's tax system or conflicted with the purpose of the [SBTA], it could have taken the necessary action to eliminate the election provision. [*IBM*, 496 Mich at 657 (opinion by VIVIANO, J.) (citations omitted).]

See also *id*. at 659 n 59 (" '[T]he later express repeal of a particular statute may be some indication that the legislature did not previously intend to repeal the statute by implication.' "), quoting 1A Singer, Sutherland Statutory Construction (7th ed), § 23:11, p 485 (alteration in original).

Therefore, especially in light of the Legislature's clear expressions of intent regarding the express and implied repeal of the Compact in conjunction with the enactment of the MBTA and the lack of any indication that § 41 of the SBTA was intended to repeal the

apportionment-election provision in the Compact, we assume that the Legislature intended for the Compact's election provisions to remain in effect alongside the SBTA. See *IBM*, 496 Mich at 657 (opinion by VIVIANO, J.). Additionally, as explained earlier, the statutes may be reasonably construed in harmony. See *id*.

Because a "repeal by implication will not be found if *any other reasonable construction* may be given to the statutes," *KTS Indus*, 263 Mich App at 36-37 (emphasis added), the Court of Claims erred by concluding that the Compact's election provision was impliedly repealed by the SBTA.

V. THE BINDING NATURE OF THE COMPACT AND OTHER CONSTITUTIONAL CHALLENGES

Next, plaintiffs raise a series of arguments regarding whether the Compact was binding on subsequent legislatures, whether the Compact was superior to statutory law, and whether an implied repeal of the Compact would violate various state and federal constitutional provisions. These claims are rooted in the Court of Claims' conclusion that the Compact was impliedly repealed by the SBTA. As previously explained, we hold that the SBTA did not impliedly repeal the Compact's apportionment-election provision. Accordingly, to the extent that plaintiffs assert that *a repeal* of the apportionment-election provision of the Compact was impermissible or violated state and federal constitutional provisions, we need not address those claims in light of that holding.[10] Fur-

[10] Plaintiffs also claim that the Court of Claims erred by determining that plaintiffs' constitutional claims were untimely. We need not address this issue because we reject plaintiffs' constitutional claims on other grounds as explained in detail in the body of this opinion.

thermore, we reject any of plaintiffs' additional claims that are not rooted in the assumption that the SBTA impliedly repealed the apportionment-election provision of the Compact—and, instead, concern whether the Compact is binding and superior to Michigan statutory law—for the reasons provided by this Court in reviewing the validity of 2014 PA 282 in *Gillette*, which are discussed next in the context of Johnson Matthey's challenges to 2014 PA 282.

VI. JOHNSON MATTHEY'S CHALLENGES TO 2014 PA 282

In Docket No. 327251, Johnson Matthey challenges the validity and constitutionality of 2014 PA 282 (hereinafter referred to as "PA 282"), which the Legislature enacted to retroactively withdraw Michigan from the Compact. We reject Johnson Matthey's claims.

Johnson Matthey's numerous state and federal constitutional challenges are identical in all relevant

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Nevertheless, we note that the Court of Claims correctly held that plaintiffs' constitutional challenges were untimely. Pursuant to MCL 205.27a(7), a taxpayer claiming a refund on the basis that a Michigan tax statute is invalid under, or is preempted by, a constitutional provision or federal law must claim a refund within 90 days of the date set for filing a return. See also *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 588-589, 591; 560 NW2d 644 (1996). Plaintiffs are seeking refunds premised in part on claims that an implied repeal of the Compact's election provision would violate various constitutional provisions. As such, they are claiming refunds based on arguments that a tax statute is preempted by constitutional provisions. Accordingly, under MCL 205.27a(7), they were required to file those claims within 90 days after the date set for filing a return.

The Court of Claims found that plaintiffs did not assert their constitutional claims within the 90-day period, and plaintiffs fail to dispute that finding. Additionally, some plaintiffs do not even address the Court of Claims' ruling that the constitutional claims were untimely. To the extent that these plaintiffs fail to address the basis of the Court of Claims' decision, we deem this argument abandoned. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

respects to the arguments raised by some of the plaintiffs in *Gillette*. In that case, we concluded that the Compact was not a binding contract on this state but was merely an advisory agreement, such that the removal of Michigan from membership in the Compact under PA 282 was not prohibited. *Gillette*, 312 Mich App at 409-413. Further, "the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause." *Id*. at 411. Accordingly, the Compact was not superior to statutory law, and it was "subject to Michigan law concerning the interpretation of statutes." *Id*. at 414. See also *id*. at 410 n 5. Furthermore, a retroactive repeal of the Compact did not violate the Contracts Clauses of either the federal or state Constitutions. *Id*. at 410, 413-414.

We also held that "the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal Constitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself." *Id*. at 414. Additionally, we held that the enactment of PA 282 "did not violate the Separation of Powers Clause of the state Constitution[.]" *Id*. at 430. Moreover, "PA 282 does not violate the Commerce Clause" of the United States Constitution. *Id*. at 434. We also concluded that "the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution." *Id*. at 438.

In sum, we rejected in *Gillette* the same arguments that Johnson Matthey raises here. Thus, Johnson Matthey's constitutional challenges to PA 282 are devoid of merit.

VII. WHETHER THE SBT IS AN INCOME TAX

Defendant argues on cross-appeal that the Court of Claims erred by concluding that the SBT is an income tax for purposes of the Compact's election provision, such that the court erroneously concluded that the SBTA was subject to, and therefore conflicted with, the Compact's election provision. We disagree.

As stated earlier, the Compact's apportionment-election provision previously stated:

> Any taxpayer *subject to an income tax* whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. [MCL 205.581, art III(1) (emphasis added).]

The Compact defined "income tax" as "a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions." MCL 205.581, art II(4). "Under the Compact's broad definition, a tax is an income tax if the tax measures net income by subtracting expenses from gross income, with at least one of the expense deductions not being specifically and directly related to a particular transaction." *IBM*, 496 Mich at 663 (opinion by VIVIANO, J.).

The SBT fits this definition. The SBT base is calculated by using federal taxable income as a starting point and then making various additions and subtractions as required by the act. *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 496-497 & n 15; 373 NW2d

730 (1985). See also *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 150-151; 445 NW2d 428 (1989) (*Trinova I*), aff'd *Trinova II*, 498 US 358; *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 537; 831 NW2d 255 (2013) ("The SBTA unambiguously stated that '[tax base] means business income' and '[business income] means federal taxable income.' MCL 208.9(1); MCL 208.3(3).") (alterations in original). Federal taxable income, for purposes of the SBT, consists of gross income minus deductions allowed by the federal tax code. See MCL 208.5(3), citing 26 USC 63. See also 26 USC 63(a); *Mobil Oil*, 422 Mich at 497 n 15. In general, deductions from gross income permitted by the federal tax code include ordinary and necessary expenses that are paid or incurred while running a business. See 26 USC 162(a); *Mobil Oil*, 422 Mich at 489.

As the Court of Claims explained, pursuant to MCL 208.9(2) through (6), "[t]he SBT . . . expands the income tax base by adding back some, but not all, of the federal expense deductions taken to arrive at federal taxable income." The Court of Claims further explained:

> For example, except for compensation, most ordinary and necessary business expenses incurred in the carrying on of a trade or business are deducted from gross income to arrive at federal taxable income, but are not added back as part of the SBT tax base. The resulting tax is thus in part measured by "an amount arrived at by deducting expenses from gross income" for purposes of defining income tax under the Compact. That some expenses such as compensation are also added back to the SBT tax base before the tax is calculated does not alter the conclusion that the SBT is "*imposed on or measured by an amount arrived at by deducting expenses from gross income*, 1 or more forms of which expenses are not specifically and directly related to particular transactions." Under the plain language of

> the Compact, it is therefore an income tax for Compact purposes. [Citations omitted.]

See also *Trinova I*, 433 Mich at 150-151 (explaining some of the adjustments to "business income," i.e., federal taxable income, which must be made when calculating the SBT base); *id*. at 149 n 6 (noting that the SBTA prescribed "various exclusions, exemptions, and industry-specific adjustments").

As the Court of Claims reasoned, some ordinary business expenses, such as insurance premiums, rent,[11] and research and development costs, which are deducted when calculating federal taxable income,[12] are not added back when determining the SBT base. See MCL 208.9 (prescribing the adjustments to federal taxable income that are required in calculating the SBT base). Consistent with the Compact's definition, these expenses are not specifically and directly related to particular transactions. See MCL 205.581, art II(4).

Therefore, because the SBT is calculated by beginning with federal taxable income, which consists of gross income minus federally allowed deductions, and because some deductions allowed under the federal tax code are not added back to the SBT base, it follows that the SBT is measured by an amount arrived at through the deduction of expenses from gross income. Accordingly, the Court of Claims properly determined that the SBT qualifies as an income tax as defined by the Compact because it "tax[ed] a variation of net income[.]" *IBM*, 496 Mich at 667 (opinion by VIVIANO, J.).

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[11] Although most rental expenses are not added back to the SBT base, MCL 208.9(4)(h) required a federal deduction for rent attributable to certain "lease back" transactions to be added back to the SBT base.

[12] See 26 USC 162(a) (allowing federal deductions for ordinary and necessary expenses paid or incurred in carrying on a trade or business).

As defendant emphasizes on appeal, we recognize that a provision of the SBTA stated that "[t]he tax levied under this section and imposed is upon the privilege of doing business and not upon income." MCL 208.31(3). However, a similar provision of the MBTA provided that "[t]he [modified gross receipts tax (MGRT)] levied and imposed under this section is upon the privilege of doing business and not upon income or property," MCL 208.1203(2), and this provision did not prevent the Michigan Supreme Court from unanimously concluding in *IBM* that the MGRT was an "income tax" under the broad definition of that term in the Compact, see *IBM*, 496 Mich at 665-667 (opinion by VIVIANO, J.); *id*. at 664 ("Although this statement indicates that the MGRT is not a tax upon income under the [MBTA], we must still determine whether the MGRT fits under the broad definition of 'income tax' under the Compact."); *id*. at 668 (ZAHRA, J., concurring); *id*. at 672 n 3 (MCCORMACK, J., dissenting).

As the lead opinion in *IBM* explained, the Court was not required to "put a definitive label on the MGRT, a task with which commentators have struggled." *Id*. at 663 n 70 (opinion by VIVIANO, J.). Commentators had characterized the MGRT as many types of taxes other than an income tax, but the lead opinion in *IBM* emphasized that its task was merely to determine whether the MGRT constituted an "income tax" under the Compact's definition. *Id*.; see also *id*. at 667 n 85 ("Our holding is limited to the determination that the MGRT is included within the Compact definition of 'income tax.' . . . [W]e do not need to reach the issue whether the MGRT, generally, is an income tax.").

Likewise, here, the labels that have been used to describe the SBT in various contexts are not dispositive of whether the SBT qualifies as an income tax

under the Compact's broad definition of that term. Although both the United States Supreme Court and the Michigan Supreme Court have characterized the SBT as a value-added tax that measures business activity rather than an income tax, see *Trinova II*, 498 US at 367; *Trinova I*, 433 Mich at 149, those characterizations were not made in the context of the Compact's definition of an income tax. Similarly, even though this Court treated the SBT as a value-added tax rather than an income tax in determining the application of a federal statute barring state taxes imposed on or measured by net income derived from interstate commerce, when the only activity in the state involved solicitation of orders, see *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 307-311; 497 NW2d 595 (1993), that analysis was not conducted under the Compact's definition of an income tax. The issue here is limited to the application of the Compact's definition; no definitive characterization of the SBT is required, just as no definitive characterization of the MGRT was required in *IBM* in order to conclude that it was an income tax under the Compact. See *IBM*, 496 Mich at 663 n 70 (opinion by VIVIANO, J.).

VIII. WHETHER PLAINTIFFS' CLAIMS ARE BARRED BY THE RETROACTIVE REPEAL OF THE COMPACT BY 2014 PA 282

Lastly, defendant argues on cross-appeal that the explicit repeal of the Compact by PA 282 extends to tax years 2005, 2006, and 2007, and to taxpayers subject to the SBT during those years. In particular, defendant contends that the language of PA 282 stating that the Compact "is repealed retroactively and effective beginning January 1, 2008," means that no taxpayer may attempt to elect the Compact's apportionment method following that date. We disagree.

Defendant's contention is contravened by the full language of the first enacting section of PA 282:

> 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713. [2014 PA 282, enacting § 1.]

This language plainly indicates that the Compact was expressly repealed beginning January 1, 2008. The SBTA was no longer in effect on January 1, 2008, given that it had been repealed effective December 31, 2007. See 2006 PA 325. Moreover, the first enacting section of PA 282 indicates that the Legislature's explicit repeal of the Compact was intended to effectuate the Legislature's original intent concerning the application of MCL 208.1301, a section of the MBTA, and the intended effect of that section to eliminate the apportionment-election provision of the Compact. The enacting section of PA 282 also explains that 2011 PA 40 was intended to *further* express the Legislature's original intent with regard to the application of MCL 208.1301 and to clarify that the Compact's apportionment-election provision was not available under the Income Tax Act of 1967. There is no language in the enacting section that suggests a

legislative intent to repeal the Compact with respect to tax years affected by the SBTA or with respect to SBT taxpayers. See *Sun Valley Foods*, 460 Mich at 236 ("If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.").

Moreover, the lead and concurring opinions in *IBM* also support the conclusion that the explicit repeal of the Compact by PA 282 effective January 1, 2008, did not extend to tax years before 2008. In *IBM*, our Supreme Court analyzed 2011 PA 40, which contained language similar to the enacting section of PA 282. 2011 PA 40 stated that "beginning January 1, 2011," a taxpayer subject to the MBTA or the Income Tax Act of 1967 could not elect to use the Compact's apportionment formula. The lead and concurring opinions concluded that the Compact's election provision was in effect for the 2008 tax year at issue in *IBM*, implicitly finding that the "beginning January 1, 2011" language in 2011 PA 40 denotes *tax years* beginning in 2011. See *IBM*, 496 Mich at 659 (opinion by VIVIANO, J.); *id*. at 668-670 (ZAHRA, J., concurring). See also *Gillette*, 312 Mich App at 406 ("In *IBM*, the Supreme Court held that through 2011 PA 40 the Legislature created a window (from January 1, 2008 until January 1, 2011) wherein certain taxpayers could still utilize the apportionment option available under Article IV of the Compact."). Likewise, the language in PA 282 stating that the Compact was repealed "effective beginning January 1, 2008," is properly understood as indicating that the express repeal of the Compact applies to *tax years* beginning on January 1, 2008.

Therefore, the express repeal of the Compact by PA 282 does not apply to the SBTA.

IX. CONCLUSION

We agree with plaintiffs that the trial court erred by concluding that the SBTA impliedly repealed the Compact's election provision. However, the rest of plaintiffs' claims on appeal, as well as defendant's alternative grounds for affirmance, lack merit.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, an issue of public importance being involved. MCR 7.219(A).

RIORDAN, P.J., and JANSEN and FORT HOOD, JJ., concurred.

KETCHUM ESTATE v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 324741. Submitted February 2, 2016, at Lansing. Decided March 1, 2016, at 9:00 a.m.

The estate of Wilma F. Ketchum brought an action in the Clinton Circuit Court against the Department of Health and Human Services to preclude it from recovering from the estate $129,703.63 it had paid the decedent for Medicaid long-term care benefits during her lifetime. Under 42 USC 1396p(b), the states are required to implement Medicaid estate recovery programs. MCL 400.112g(1), part of the Social Welfare Act, MCL 400.1 *et seq*., authorized the department to establish and operate such a program, but MCL 400.112g(5) required federal approval before the program could be implemented. As relevant to this case, MCL 400.112g(3)(e)(*i*) required the department to seek federal approval regarding the circumstances under which the estates of medical-assistance recipients would be exempt from the Michigan Medicaid estate recovery program because of a hardship. The statute required the department to develop a definition of hardship that included, but was not limited to including, (1) an exemption for the portion of the value of the medical-assistance recipient's homestead equal to or less than 50% of the average price of a home in the county in which the recipient's homestead was located as of the date of his or her death, (2) an exemption for the portion of an estate that is the primary income-producing asset of survivors, and (3) a rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted to avoid estate recovery. The resultant state plan under Title XIX of the Social Security Act, approved by the federal government, contained the rebuttable presumption and defined undue hardship as existing when (1) the estate subject to recovery is the primary income-producing asset of the survivors, (2) the estate is a home of modest value (defined as one valued at 50% or less of the average price of homes in the county where the homestead was located, as of the date of the decedent's death), or (3) the recovery of the decedent's estate would cause a survivor to become or remain eligible for Medicaid. It also

provided the opportunity for an exemption for certain survivors who did not satisfy the definition of undue hardship but were residing in the decedent's home for a specific period under specific circumstances. Furthermore, a means test was to be applied when considering whether to grant a hardship waiver. Finally, the state plan provided that undue hardship waivers are temporary and expire when the conditions that qualified an estate for a waiver no longer exist. The department also elaborated its policies regarding hardship waivers in a policy manual, Bridges Administrative Manual (BAM) 120. In this case, the estate had initially requested a hardship waiver from estate recovery, asserting that when the decedent enrolled in Medicaid, the department had not provided adequate notice about estate recovery or hardship waivers. The estate further asserted that the decedent's house had been sold for $30,000 following her death and that the estate received $28,670.64 in cash after deducting the fees associated with the sale. The department denied the waiver, concluding that the estate did not meet the requirements for a hardship exemption. The estate requested an administrative hearing, at which it argued, among other things, that the department had to grant a hardship waiver because the home was valued at less than 50% of the average price of a home in the county and that the denial was contrary to the definition of hardship in BAM 120. The department argued that the hardship waiver was properly denied because no home of modest value existed once the home was sold and that the administrative tribunal did not have jurisdiction to determine the notice issue. The administrative law judge issued a proposal for decision that recommended upholding the denial, concluding that the home had been sold, leaving the estate with cash and not a home of modest value, and that he did not have jurisdiction to decide the notice issue. The estate filed exceptions to the proposal for decision, arguing that it violated MCL 400.112g(e)(*i*), that BAM 120 did not conform to the governing statute because it required a means test, and that BAM 120 required the department to consider the value of the home on the date of a decedent's death regardless of whether the home was subsequently sold. The department's director, however, adopted the proposal for decision, and the estate appealed. The court, Randy L. Tahvonen, J., reversed, holding that the notice issue had been resolved in a separate probate court proceeding and that MCL 400.112g(3)(e)(*i*) required the department to create an exemption for a homestead equal to or less than 50% of the average price of a home in the county, a statutory directive

that trumped any inconsistent administrative regulations, policies, or directives. The Court of Appeals granted the department leave to appeal.

The Court of Appeals *held*:

The Legislature delegated broad authority to the department to enable it to accomplish its statutory responsibilities with respect to the Medicaid program. The Legislature clearly required any state plan submitted for federal approval to contain the substantive requirements set forth in MCL 400.112g(3)(e)(*i*) to (*iii*) but also gave the department discretion to include other requirements for the hardship exemption, which the Legislature did. The question in this case was whether the estate met those additional requirements. The department denied the hardship waiver on the basis that the home, which was of modest value at the time Ketchum died, had been sold before the hardship application was submitted. Undue hardship waivers expire when the conditions that qualified the estate no longer exist. When the home was sold, the estate had cash as an asset rather than a home of modest value, so the estate's ability to obtain an undue hardship waiver necessarily expired. The Legislature authorized the department to implement this and other additional provisions as long as they were submitted to and approved by the appropriate federal authorities.

Reversed and remanded.

Charlotte F. Shoup, PLC (by *Charlotte F. Shoup*), and *Chalgian & Tripp Law Offices PLLC* (by *David L. Shaltz*) for the estate of Wilma F. Ketchum.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Brian K. McLaughlin*, Assistant Attorney General, for the Department of Health and Human Services.

Amicus Curiae:

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Amy E. Peterman*), for the Elder Law and Disability Rights Section of the State Bar of Michigan.

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

MURRAY, J. This case involves the estate of Wilma Francis Ketchum's attempt to preclude the state Department of Health and Human Services (DHHS)[1] from recovering from the estate certain amounts that it paid to the decedent, Wilma Ketchum, for Medicaid long-term care benefits during her lifetime. After defendant DHHS initially denied plaintiff estate's request for a hardship waiver, plaintiff requested an administrative hearing that resulted in a proposal for a decision recommending the denial be upheld, which the DHHS's director ultimately followed. Plaintiff then filed an appeal in the circuit court, which overturned the DHHS's decision. We then granted the DHHS's application for leave to appeal, *Ketchum Estate v Dep't of Community Health*, unpublished order of the Court of Appeals, entered April 10, 2015 (Docket No. 324741), limited to the issue raised in the application, MCR 7.205(E)(4). We now reverse.

I. BACKGROUND FACTS AND PROCEEDINGS

"In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. See 42 USC 1396 *et seq*. This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010). In 1993, Congress required states to implement Medicaid estate recovery programs. 42 USC 1396p(b). "The term 'estate recovery' refers to the provisions of federal law requiring states

[1] The Department of Community Health was merged with the Department of Human Services, and the combined agency is now known as the Department of Health and Human Services. Executive Order No. 2015-4.

to attempt to recover payments made to healthcare providers on behalf of a Medicaid recipient from the recipient's estate after his or her death." Swanberg & Steward, *Medicaid Estate Recovery Update: What You Need to Know Now*, 93 Mich B J 28, 28 (May 2014). In 2007, the Michigan Legislature passed 2007 PA 74, which added MCL 400.112g though MCL 400.112k to Michigan's Social Welfare Act, MCL 400.1 *et seq*. This legislation empowered defendant to "establish and operate the Michigan medicaid estate recovery program to comply with" 42 USC 1396p. MCL 400.112g(1). MCL 400.112g(5) required approval by the federal government before the estate recovery program would be implemented.

Specifically, MCL 400.112g(3) details what defendant had to seek federal approval for when it comes to a hardship exemption:

> (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:*
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> (a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(*i*) and (*ii*) of title XIX.
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> (b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.
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> (c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.
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> (d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that

may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(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.*

(*ii*) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.

(*iii*) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

(f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

(4) The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the

amount of recovery available or if the recovery is not in the best economic interest of the state.

(5) The department of community health shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained.

(6) The department of community health shall not recover assets from the home of a medical assistance recipient if 1 or more of the following individuals are lawfully residing in that home:

(a) The medical assistance recipient's spouse.

(b) The medical assistance recipient's child who is under the age of 21 years, or is blind or permanently and totally disabled as defined in section 1614 of the social security act, 42 USC 1382c.

(c) The medical assistance recipient's caretaker relative who was residing in the medical assistance recipient's home for a period of at least 2 years immediately before the date of the medical assistance recipient's admission to a medical institution and who establishes that he or she provided care that permitted the medical assistance recipient to reside at home rather than in an institution. As used in this subdivision, "caretaker relative" means any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient.

(d) The medical assistance recipient's sibling who has an equity interest in the medical assistance recipient's home and who was residing in the medical assistance recipient's home for a period of at least 1 year immediately before the date of the individual's admission to a medical institution. [Emphasis added.]

The current state plan, approved by the federal government, provides the following regarding the definition of undue hardship:

4. The State defines undue hardship as follows:

An undue hardship exists when (1) the estate subject to recovery is the primary income producing asset of the survivors (where such income is limited), including, but

not limited to, a family farm or business; (2) the estate subject to recovery is a home of modest value or (3) the State's recovery of a decedent's estate would cause a survivor to become or remain eligible for Medicaid.

There is a presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery. The agency will not grant an undue hardship waiver if the granting of such waiver results in the payment of claims to other creditors with a lower priority standing.

Home of modest value is defined as A home valued AT fifty percent (50%) or less of the average price of homes in the county where the homestead is located, as of the date of the beneficiary's death.

For individuals who apply for but do not meet the definition of undue hardship as found in MCL §400.112g and provided above, the State will consider granting an exemption when a survivor who was residing in the deceased beneficiary's home continuously for at least two years immediately before the beneficiary's date of death, provided care that kept the deceased beneficiary out of an institution, even if the deceased beneficiary never entered an institution. This exemption will only be granted in circumstances where non-institutional long-term care services approved under the State Plan were provided and only after the means test has been satisfied.

The State is following its own definition of undue hardship in accordance with MCL §400.112g(3)(e). When considering whether to grant an undue hardship waiver, a means test will be applied. West Virginia v. Thompson, 475 F.3d 204 [CA 4, 2007]. An applicant will satisfy the means test only if both of the following are true:

total household income of the applicant is less than 200 percent of the poverty level for a household of the same size; and

total household resources of the applicant do not exceed $10,000.

> Undue hardship waivers are temporary. Undue hardship waivers expire when the conditions which qualified an estate, or a portion of an estate, for a waiver no longer exist.
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> 5. The following standards and procedures are used by the State for waiving estate recoveries when recovery would cause an undue hardship, or when recovery is not cost-effective.
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> Review of hardship waivers begins with the State's vendor. The vendor, in accordance with its contract with the State, reviews all incoming waiver applications and makes an initial recommendation to accept or deny and sends it to the Estate Recovery Specialist.
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> * * *
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> The vendor will use the following criteria when making an initial undue hardship waiver recommendation:
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> • whether the estate is the primary income-producing asset of the survivors
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> • whether the estate is a home of modest value
>
> • whether recovery from the estate will cause a survivor to become or remain eligible for Medicaid
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> • whether an actual hardship exists after application of the means test[.][2]

Finally, defendant's Bridges Administrative Manual 120 (BAM 120)—which essentially contains defendant's policies—states the following regarding the undue hardship exception to estate recovery:

> Recovery may be waived if a person inheriting property from the estate can prove that recovery would result in an undue hardship. An application for an undue hardship must be requested by the applicant and returned with

[2] State Plan Under Title XIX of the Social Security Act, Attachment 4.17-A, TN No. 12-10, pp 2-3, approved September 19, 2012, effective April 1, 2012.

proper documentation in order for a hardship waiver to be considered. In order to qualify for a hardship exemption, an applicant must file the application with the department not later than 60 days from the date the department sends the Notice of Intent to the personal representative or estate contact. An undue hardship exemption is granted to the applicant only and not the estate generally.

Undue hardship waivers are temporary. Submitted applications will be reviewed by the department or its designee, and the department shall make a written determination on such application.

An undue hardship may exist when one or more of the following are true:

• The estate subject to recovery is the sole-income-producing asset of the survivors (where such income is limited), such as a family farm or business.

• The estate subject to recovery is a home of modest value, see definition in this item.

• The state's recovery of decedent's estate would cause a surviving heir to become or remain eligible for Medicaid.

When considering whether to grant an undue hardship, the department shall apply a means test to all applicants. To ensure that waivers are not granted in a way that is contrary to the intent of the estate recovery program under federal law.

An applicant for an undue hardship waiver will satisfy the means test only if both of the following are true:

• Total household income of the applicant is less than 200 percent of the poverty level for a household of the same size as set in Reference Table Manual 246.

• Total household resources of the applicant do not exceed $10,000.[3]

Ketchum began receiving Medicaid long-term care services in November 2010, which continued until her

[3] State of Michigan, Department of Human Services, BAM 120, BPB 2012-007, May 1, 2012, pp 8-9.

death on August 1, 2013. On September 21, 2013, the attorney for plaintiff's personal representative sent defendant a letter asserting "a complete exemption from estate recovery in this matter" because defendant had not provided adequate notice about estate recovery or about the process for applying for a hardship waiver when Ketchum enrolled in Medicaid. Defendant mailed the attorney hardship waiver applications and indicated that it would use the information provided in the application to determine whether plaintiff qualified for a waiver.

Three applications for a hardship waiver were subsequently completed, one for each of Ketchum's children, and in them they explained that although the applications were being completed, plaintiff and all three heirs were asserting a right to an estate recovery exemption under MCL 400.112g(3)(e)(*i*). A settlement statement was also attached showing that plaintiff's house had been sold on September 25, 2013, for a gross amount of $30,000, and after fees associated with the sale, $28,670.64 was turned over in cash to plaintiff. Also attached was property information from Clinton County showing that 50% of the average value of residential property in the county was $65,179. Finally, a record from plaintiff's probate case[4] was attached showing that plaintiff had disallowed defendant's claim for reimbursement of $129,703.63 in Medicaid benefits it had provided to Ketchum during her lifetime.

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[4] The probate court case was consolidated with appeals from three other probate court orders involving the same issues, *In re Gorney Estate*, unpublished order of the Court of Appeals, entered May 20, 2015 (Docket Nos. 323090, 323185, 323304, 325792, and 326642), and the decision on those appeals was issued on February 4, 2016, *In re Gorney Estate*, 314 Mich App 281; 886 NW2d 894 (2016).

On December 27, 2013, defendant sent plaintiff a letter stating that "this estate does not meet the requirements for a hardship exemption because recovery will not cause the applicant to become or remain eligible for Medicaid." The letter further stated that estate recovery would continue and that plaintiff could request an administrative hearing to challenge the decision, which plaintiff did on January 19, 2014. On February 26, 2014, defendant sent three new letters,[5] one to each of Ketchum's children, setting forth a new and independent ground for the denial, stating that "this estate does not meet the requirements for a hardship exemption because the home has been sold and does not qualify as a home of modest value."

At the administrative hearing plaintiff argued that MCL 400.112g(3)(e) required defendant to grant it a hardship waiver because the home was valued at less than 50% of the average price of a home in Clinton County, that the denial was contrary to the definition of hardship in BAM 120, that defendant's position was arbitrary and capricious, and that recovery was not cost effective. Defendant argued that the hardship waiver was properly denied because no home of modest value existed once the home was sold, and the administrative tribunal did not have jurisdiction to determine whether notice was adequately provided.

An administrative law judge issued a proposal for decision that recommended affirming defendant's decision to deny plaintiff a hardship exception because the home had been sold, leaving plaintiff with "cash" in the estate and not a home of modest value. The proposal for decision also concluded that the administrative tribunal did not have jurisdiction to decide

[5] The letters stated that they replaced "the letter that was sent in error on December 27, 2013."

issues regarding whether notice was properly given or if recovery should be barred because it was not in the best economic interest of the state.

Plaintiff filed exceptions to the proposal for decision, arguing that it violated the clear meaning of "MCL 400.112g(e)(i),"[6] that by requiring a "means test" BAM 120 does not conform to the governing statute, and that BAM 120 requires defendant to look to the value of an estate's home on the date of a decedent's death regardless of whether it is sold after death. On April 24, 2014, the DHHS director entered a final order adopting the recommendation in the proposal for decision and denying the hardship exemption.

Plaintiff filed a claim of appeal in the circuit court, arguing the same issues it had during the administrative proceedings, i.e., that Ketchum did not receive adequate notice about estate recovery, that it was entitled to a hardship waiver from estate recovery for a home of modest value, and that defendant's denial was contrary to MCL 400.112g(3)(e)(*i*). Defendant in turn argued that plaintiff was collaterally estopped from arguing issues pertaining to notice, and that it had rationally interpreted the "home of modest value" waiver to no longer apply once a home is sold.

After a hearing, the circuit court issued an opinion and order reversing defendant's denial of the hardship exemption. The court stated that the issue regarding notice had been resolved in an August 5, 2014 opinion and order from the probate court and that it could not rule on whether the probate court's decision was correct.[7] The circuit court went on to conclude that

[6] Presumably referring to MCL 400.112g(3)(e)(*i*).

[7] But our Court could, and did, ruling that the estate did receive sufficient notice, contrary to what the probate court had held. *Gorney Estate*, 314 Mich App at 292-293.

MCL 400.112g(3)(e)(*i*) required defendant to create an exemption for a homestead equal to or less than 50% of the average price of a home in the county and that this statutory directive "trumps any inconsistent administrative regulations, policies, or directives."

As noted, we granted leave to appeal, limited to the one issue raised in defendant's application, *Ketchum Estate v Dep't of Community Health*, unpublished order of the Court of Appeals, entered April 10, 2015 (Docket No. 324741),[8] which when reduced to a reasonable length, was did "the circuit court err when it concluded that MCL 400.112g(3)(e) created a statutory hardship exemption from estate recovery?"

II. ANALYSIS

Defendant seeks reversal of the circuit court's decision that it was statutorily required to grant plaintiff a home-of-modest-value hardship waiver. "[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles" and whether its factual findings were clearly erroneous. *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996). "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 235. This Court reviews questions of statutory interpretation de novo. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009).

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[8] Amicus curiae submitted a brief that addresses the issue upon which we granted leave, but also goes further and addresses an additional argument, relative to the cost effectiveness of pursuing estate recovery, that was not raised by either party in the application process. This amicus curiae cannot do. See MCR 7.212(H)(2) and *Kinder Morgan Mich LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007).

Primarily at issue is the import of MCL 400.112g(3)(e)(*i*), which bears repeating:

> (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:*
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> (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:*
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> (*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.*
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> (*ii*) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.
>
> (*iii*) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

"When faced with questions of statutory interpretation, [this Court's] obligation is to discern and give

effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Words of a statute are to be given "their plain and ordinary meaning," *id*., which in part requires consideration of "the context in which the words are used," *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002), as well as the placement of the words in the statutory scheme, *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

"Pursuant to the Social Welfare Act (SWA), MCL 400.1 *et seq.*, the [Department of Community Health (DCH)] is responsible for establishing and administering medical assistance programs in the state, including the Medicaid program." *Pharm Research & Mfr of America v Dep't of Community Health*, 254 Mich App 397, 404; 657 NW2d 162 (2002). Given the "complex nature of the endeavor, the Legislature has delegated broad authority to the DCH to enable it to accomplish its statutory responsibilities." *Id*.

In *In re Keyes Estate*, 310 Mich App 266, 268; 871 NW2d 388 (2015), this Court concluded that in 2007 the Legislature amended the Social Welfare Act to require the DHHS to establish a Medicaid estate recovery program, but that it would not be implemented until approved by the federal government. Relative to MCL 400.112g(3)(e), the Court stated that that subdivision "is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in

the subdivisions." *Id*. at 272. The Court rejected the estate's argument that MCL 400.112g(3)(e) provided a specific requirement that the DHHS provide certain notices about estate recovery to Medicaid applicants, holding that § 112g(3)(e) simply required the department to seek approval of certain provisions from the federal government in developing the estate recovery program. *Id*.

Defendant argues that *Keyes* controls the disposition of this case, in that under the rationale of *Keyes*, MCL 400.112g(3)(e) merely required defendant to seek federal approval of certain provisions in the plan, *id*., and therefore MCL 400.112g(3)(e)(*i*) (like all other subparagraphs of MCL 400.112g(3)(e)) does not contain a binding mandate for defendant to grant a home-of-modest-value exemption when the 50% threshold is shown. Plaintiff, on the other hand, argues that *Keyes* is distinguishable on its facts, and in particular because the provision at issue here—MCL 400.112g(3)(e)(*i*)—contains a more specific command for inclusion into the state plan than does the statutory provision at issue in *Keyes*. *Keyes*, however, does not play as big a role in this case as the parties perceive.

The parties focus on the *Keyes* Court's recognition that "Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions." *Keyes*, 310 Mich App at 272. *Keyes* was, of course, correct in that the notice language within Subsection (3)(e) does not itself constitute the state notice provision, as that subsection simply directs the DHHS to submit a state plan containing a notice requirement. In fact, the *Keyes* Court emphasized the directive nature of the statutory language as one means of distinguishing between the two notice

provisions contained in Subsections (3)(e) and (7), see *id*. at 272-273, but that Court did not address the issues presented here, i.e., whether the requirements within the subparagraphs of Subsection (3)(e) must be placed into the state plan that is submitted for approval and whether the DHHS could *add* additional provisions to those exemptions.

As *Keyes* recognized, Subsection (3)(e) makes clear that any specifics contained in Subsections (3)(e)(*i*) through (*iii*) *are required* to be included in the state plan submitted for approval, but just as importantly, that subsection also specifies that the department is "not limited to" including just those provisions. In other words, and as plaintiff argues, the Legislature clearly intended through the language in Subsection (3)(e) to require that any state plan submitted for federal approval contain the substantive requirements set forth in Subparagraphs (*i*) through (*iii*). But in that same subsection, the Legislature also provided express language ("includes, but not limited to, the following") granting the DHHS discretion to include *other* requirements for the hardship exemption.[9] And the DHHS did just that, as there is no dispute that the state plan

[9] Amicus curiae's argument surrounding the meaning of MCL 400.112g(3)(e) includes resort to the contents of a Senate Fiscal Agency analysis. However, we do not resort to legislative history when the text of the statute is clear. *Chmielewski v Xermac Inc*, 457 Mich 593, 608; 580 NW2d 817 (1998). Amicus curiae also asserts that defendant failed to comply with MCL 400.112g(3)(e) because it failed to specifically seek approval for the language in MCL 400.112g(3)(e)(*i*) from the federal government. However, there is no documentation in the record concerning what documents or requests defendant sent to the Centers for Medicare & Medicaid Services. Additionally, to the extent that defendant failed to perform a clear legal duty that did not involve an exercise of discretion or judgment and plaintiff had a clear right to the performance of that duty, the remedy would be an action for mandamus. *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994).

submitted and approved contained both the requirements set forth in Subsections (3)(e)(*i*) through (*iii*), as well as additional criteria—such as the temporal requirement for hardship waivers—that will be discussed below. Consequently, helpful as the language in *Keyes* may be regarding the general framework of Subsection (3)(e), it is not dispositive to resolving this case because the state plan *did* include the requirements of Subsections (3)(e)(*i*) through (*iii*), as well as additional permissible provisions. The question in this case is whether the estate met those additional requirements.

The state plan, as contained on defendant's website and which has an effective date of April 1, 2012 (after Ketchum's death), states:

> 4. The State Plan defines undue hardship as follows:
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> An undue hardship exists when (1) the estate subject to recovery is the primary income producing asset of the survivors (where such income is limited), including, but not limited to, a family farm or business; (2) the estate subject to recovery is a home of modest value or (3) the State's recovery of a decedent's estate would cause a survivor to become or remain eligible for Medicaid.
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> * * *
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> Home of modest value is defined as A home valued AT fifty percent (50%) or less of the average price of homes in the county where the homestead is located, as of the date of the beneficiary's death.
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> For individuals who apply for but do not meet the definition of undue hardship as found in MCL §400.112g and provided above, the State will consider granting an exemption when a survivor who was residing in the deceased beneficiary's home continuously for at least two years immediately before the beneficiary's date of death, provided care that kept the deceased beneficiary out of an

institution, even if the deceased beneficiary never entered an institution. This exemption will only be granted in circumstances where non-institutional long-term care services approved under the State Plan were provided and only after the means test has been satisfied.

The State is following its own definition of undue hardship in accordance with MCL §400.112g(3)(e). When considering whether to grant an undue hardship waiver, a means test will be applied. West Virginia v. Thompson, 475 F.3d 204 [CA 4, 2007]. An applicant will satisfy the means test only if both of the following are true:

total household income of the applicant is less than 200 percent of the poverty level for a household of the same size; and

total household resources of the applicant do not exceed $10,000.

Undue hardship waivers are temporary. Undue hardship waivers expire when the conditions which qualified an estate, or a portion of an estate, for a waiver no longer exist.

5. The following standards and procedures are used by the State for waiving estate recoveries when recovery would cause an undue hardship, or when recovery is not cost-effective.

Review of hardship waivers begins with the State's vendor. . . .

* * *

The vendor will use the following criteria when making an initial undue hardship waiver recommendation:

• whether the estate is the primary income-producing asset of the survivors

• whether the estate is a home of modest value

• whether recovery from the estate will cause a survivor to become or remain eligible for Medicaid

> • whether an actual hardship exists after application of the means test[.][10]

Defendant denied the hardship waiver on the basis that the home (which no one disputes was of modest value at the time of Ketchum's death) had been sold prior to when the application was submitted. Although plaintiff is correct that nothing in the state plan or in BAM 120 *explicitly* states that once a home is sold the home-of-modest-value hardship waiver can no longer be obtained, both state that "[u]ndue hardship waivers are temporary" and the state plan states that the "[u]ndue hardship waiver[] expire[s] when the conditions which qualified an estate, or a portion of an estate, for a waiver no longer exist." Under these provisions, once a home of modest value is sold and converted to cash, an estate no longer has a home of modest value as an asset; it has cash. Therefore, defendant is correct that, once the home has been turned to cash, the condition that caused the undue hardship—the presence of a home of modest value—no longer exists and the ability to obtain an undue hardship waiver necessarily expires.

Moreover, this time element does not conflict with the commands of MCL 400.112g(3)(e)(*i*), as this DHHS policy provision was (as required by statute) submitted to and approved by federal authorities and falls within the broad language "includes, but is not limited to," contained within MCL 400.112g(3)(e). Clearly, the Legislature approved the DHHS's implementing additional provisions on this issue, as long as they were submitted to and approved by the appropriate federal authorities. Thus, the executive branch has not ven-

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[10] State Plan, Attachment 4.17-A, TN No. 12-10, pp 2-3 (emphasis added).

tured beyond the role given to it by the Legislature. See *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 46; 869 NW2d 810 (2015).[11]

Additionally, nothing within MCL 400.112g(3)(e)(*i*) prevents the implementation of the temporal requirement on hardship waivers. The plain language of that subparagraph references the recipient's date of death for valuation purposes, not, as plaintiff argues, to preserve in perpetuity the ability to utilize the modest home value exemption.

Finally, plaintiff and amicus curiae argue that defendant is precluded from pursuing estate recovery against plaintiff because MCL 400.112g(4) states that defendant "shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state" and that because plaintiff has modest assets to begin with, after payment of higher priority claims plaintiff will only have a meager amount to turn over to defendant if it is able to collect. However, this issue (1) was not raised in defendant's application and (2) does not concern whether defendant was required to grant plaintiff a hardship exemption. Instead, it concerns whether defendant *should have* pursued a claim against plaintiff. It is not a

[11] Plaintiff argues that the fourth paragraph of § 4 of the quoted portion of the state plan only requires a means test for applicants who do not meet one of the three listed criteria in the initial paragraph of that section. The fourth paragraph states that "[f]or individuals who apply for but do not meet the definition of undue hardship as found in MCL §400.112g and provided above, the State will consider granting an exemption . . . ." *Id*. at 2. This issue does not fall within the issue upon which we granted leave to appeal. In any event, the relevant language also indicates that it concerns an exemption for a person who resided in the decedent's home and provided care for the decedent to keep the decedent out of an institution. That is not the situation presented in this case.

matter to be decided on an appeal from an administrative decision to deny plaintiff a hardship waiver, especially when it was not raised in the application for leave to appeal. MCR 7.205(E)(4).

Reversed and remanded for entry of an order granting summary disposition to defendant. No costs to either side, a question of public importance being involved.

BOONSTRA, P.J., and K. F. KELLY, J., concurred with MURRAY, J.

BIENENSTOCK & ASSOCIATES, INC v LOWRY

Docket No. 323986. Submitted November 4, 2015, at Detroit. Decided March 3, 2016, at 9:00 a.m.

Defendants filed an action in the Macomb Circuit Court for class arbitration of multiple claims to obtain overdue compensation from plaintiffs. Plaintiffs moved for summary disposition, which was granted with regard to 22 individuals who had each signed an Independent Contractor Agreement (ICA) containing an arbitration provision. Plaintiffs' motion for summary disposition was denied with regard to four individuals for whom no ICA could be found. Defendants filed a demand for class arbitration in the Oakland Circuit Court, and plaintiffs filed an action for declaratory and injunctive relief in response. Plaintiffs followed with a motion for summary disposition on the grounds that another action existed between the parties on the same claim and that there was no genuine issue of material fact. After a hearing on the motion, the court, Wendy Lynn Potts, J., denied plaintiffs' motion for summary disposition. The court ruled from the bench that when a contract between the parties is silent about class arbitration, whether class arbitration is permitted is a gateway question for the court to decide. In contrast, in the absence of contractual language addressing the issue, the court determined that whether arbitration cases can be consolidated is a subsidiary, or procedural, question for the arbitrator to decide. Plaintiffs' motion for reconsideration was denied in a written opinion that confirmed the court's ruling from the bench. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court properly concluded that whether arbitration cases may be consolidated is a subsidiary question for the arbitrator to decide when the parties' contract is silent about consolidation. Subsidiary, or procedural, questions that affect the final disposition of a case are matters to be decided by the arbitrator. In this case, the contracts signed by defendants were silent with regard to whether arbitration cases could be consolidated. When a contract is silent on a question concerning arbitration, the question must be decided by applying two presumptions to the matter: (1) gateway questions are presumptively

disposed of by the court, and (2) procedural questions are presumptively disposed of by the arbitrator. Gateway questions, or questions about whether an issue is arbitrable, include whether an arbitration clause binds the parties and whether an arbitration clause in a binding contract applies to a particular type of controversy. Procedural or subsidiary questions involve the application of procedural preconditions to the arbitration process. These include questions regarding whether any prerequisites to arbitration have been satisfied and questions regarding allegations of waiver, delay, or a similar defense to arbitrability. In this case, the arbitration clause did not address the issue of consolidation; the arbitration clause merely granted broad power to the arbitrator to resolve all disputes between the parties. The gateway question was answered because the parties were clearly subject to an arbitration agreement and because there was no indication that the claim for overdue compensation fell outside the scope of arbitration. However, the question whether the instant arbitration claims could be consolidated was unanswered by the information disposing of the gateway question. Rather, consolidation was a procedural issue—an issue to be decided by the arbitrator.

2. The trial court properly concluded that whether class arbitration is permissible is a gateway question for the court to decide when the parties' contract is silent regarding class arbitration.

Affirmed.

1. ARBITRATION — AVAILABILITY OF CLASS ARBITRATION — CONTRACT IS SILENT — DECIDED BY COURT.

When a contract is silent with regard to class arbitration, the question whether class arbitration is permitted is a gateway question to be decided by the court.

2. ARBITRATION — AVAILABILITY OF CLAIM CONSOLIDATION — CONTRACT IS SILENT — DECIDED BY ARBITRATOR.

When a contract is silent with regard to the consolidation of arbitration claims, the question whether consolidation is permitted is a procedural question to be decided by the arbitrator.

Kienbaum Opperwall Hardy & Pelton, PLC (by *Thomas G. Kienbaum*, *Elizabeth Hardy*, and *William B. Forrest III*), for plaintiffs.

The Miller Law Firm, PC (by *Kevin F. O'Shea*, *David B. Viar*, and *Devon P. Allard*), for defendants.

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

MURRAY, J. In this action for declaratory and injunctive relief, plaintiffs Lauren Bienenstock & Associates, Inc. (LBA), Lauren Bienenstock, and Samuel Bienenstock appeal as of right the order of the Oakland Circuit Court granting in part and denying in part their motion for summary disposition. The question presented is whether a trial court or an arbitrator has the authority under the Federal Arbitration Act (FAA), 9 USC § 1 *et seq*., to determine whether multiple arbitration cases may be consolidated when the arbitration agreement is silent on that issue. We hold that the arbitrator is the one to decide that issue, and so we affirm the trial court's order denying plaintiffs' motion for summary disposition on that issue.

I. FACTS AND PROCEDURAL HISTORY

The factual backdrop to this proceeding arose from a dispute about compensation. All of the defendants worked as independent contractors for LBA at some point in the past. All but two of the defendants in the trial court, Monica Storm and Pamela Worthington, also known as Pamela Jackson, signed independent contractor agreements (ICAs) with LBA for performing their work as licensed court reporters. Each of the ICAs signed by the 22 defendants contained the following clause:

> Any dispute relating to this Agreement, or breach thereof, shall be settled by arbitration pursuant to the rules and regulations of the American Arbitration Association

> ("AAA"). Either party requesting arbitration under this Agreement shall make a demand on the other party by registered or certified mail, with a copy to the AAA's Southfield, Michigan office, which shall be the location of any arbitration hearing. The arbitration shall then take place as noticed by the AAA, and the outcome thereof shall be binding regardless of whether one of the parties fails or refuses to participate.

Initially, defendants filed a lawsuit against plaintiffs in the Macomb Circuit Court seeking what they believed was overdue compensation. However, as a result of the arbitration clause quoted above, plaintiffs moved for, and were granted, summary disposition with regard to 22 defendants in the case—all of whom had signed an ICA with an arbitration agreement—and were denied summary disposition with regard to the four other court reporters for whom no ICA could be found.[1] The 22 defendants appealed that decision to this Court, arguing that because the ICAs were not valid or enforceable, they were not required to resolve their disputes by arbitration. We concluded otherwise. *Lowry v Lauren Bienenstock & Assoc, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2014 (Docket No. 317516).

In any event, while those two cases were pending, defendants (including the 22 individuals with a pending appeal) filed a demand for arbitration against plaintiffs with the American Arbitration Association (AAA). Because their ICAs provided that arbitration would be handled under AAA rules and regulations, and AAA rules permitted class arbitration under certain circumstances, defendants filed their arbitration

[1] The four remaining court reporters, however, voluntarily dismissed their claims without prejudice because they did not live or do business in Macomb County. They then refiled in the Oakland Circuit Court, with one additional court reporter, reasserting the same allegations.

as a class arbitration. Defendants defined the class as "[a]ll court reporters who currently provide, or formerly provided, court reporting services as independent contractors for [LBA] pursuant to a written [ICA] that included an arbitration provision." Defendants asserted that the class numbered in the hundreds, they all shared a common transaction arising out of the same facts and applicable law, joinder of all claimants would be impracticable, and class arbitration was the most convenient and cost-effective way of disposing of the dispute.

Plaintiffs responded by filing the instant suit in the Oakland Circuit Court, requesting declaratory and injunctive relief regarding defendants' arbitration before the AAA. Specifically, plaintiffs requested that the trial court declare that defendants were not permitted to bring a class arbitration, and that it enjoin their current class arbitration from going forward. Plaintiffs asserted that federal caselaw under the FAA held that it was a court's duty to decide the "gateway issue" of whether class arbitration is permitted. That question was not, as asserted by defendants, for the arbitrator to decide. Relatedly, plaintiffs also asked for a declaration that defendants were only permitted to proceed with individual arbitration regarding their own individual claims, and that there should not be any consolidation. Soon after filing suit, plaintiffs moved for summary disposition of all their claims pursuant to MCR 2.116(C)(6) and (C)(10), asking the trial court to (1) find that it had the authority to determine whether class arbitration or consolidation was permitted, and (2) decide those issues in plaintiffs' favor.

Defendants, of course, disagreed with plaintiffs' arguments. Instead, defendants countered, the arbitrator should determine whether class arbitration (and

consolidation) is permitted, principally because the arbitration agreement specifically stated that it would be handled under AAA rules and regulations, and those rules permit class arbitration in certain circumstances and give the arbitrator the authority to decide consolidation issues. Noting that the cases relied on by plaintiffs held only that a trial court should decide whether class arbitration is permitted when the contract does not require otherwise, defendants pointed to the contract's specific reference to AAA rules, which state that the arbitrator is to make the decision, and argued that the arbitration provision required the trial court to defer to the arbitrator.

At the motion hearing, the trial court ruled from the bench. First, the trial court held that, pursuant to persuasive caselaw, in the face of contractual silence whether class arbitration is permitted is a gateway issue for the trial court to decide. The trial court also held that whether consolidation was permitted was a subsidiary question for the arbitrator to decide and denied plaintiffs' motion for summary disposition on that question.

The trial court subsequently denied plaintiffs' motion for reconsideration. In doing so, the trial court ruled that because the question of consolidation of claims that are undoubtedly arbitrable falls into the subsidiary question category, without specific instruction from the contract, it is an issue for the arbitrator to decide. Although the trial court noted the potential for disparate treatment between class arbitration and consolidation decisions and who can decide them, the court reasoned that a decision from the United States Court of Appeals for the Sixth Circuit, *Reed Elsevier, Inc v Crockett*, 734 F3d 594, 597 (CA 6, 2013), supported the principle that courts should decide the

gateway issue of class arbitration. The court noted that no decision supported the theory that consolidation was also a gateway issue, and so it concluded that it was a subsidiary issue.

This appeal followed.

II. ANALYSIS

"This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*.

A. GENERAL PRINCIPLES

As noted at the outset of this opinion, the only issue to be decided is whether a trial court judge or an arbitrator is the appropriate one to decide whether multiple arbitrations should be consolidated when the contract does not speak to the issue. The issue is governed by federal law, as there is no dispute that the FAA applies to these contracts. See *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 232;

590 NW2d 580 (1998) (this Court must apply the FAA because "[s]tate courts are bound, under the Supremacy Clause, US Const, art VI, cl 2, to enforce the FAA's substantive provisions" for contracts arising out of interstate commerce). With regard to issues involving federal law, this Court is bound by decisions of the United States Supreme Court, *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), but is not bound by decisions of any lower federal courts, because "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts," *id*. at 606-607.

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc v Kaplan*, 514 US 938, 943; 115 S Ct 1920; 131 L Ed 2d 985 (1995). In other words, " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83; 123 S Ct 588; 154 L Ed 2d 491 (2002), quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). "In this endeavor, as with any other contract, the parties' intentions control." *Stolt-Nielsen S A v AnimalFeeds Int'l Corp*, 559 US 662, 682; 130 S Ct 1758; 176 L Ed 2d 605 (2010) (quotation marks and citations omitted).

"Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Group PLC v Republic of Argentina*, 572 US ___, ___; 134 S Ct 1198, 1206; 188 L Ed 2d 220 (2014). However, "[i]f the contract is silent on the matter of who primar-

ily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions." *Id*. at ___; 134 S Ct at 1206. One such presumption is that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc v Communication Workers of America*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986). In *Howsam*, 537 US at 83, the Supreme Court referred to the above exception as a "gateway question," or a "question of arbitrability" and held that it had a limited scope. Examples of gateway or arbitrability issues "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " *BG Group*, 572 US at ___; 134 S Ct at 1206, quoting *Howsam*, 537 US at 84.

On the other hand, there are " 'procedural questions which grow out of the dispute and bear on its final disposition . . . .' " *Howsam*, 537 US at 84, quoting *John Wiley & Sons, Inc v Livingston*, 376 US 543, 557; 84 S Ct 909; 11 L Ed 2d 898 (1964). We presume (again, absent any relevant contract language) that procedural questions, sometimes referred to as subsidiary questions, are to be decided by the arbitrator, not the courts. *Howsam*, 537 US at 85. In other words, "the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *BG Group*, 572 US at ___; 134 S Ct at 1207. Examples of procedural questions for the arbitrator to decide include "whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration," and "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam*, 537

US at 84 (quotation marks and citations omitted; alteration in original). When the issue presented is close and "there is doubt" about whether an issue is a gateway question for the court or a procedural one for the arbitrator, "we should resolve that doubt in favor of arbitration." *Green Tree Financial Corp v Bazzle*, 539 US 444, 452; 123 S Ct 2402; 156 L Ed 2d 414 (2003) (plurality decision; opinion by Breyer, J.) (quotation marks omitted), citing *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626; 105 S Ct 3346; 87 L Ed 2d 444 (1985).

From these doctrinal definitions there are typically two situations where a court would be empowered to decide whether consolidation is permissible. First, if the contract between the parties explicitly states that a court should decide the issue, then the parties' intent would be plain, and a court would be required to follow that intention. See *Stolt-Nielsen*, 559 US at 682 ("In this endeavor, as with any other contract, the parties' intentions control.") (quotation marks and citation omitted), and *BG Group*, 572 US at ___; 134 S Ct at 1206 ("[I]t is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide."). Second, if the parties' intent is not discernable from the face of the contract, then a court must engage in presumptions regarding the parties' intent, *BG Group*, 572 US at ___; 134 S Ct at 1206, and should only decide an issue if it is a gateway issue involving whether a contract to arbitrate exists or whether a particular type of claim falls under the arbitration agreement. *Howsam*, 537 US at 84.

B. APPLICATION OF GENERAL PRINCIPLES

Turning to the facts before us, the contract does not reveal an intent regarding consolidation, as the text of

the arbitration clause makes no mention of consolidation or the potential combination of various parties. Rather, the contract merely grants broad power to the arbitrator to determine all disputes arising between the parties. With no mention of consolidation in the text of the contract, we must turn to the presumptions. *BG Group*, 572 US at ___; 134 S Ct at 1206-1207. In doing so, it is clear that the parties are subject to an arbitration agreement, and there is no suggestion that the underlying claim for overdue compensation falls outside the scope of the agreement. Consequently, the issue of who decides whether to consolidate arbitration claims does not fall within the general purview of a gateway issue, see *id*., and is instead a procedural or subsidiary issue for the arbitrator to decide. *Stolt-Nielsen*, 559 US at 685.

The United States Court of Appeals for the Seventh Circuit came to this same straightforward conclusion in *Employers Ins Co of Wausau v Century Indemnity Co*, 443 F3d 573, 577 (CA 7, 2006), where the court cogently explained:

> We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve. It does not involve whether Wausau and Century are bound by an arbitration clause or whether the arbitration clause covers the Aqua-Chem policies. Instead, the consolidation question concerns grievance procedures—i.e., whether Century can be required to participate in one arbitration covering both the Agreements, or in an arbitration with other reinsurers.

Accord *Harry Baker Smith Architects II, PLLC v Sea Breeze I, LLC*, 83 So 3d 395, 399 (Miss App, 2011) (holding that because the parties agreed to arbitrate, and both placed the issue before the arbitrator, the issue of consolidation was for the arbitrator); *Certain*

Underwriters at Lloyd's London v Westchester Fire Ins Co, 489 F3d 580, 587-588 (CA 3, 2007) (holding that because the parties agreed to arbitrate the particular issue, any doubt about who should decide the consolidation issue was resolved in favor of the arbitrator); *Shaw's Supermarkets, Inc v United Food & Commercial Workers Union, Local 791*, 321 F3d 251, 254 (CA 1, 2003) (concluding that because each of the grievances were arbitrable, consolidation was a procedural issue for the arbitrator).

In addition, allowing an arbitrator to decide consolidation issues in light of a silent contract would in no way create a "risk of forcing parties to arbitrate *a matter* that they may well not have agreed to arbitrate," *Howsam*, 537 US at 83-84 (emphasis added), because the underlying claims indisputably fall under the agreed-on arbitration clause. And, in no way will the answer on consolidation "determine whether the underlying controversy will proceed to arbitration on the merits." *Id*. at 83. Regardless of the outcome of this decision, each of the grievances will proceed to arbitration, with the answer on consolidation determining only what form that arbitration will take. Under the facts presented, the issue of consolidation is a procedural one.

As we noted, our conclusion is consistent with a significant number of federal decisions, each of which have held that whether to consolidate is for the arbitrator to decide when the contract is silent on the issue. Indeed, the decisions are almost uniform in this conclusion. See, e.g., *Certain Underwriters*, 489 F3d at 588; *Employers Ins Co of Wausau*, 443 F3d at 577; *Shaw's Supermarkets*, 321 F3d at 254; and *Blimpie Int'l, Inc v Blimpie of the Keys*, 371 F Supp 2d 469, 473 (SD NY, 2005). We therefore hold that in the face of

contractual silence on the issue, whether multiple arbitrations should be consolidated is a question for the arbitrator.

To their credit, plaintiffs do not seek to hide from this line of cases. Instead, they argue that these cases were collectively based on an incorrect understanding of the precedential effect of *Bazzle*,[2] or that the passage of time since *Stolt-Nielsen* was released has caused the plurality decision in *Bazzle* to be no longer persuasive. Proof of this, they argue, is that several federal courts of appeal have recently held that whether class arbitration can proceed *is* a gateway issue, which of course is contrary to the plurality decision in *Bazzle*. Plaintiffs are correct that *Bazzle* provided *a* foundation for many of these cases, but of equal—if not greater—import to these decisions was the majority opinion in *Howsam*. And *Stolt-Nielsen* did not alter how we look at this precise issue, at least not in the way plaintiffs suggest. We explain our conclusions below.

C. *STOLT-NIELSEN* DOES NOT ADDRESS THIS ISSUE

Determining the import of *Stolt-Nielsen* requires knowing its context in relation to *Bazzle*. In *Bazzle*, a plurality of the Court concluded that the question whether a contract allowed for class arbitration was not a gateway issue, and thus it was for the arbitrator, rather than the court, to decide. See *Bazzle*, 539 US at 452-453. After *Bazzle* was issued in 2003, many federal

[2] *Bazzle* was a plurality decision, and although plurality decisions generally have no precedential effect, there was a split amongst the circuits as to whether *Bazzle* contained a discernable holding. Compare *Employers Ins Co of Wausau*, 443 F3d at 580 (concluding that there was not one), with *Pedcor Mgt Co, Inc Welfare Benefit Program v Nations Personnel of Texas, Inc*, 343 F3d 355, 358-359 (CA 5, 2003) (finding that there was).

courts relied in part on it to hold that arbitrators were to decide the procedural question of whether an arbitration agreement allowed for class arbitration. See *Pedcor Mgt Co, Inc Welfare Benefit Plan v Nations Personnel of Texas, Inc*, 343 F3d 355, 359-360 (CA 5, 2003), and *Johnson v Long John Silver's Restaurants, Inc*, 320 F Supp 2d 656, 668 (MD Tenn, 2004), aff'd 414 F3d 583 (CA 6, 2005).[3]

But then came *Stolt-Nielsen*, in which a majority of justices made clear that *Bazzle* was only a plurality decision, and thus did not contain a holding regarding anything, let alone deciding whether classwide arbitration was a gateway issue for the court to decide. *Stolt-Nielsen*, 559 US at 679-680. The Court made this point again in *Oxford Health Plans LLC v Sutter*, 569 US ___, ___; 133 S Ct 2064, 2068 n 2; 186 L Ed 2d 113 (2013), where a majority said that "[the] Court has not yet decided whether the availability of class arbitration" is a decision relegated to the court (thus a gateway issue) or the arbitrator (and thus a procedural, or subsidiary, issue).[4] See also *Reed Elsevier*, 734 F3d at 597-598 (recognizing that *Bazzle* contained no precedential rulings, and holding that based on *Stolt-Nielsen*, class arbitration was a gateway issue for the court).

Plaintiffs argue that *Stolt-Nielsen* and *Oxford Health Plans* have diminished the importance of the *Bazzle* plurality's decision, and so in turn the cases

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[3] As we noted earlier, during this same post-*Bazzle*, pre-*Stolt-Nielsen* time period, courts were concluding that consolidation was also for the arbitrator to decide. See *Certain Underwriters*, 489 F3d at 587-588; *Employers Ins Co of Wausau*, 443 F3d at 577; *Shaw's Supermarkets*, 321 F3d at 254; *Blimpie Int'l*, 371 F Supp 2d at 473.

[4] As a result, who decides whether an agreement authorizes class arbitration "remains open at the Supreme Court level." *Price v NCR Corp*, 908 F Supp 2d 935, 941 (ND Ill, 2012).

decided before *Stolt-Nielsen* that addressed consolidation as a gateway issue with *Bazzle* as their foundation are suspect and should not be considered persuasive precedent. *Stolt-Nielsen* does not, however, affect this issue in the way plaintiffs perceive. As explained below, if anything *Stolt-Nielsen* implicitly disenfranchised courts from analogizing class arbitration issues to these involving consolidation.

The issue presented in *Stolt-Nielsen*, a post-arbitration case, was "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)." *Stolt-Nielsen*, 559 US at 666. Accordingly, as some courts have noted, "*Stolt-Nielsen* concerns only *how to decide* whether an arbitration agreement authorizes class arbitration, not *who decides*." *Lee v JPMorgan Chase & Co*, 982 F Supp 2d 1109, 1113 (CD Cal, 2013). See also *Blue Cross Blue Shield of Massachusetts, Inc v BCS Ins Co*, 671 F3d 635, 638-639 (CA 7, 2011) (noting that the only issue decided in *Stolt-Nielsen* was whether the arbitrators exceeded their authority in conducting a class arbitration, not who decides that issue in the first instance). That the *Stolt-Nielsen* Court did *not* address which entity—court or arbitrator—should decide whether an arbitration agreement permitted class arbitration, was more recently made clear in *Oxford Health Plans*, 569 US at ___; 133 S Ct at 2068 n 2. The question we are faced with today has therefore not been decided by the United States Supreme Court, and thus *Stolt-Nielsen* does not *require* rejection of those post-*Bazzle* decisions holding that absent contract language addressing the issue, consolidation was for the arbitrator to decide. See *Lee*, 982 F Supp 2d at 1113 (rejecting the argument that *Stolt-Nielsen* changed the legal landscape on gateway issues, since it did not involve one), and *Blue*

Cross Blue Shield of Massachusetts, 671 F3d at 638-639 (holding that *Stolt-Nielsen* did not require it to modify its prior holding in *Employers Ins Co of Wausau*, 443 F3d at 577, that whether to consolidate arbitration cases was not a gateway issue).

D. CLASS ARBITRATION DECISIONS

Having rejected plaintiffs' theory of the impact of *Stolt-Nielsen*, we now turn to whether the more recent class arbitration gateway decisions impact the consolidation issue. Although there can be no doubt that the "confusion of whether class arbitration is a gateway or subsidiary issue began with [the *Bazzle* and *Stolt-Nielsen*] decisions," *Shakoor v VXI Global Solutions Inc*, 2015 Ohio 2587; 35 NE3d 539, 545 (Ohio App, 2015), no real confusion exists; under these circumstances, consolidation is a subsidiary issue. This holds true because, despite this lack of clarity at the Supreme Court level, the simple fact is that most (if not all) federal courts have held—pre- and post-*Stolt-Nielsen*—that consolidation is a procedural issue properly left to the arbitrator. And this is not just a numbers game, where we look to the majority of decisions on an issue and simply follow them. Instead, in addition to recognizing (as we already have) the limited holding of *Stolt-Nielsen*, these courts also recognized (1) the significantly different and more complex considerations involved in determining whether class arbitration should proceed, compared to what is considered in consolidation issues, and (2) the procedural nature of consolidation issues.

Decisions like *Reed Elsevier*, which have concluded, contrary to *Bazzle*, that class arbitration is a gateway issue, do not support the argument that consolidation issues are as well. Indeed, much of what is contained in

Stolt-Nielsen provides support for the conclusion that class arbitration issues involve unique and particularly complex matters and are placed in a completely different category from those involving consolidation. For example, the Court repeatedly emphasized the significant differences between a bilateral arbitration (one claimant under one contract) and classwide arbitration, classifying the differences as "fundamental." *Stolt-Nielsen*, 559 US at 686. The California Court of Appeals, citing to *Stolt-Nielsen*, explained some of these critical differences:

> For example, arbitration's putative benefits—i.e., "lower costs, greater efficiency and speed"—"are much less assured" in classwide arbitration, which, according to the court, "giv[es] reason to doubt the parties' mutual consent" to a classwide arbitration procedure. (*Stolt–Nielsen*, *supra*, at p 685, 130 S Ct 1758; [*AT & T Mobility LLC v*] *Concepcion*, [563 US 333; 131 S Ct 1740, 1751; 179 L Ed 2d 742 (2011)] ["the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"].) Further, "[c]onfidentiality becomes more difficult" in classwide arbitrations (*Concepcion*, *supra*, at p 1750), a complication that "potentially frustrate[s] the parties' assumptions when they agreed to arbitrate." (*Stolt–Nielsen*, *supra*, at p 686, 130 S Ct 1758.) [*Garden Fresh Restaurant Corp v Superior Court*, 231 Cal App 4th 678, 686; 180 Cal Rptr 3d 89 (2014) (some alterations in original).]

An equal, if not greater, concern has been the impact class arbitration can have on third parties, for a class arbitration award "no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Stolt-Nielsen*, 559 US at 686. No less significant are the notice and opt-out requirements and a quagmire of

other complex issues that must be addressed in a class proceeding. See *Opalinski v Robert Half Int'l Inc*, 761 F3d 326, 332-335 (CA 3, 2014), and *Reed Elsevier*, 734 F3d at 598, both discussing how fundamental the differences are between class arbitration and bilateral arbitration. And because of the significant issues and differences involved in class arbitration versus bilateral arbitration, the *Stolt-Nielsen* Court held that an arbitrator exceeded his authority by forcing parties to proceed with class arbitration when no contractual language supported that type of proceeding. *Stolt-Nielsen*, 559 US at 687.

The concerns that surface with class arbitrations do not, for the most part, exist with consolidation. For one, consolidating arbitrations does not result in an arbitrator deciding the rights of absent third parties. Instead, cases that are already subject to arbitration are merely consolidated before the same arbitrator, who can then presumably promote greater efficiency when it comes to discovery or other pre-arbitration matters. The rules typically considered in deciding whether a class action should proceed—and what must be done if it does proceed—are much more complex, time-consuming, and expensive than the issues typically involved in deciding whether to consolidate. Compare MCR 2.505(A) with MCR 3.501. In other words, the significant concerns and issues raised by a request for class arbitration do not arise when individual cases are consolidated. This point was articulated quite well by the United States Court of Appeals for the Seventh Circuit, where Chief Judge Easterbrook wrote for the court in *Blue Cross Blue Shield of Massachusetts*, 671 F3d at 640:

> Class actions always have been treated as special. One self-selected plaintiff represents others, who are entitled

> to protection from the representative's misconduct or incompetence. Often this requires individual notice to class members, a procedure that may be more complex and costly than the adjudication itself. See *Eisen v Carlisle & Jacquelin*, 417 US 156; 94 S Ct 2140; 40 L Ed 2d 732 (1974). As a practical matter the representative's small stake means that lawyers are in charge, which creates a further need for the adjudicator to protect the class. Finally, class actions can turn a small claim into a whopping one. Unsurprisingly, Fed.R.Civ.P. 23 imposes stringent requirements on class certification. Consolidation of suits that are going to proceed anyway poses none of these potential problems. That's why Fed.R.Civ.P. 42(a) leaves to a district judge's discretion—and without any of Rule 23's procedures and safeguards—the decision whether to consolidate multiple suits. Just as consolidation under Rule 42(a) does not change the fundamental nature of litigation, so consolidation of the plans' claims would not change the fundamental nature of arbitration.[5]

Hence, decisions like *Reed Elsevier*, and other post-*Stolt-Nielsen* decisions holding that class arbitration is a gateway issue, address a different animal than we do when addressing a consolidation issue. And for that reason they provide no assistance to plaintiffs' position.

E. CONCLUSION

Finally, critical to our decision is remembering that gateway issues involve "questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " *BG Group*, 572 US at ___; 134 S Ct at 1206, quoting *Howsam*, 537 US at 84. As we emphasized earlier, gateway arbitrability questions fall into a very narrow

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[5] MCR 2.505(A) contains the same criteria for consolidation of circuit court actions as are contained in Federal Rule of Civil Procedure 42.

range of issues focusing on whether the parties agreed to arbitrate at all, or agreed to arbitrate a particular *type* of claim. *Garden Fresh Restaurant*, 231 Cal App 4th at 684, citing *Howsam*, 537 US at 83. Though these may not be the only circumstances in which gateway issues may be found—as reflected by those cases concluding that a decision on class arbitration is a gateway issue—this fundamental underpinning to gateway issues makes it clear that the fact-intensive decision of consolidation is procedural.

For all these reasons, we conclude that the virtually unanimous opinions amongst the federal courts, prior to (and after) *Stolt-Nielsen*, holding that consolidation decisions are subsidiary ones left to the arbitrator to decide under the contract (when the contract does not provide for a different venue or otherwise address consolidation), remain persuasive authority, and nothing in the caselaw since then requires a different conclusion.[6] We therefore agree with and follow the rationale of those cases and hold that, absent any contractual language addressing the issue, whether multiple arbitrations should be consolidated is a procedural or subsidiary issue for the arbitrator to decide.

Affirmed. Defendants may tax costs, having prevailed in full. MCR 7.219(A).

STEPHENS, P.J., and CAVANAGH, J., concurred with MURRAY, J.

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[6] We point out that in *Bay Co Bldg Auth v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984), we held that in the absence of contractual language addressing consolidation, it was for the arbitrator to decide the issue because it was a procedural, rather than a gateway, issue. But we do not rely on that case, nor do we need to address Michigan's Uniform Arbitration Act, MCL 691.1681 *et seq*., because this issue is controlled by federal law. *In re Salomon Inc Shareholders' Derivative Litigation*, 68 F3d 554, 559 (CA 2, 1995).

PEOPLE OF THE CITY OF GRAND RAPIDS v GASPER

PEOPLE OF THE CITY OF GRAND RAPIDS v SMITH

PEOPLE OF THE CITY OF GRAND RAPIDS v LEHNEN

Docket Nos. 324150, 324152, and 328165. Submitted March 2, 2016, at Grand Rapids. Decided March 8, 2016, at 9:00 a.m.

John F. Gasper (an employee of the Tip Top Deluxe Bar and Grille in Grand Rapids) and Theodore H. Smith and Franklin D. Lehnen, Jr. (co-owners of Tip Top), were charged in the 61st District Court with violations of § 9.63(3) of the city of Grand Rapids' Noise Control Ordinance in connection with complaints about several live-music events that had occurred at the bar. The ordinance prohibited any use of the premises that destroyed the peace and tranquility of the surrounding neighborhood. Gasper and Smith moved to dismiss the charges against them. Following a hearing, the court, Donald H. Passenger, J., determined that there was a question of fact for the jury regarding whether the bar's music on the nights in question had actually destroyed the peace and tranquility of the surrounding neighborhood but also concluded that § 9.63(3) was unconstitutionally vague because reasonable minds could differ regarding what destroys the peace and tranquility of a neighborhood, and there was no objective way for the police to make that determination. The court dismissed the cases against Gasper and Smith, and the city of Grand Rapids appealed in the Kent Circuit Court. The circuit court, George S. Buth, J., reversed in part, concluding that § 9.63(3) was not unconstitutionally vague, and remanded Gasper's and Smith's cases for trial. The court reasoned that when read in its entirety, § 9.63 delineated clear standards for establishing a per se violation under § 9.63(11) (which set forth maximum permitted decibel levels of sound in various zoning districts) but also allowed enforcement in other circumstances, such as those set forth in § 9.63(1) (prohibiting specific loud noises on or near public ways) or under § 9.63(3) when noise levels were believed to destroy the peace and tranquility of the surrounding neighborhood. The Court of Appeals granted Gasper and Smith leave to appeal. In the meantime, Lehnen's case had proceeded to trial. The district court ruled that it would give Lehnen's jury a set of instructions

concerning the elements of a violation of § 9.63(3) that included a dictionary definition of the term "destroy," an element requiring that decibel readings higher than certain levels had been taken, and an element requiring that those decibel levels had been taken at the boundary line of the property, believing that the instruction comported with the circuit court's ruling in Gasper's and Smith's cases, i.e., that § 9.63(3) must be read in conjunction with § 9.63(11), which set forth violations based on decibel readings at various locations. The city sought leave to appeal the jury-instruction ruling in the circuit court, which granted the application and reversed the district court's ruling, ordering that the references to decibel levels and the definition of "destroy" had to be struck from the instructions. Lehnen sought leave to appeal the circuit court's ruling on the jury-instruction issue. The Court of Appeals granted leave and consolidated his appeal with Gasper's and Smith's appeals.

The Court of Appeals *held*:

Section 9.63(3) was void for vagueness. Under the Due Process Clause of the Fourteenth Amendment, an enactment may be found unconstitutionally vague if it (1) fails to provide fair notice of what conduct is prohibited, (2) encourages arbitrary and discriminatory enforcement, or (3) is overbroad and impinges on First Amendment freedoms. Defendants argued that § 9.63(3) was unconstitutionally vague on the first two grounds. Section 9.63(3) provides virtually no guidance for determining whether a person's conduct is prohibited. In particular, the specification in § 9.63(11) of maximum decibel limits could not help a citizen determine whether his or her conduct would violate § 9.63(3), nor did § 9.63(11) place any constraints on the discretion of an officer enforcing § 9.63(3). As acknowledged by the circuit court, even compliance with the decibel-level limits of § 9.63(11) would not protect a citizen from being cited for violating § 9.63(3). The circuit court therefore erred by determining that the language of § 9.63(11) saved § 9.63(3) from vagueness. Additionally, § 9.63(3) vests the enforcing officer with almost complete discretion to determine whether the ordinance has been violated. There was no narrowing construction of § 9.63(3) that would render it constitutional. The district court's attempts through its jury instructions to read into § 9.63(3) a requirement that a violation of § 9.63(11) have occurred effected a substantial revision of the ordinance and essentially rendered § 9.63(3) nugatory or surplusage. However, § 9.63(3) could readily be severed from the remainder of the city's noise ordinance, which remained valid.

Reversed and remanded for dismissal of the prosecutions.

Catherine M. Mish, City Attorney, and *Elliot J. Gruszka*, Assistant City Attorney, for the people of the city of Grand Rapids.

Haehnel & Phelan (by *Craig W. Haehnel*) for John F. Gasper, Theodore H. Smith, and Franklin D. Lehnen, Jr.

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

BOONSTRA, J. These consolidated appeals by leave granted[1] arise from alleged violations of a Grand Rapids noise ordinance. Defendants John F. Gasper and Theodore H. Smith appeal an order of the circuit court reversing the district court's order dismissing their cases on the basis that § 9.63(3) of the city's Noise Control Ordinance[2] was unconstitutionally vague. Defendant Franklin D. Lehnen, Jr., appeals the order of the circuit court reversing the district court's ruling concerning jury instructions in his criminal prosecution for a violation of § 9.63(3). We reverse the circuit court's order regarding Gasper and Smith and remand for dismissal of the criminal prosecutions against all defendants.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

These cases arise from the municipal prosecutions of several individuals associated with the Tip Top Deluxe Bar and Grille in Grand Rapids, Michigan, for the

[1] *People of Grand Rapids v Gasper*, unpublished order of the Court of Appeals, entered March 12, 2015 (Docket No. 324150); *People of Grand Rapids v Smith*, unpublished order of the Court of Appeals, entered March 12, 2015 (Docket No. 324152); *People of Grand Rapids v Lehnen*, unpublished order of the Court of Appeals, entered October 15, 2015 (Docket No. 328165).

[2] Grand Rapids Code, tit IX, ch 151, art 5, § 9.63(3).

alleged violation of § 9.63(3) of the city's Noise Control Ordinance, which provides:

> No person shall use any premises or suffer any premises under his or her care or control to be used which shall destroy the peace and tranquility of the surrounding neighborhood.

Gasper is an employee of Tip Top; Smith and Lehnen are co-owners. Defendants and another employee of Tip Top, Jacqueline Martin,[3] were charged with violations of § 9.63(3) in connection with events that occurred on various dates in 2012 and 2013.

Gasper, Smith, and Martin moved in the district court to dismiss the charges against them. The court held a hearing on the motions on April 22, 2014. At the hearing, Grand Rapids police officers testified that they had responded to noise complaints on the nights in question (when live music was playing) and issued citations for violations of § 9.63(3). The officers admitted on cross-examination that they did not record the decibel level of the noise and that the departmental policy was to strictly enforce noise violations from Tip Top. The officers testified that they understood a violation of § 9.63(3) to occur if noise could be heard from a "public way" (i.e., the street) regardless of actual decibel level. The officers, as well as one complainant,

[3] Martin also sought leave to appeal, which was granted, and her case was consolidated with the cases involving Gasper and Smith. *People of Grand Rapids v Martin*, unpublished order of the Court of Appeals, entered March 12, 2015 (Docket No. 324151). However, Martin eventually received a directed verdict of acquittal in her district court trial for violation of the ordinance. This Court subsequently dismissed her appeal as moot, *People of Grand Rapids v Martin*, unpublished order of the Court of Appeals, entered May 15, 2015 (Docket No. 324151), and disconsolidated *Gasper* and *Smith* from her case, *People of Grand Rapids v Martin*, unpublished order of the Court of Appeals, entered June 10, 2015 (Docket No. 324151).

all testified to their belief that the noise from Tip Top "destroy[ed] the peace and tranquility of the surrounding neighborhood."

Although the district court determined that there was a question of fact for the jury regarding whether the bar's music on the nights in question had actually destroyed the peace and tranquility of the surrounding neighborhood, it also concluded that § 9.63(3) was unconstitutionally vague because reasonable minds could differ regarding what destroys the peace and tranquility of a neighborhood and there was no objective way for police to make that determination. Consequently, the owners and employees of Tip Top had no way of knowing how loud its music could be. Further, while the police, in enforcing § 9.63(3), had assessed whether the music could be heard from the street, § 9.63(3) contained no language to support the conclusion that a violation occurred when and because music could be heard from the street.

The district court dismissed the cases against Gasper, Martin, and Smith. The record does not reflect whether Lehnen moved the district court for the dismissal of his case.

The Grand Rapids City Attorney appealed the district court's order of dismissal in the circuit court, arguing that § 9.63(3) was not unconstitutionally vague because a reasonable person would know the meaning of the word "destroy." Gasper, Martin, and Smith argued that the district court had correctly determined that § 9.63(3) was unconstitutionally vague, because it did not provide adequate notice of what conduct was prohibited and allowed police officers broad latitude in enforcing the ordinance on the basis of the officers' subjective determination that the peace and tranquility of a neighborhood had been destroyed. They referred the

circuit court to other parts of the Grand Rapids noise ordinance that provided specific decibel limits for certain zones and certain times of day and argued that a citizen could believe that he or she was in compliance with the law by not producing noise louder than the specified decibel level, only to be cited in an officer's discretion for violating § 9.63(3).

The circuit court reversed the district court's order in part and remanded Gasper's, Martin's, and Smith's cases for trial, holding that § 9.63(3) was not unconstitutionally vague. The circuit court reasoned that § 9.63(3), when read in conjunction with other portions of the ordinance, specifically § 9.63(11),[4] provided notice to residents of maximum sound levels during the day and night and how those levels would be measured, and stated:

> When read in its entirety, Section 9.63 delineates clear standards for establishing a per se violation under Sec. 9.63(11) and also allows enforcement when distinctly and loudly audible noise is made upon a public way or in close proximity thereto as well as when noise levels are believed to destroy the peace and tranquility of the surrounding neighborhood. See Sec. 9.63(1) and (3)[.][5]

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[4] Section 9.63(11) sets forth the maximum daytime and nighttime sound pressure levels (measured in decibels for various frequencies using specified equipment) permitted for various zoning districts.

[5] Section 9.63(1) provides:

> No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling or shouting, or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, mechanical device, radio, phonograph, sound amplifying or other similar electronic device; provided that a licensed peddler is not hereby restricted or prohibited so long as he or she shall have met the requirements and conditions hereinafter specified in subsection (5) nor does this prohibition apply to all bands

> . . . In light of the objective outside parameters established in Subsection (11), the police are not permitted "to wield apparently unlimited discretionary powers in choosing those persons in violation of the ordinance" if they choose to charge an alleged offender under the subjective standards of either Subsection (1) or (3). Additionally, the owners and employees have notice of what maximum sound pressure levels are permitted during daytime and nighttime hours; how the levels will be measured; and that the performance standards will be applied at the boundaries of the lot. When the police choose to cite a property owner or employee under subsection (3), as correctly noted by [the district court], a jury question is presented regarding whether the peace and tranquility of the neighborhood has been destroyed.

The circuit court affirmed the district court's ruling that a question of fact existed regarding whether Gasper, Martin, and Smith had destroyed the peace and tranquility of the surrounding neighborhood on any of the nights in question.

Gasper, Martin, and Smith filed applications for leave to appeal to this Court. However, their trials were not stayed pending these appeals. In advance of Martin's trial, the district court ruled, over the city's objection, that the jury instruction regarding the elements of a violation of § 9.63(3) would include a dictionary definition of the term "destroy," an element requiring that decibel readings above certain levels had been taken, and an element requiring that those decibel levels were taken at the boundary line of the property. The city attorney sought leave in the circuit court to appeal this jury instruction, but the circuit court denied the application.

Martin's trial went forward before this Court's deci-

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and orchestras or similar musical bodies utilized as part of a parade or similar authorized musical production.

sion on her application for leave to appeal, and the district court granted her a directed verdict of acquittal. This Court thus dismissed her appeal as moot.[6]

Lehnen's case also proceeded to trial. The same issue with the jury instructions arose, and the district court ruled that it would give the same set of instructions as it had in Martin's case. The district court stated that it believed this instruction comported with the circuit court's ruling in Gasper's, Smith's, and Martin's cases, i.e., that § 9.63(3) must be read in conjunction with § 9.63(11), which set forth violations based on decibel readings. The city attorney filed another application in the circuit court for leave to appeal the jury-instruction ruling. This time, the circuit court granted the application and reversed the district court's ruling, ordering that references to the definition of "destroy" and decibel readings must be struck from the instructions because decibel readings were not an element of a violation of § 9.63(3).

Lehnen filed an application in this Court for leave to appeal the circuit court's ruling on the jury-instruction issue, which was granted and consolidated with Gasper's and Smith's appeals.[7] On June 22, 2015, the district court granted a motion to stay all cases involving violations of § 9.63(3) reported at Tip Top pending the outcome of these consolidated appeals, thus staying defendants' criminal proceedings pending our resolution of their appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the constitutionality of a municipal ordinance. *Plymouth Charter Twp v Han-*

[6] See note 3 of this opinion.

[7] See note 1 of this opinion.

cock, 236 Mich App 197, 199; 600 NW2d 380 (1999). "Further, because ordinances are treated as statutes for purpose of interpretation and review, [this Court] also review[s] de novo the interpretation and application of a municipal ordinance." *Bonner v City of Brighton*, 495 Mich 209, 221-222; 848 NW2d 380 (2014). "[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance . . . ." *Id*. at 222. Ordinances are presumed to be constitutional "and will be so construed unless the party challenging the statute clearly establishes its unconstitutionality." *Hancock*, 236 Mich App at 199. Further, we may apply a narrowing construction to an ordinance if doing so would render it constitutional without harming the intent of the legislative body. See *People v F P Books & News, Inc (On Remand)*, 210 Mich App 205, 209; 533 NW2d 362 (1995).

III. CONSTITUTIONALITY OF § 9.63(3)

Defendants argue that the circuit court erred by reversing the district court and ruling § 9.63(3) constitutional. We agree.

A constitutional challenge based on vagueness "is brought under the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *People v Lino*, 447 Mich 567, 575 n 2; 527 NW2d 434 (1994). As the United States Supreme Court has observed:

> 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." [*Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972) (citations omitted) (alterations in original).]

Thus, there are three ways in which an enactment may be found unconstitutionally vague: "(1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms." *Lino*, 447 Mich at 575-576, citing *People v Howell*, 396 Mich 16, 20 & n 4; 238 NW2d 148 (1976). Defendants argue that § 9.63(3) is unconstitutionally vague for the first two reasons; that is, the ordinance fails to provide sufficient notice of what conduct is proscribed and encourages arbitrary and discriminatory enforcement.

In finding § 9.63(3) constitutional, the circuit court considered § 9.63(11) of the ordinance, reasoning that the standards set forth in that subsection provided "objective outside parameters" by which citizens could determine what conduct was proscribed under § 9.63(3) and prevented law enforcement officers from arbitrarily enforcing the ordinance. However, the court acknowledged that a person could be cited for violating Subsection (3) regardless of compliance with

Subsection (11): "Section 9.63 delineates clear standards for establishing a per se violation under Sec. 9.63(11) and *also* allows enforcement . . . when noise levels are believed to destroy the peace and tranquility of the surrounding neighborhood." We conclude, consistently with that acknowledgement, that the existence of maximum decibel limits in § 9.63(11) does not aid a citizen in determining whether his or her conduct violates § 9.63(3), nor does it place any constraints on enforcing officers' discretion. We therefore hold that the circuit court erred by determining that the language of § 9.63(11) saved § 9.63(3) from vagueness.[8]

Further, the ordinance in question resembles other ordinances held by the United States Supreme Court to be unconstitutionally vague, such as an ordinance that prohibited "annoying" passersby, *Coates v Cincinnati*, 402 US 611; 91 S Ct 1686; 29 L Ed 2d 214 (1971), and an ordinance requiring the production of "credible and reliable" identification to police officers, *Kolender v Lawson*, 461 US 352; 103 S Ct 1855; 75 L Ed 2d 903 (1983). Like the ordinances in those cases, § 9.63(3) provides virtually no guidance to a citizen in determining whether his or her conduct is prohibited; as acknowledged by the circuit court, even compliance with the decibel limits of § 9.63(11) does not protect a citizen from citation for the violation of § 9.63(3). And on the other side of the coin, it vests the enforcing officer with almost complete discretion to determine whether the ordinance has been violated. *Kolender*, 461 US at 358.

[8] In fact, the city attorney also disagreed that the requirements of § 9.63(11) had any bearing on prosecutions under § 9.63(3). To the contrary, she argued that § 9.63(11) was "a completely different subsection of the noise ordinance" and that determining under which section to prosecute was simply a matter of "prosecutorial discretion."

The ordinance also resembles the statute at issue in *People v Boomer*, 250 Mich App 534, 536; 655 NW2d 255 (2002), which provided that it was a misdemeanor for any person to " 'use any indecent, immoral, obscene, vulgar, or insulting language in the presence or hearing of any woman or child . . . .' " This Court determined that the statute essentially required a person who spoke in the presence of women or children to "guess what a law enforcement officer might consider too indecent, immoral, or vulgar . . . ." *Id*. at 541. A person making noise in a neighborhood is similarly required to guess whether law enforcement would consider his or her conduct as destroying the peace and tranquility of the neighborhood. Simply put, conduct that "destroy[s]" the peace and tranquility of some would not affect others to such an extent. There is no standard for determining what destroys the peace and tranquility of a neighborhood, which compels "men of common intelligence" to guess what conduct is proscribed by § 9.63(3). See *Coates*, 402 US at 614; *Kolender*, 461 US at 358; *People v Gagnon*, 129 Mich App 678, 683-684; 341 NW2d 867 (1983). Moreover, because § 9.63(3) fails to provide explicit standards for determining what "destroy[s] the peace and tranquility of the surrounding neighborhood," law enforcement officers and finders of fact are necessarily vested with "virtually complete discretion" to determine whether a violation of § 9.63(3) has occurred. *Kolender*, 461 US at 358.

We also find this case distinguishable from cases involving challenges to disturbing-the-peace statutes. Although this Court has held that a reasonable person is sufficiently aware of what conduct constitutes a disturbance of the peace, see *City of Lansing v Hartsuff*, 213 Mich App 338, 344-345; 539 NW2d 781 (1995); *Hancock*, 236 Mich App at 201-202, the ordinance at

issue does not proscribe conduct that merely *disturbs* or *disrupts* the peace and tranquility, but rather that which *destroys* the peace and tranquility. Thus, a person of ordinary intelligence would still have to guess whether his or her conduct was lawful, because conduct that one person might consider to totally *destroy* the peace and tranquility might merely *disrupt* the peace and tranquility for another person. Accord *Boomer*, 250 Mich App at 541.[9]

Finally, we note that there is no narrowing construction of § 9.63(3) that would render it constitutional. *F P Books*, 210 Mich App at 209. Although the district court tried, through its jury instructions and in an attempt to comply with the circuit court's ruling, to read into § 9.63(3) a requirement that a violation of § 9.63(11) have occurred, such a reading effects a substantial revision of the ordinance and essentially amounts to rendering § 9.63(3) nugatory or surplusage—i.e., if a violation of § 9.63(3) can only be accomplished through a violation of § 9.63(11) and both violations are punishable as criminal misdemeanors, as indeed the parties seem to agree is the case, § 9.63(3) becomes mere surplusage.

However, § 9.63(3) is readily susceptible to severance from the remainder of the city's Noise Control Ordinance. Deletion of § 9.63(3) would not render in-

[9] We note also Justice CORRIGAN's dissent from our Supreme Court's decision to deny leave to appeal in *Plymouth Charter Twp v Hancock*, 463 Mich 908, 910 (2000) (CORRIGAN, J., dissenting), in which she observed that "courts of other jurisdictions have disagreed on whether use of a reasonable person standard in a noise ordinance is sufficient to give a person of ordinary intelligence fair notice the conduct is forbidden." We conclude that the application of a reasonable-person standard to § 9.63(3) would not save the ordinance from vagueness, but we express no opinion on its use in other noise-ordinance cases involving different statutory language.

valid or unreasonable the remainder of the ordinance, and no additional language or construction would be necessary. *F P Books*, 210 Mich App at 209. Nor would Grand Rapids be left without a mechanism to curtail excessive noise from Tip Top; indeed, the city attorney acknowledged that she had sent officers to the location (although perhaps not on these occasions) to take decibel readings and that it was a matter of prosecutorial discretion whether to prosecute under § 9.63(3) rather than § 9.63(11).

We therefore reverse the circuit court's order to the extent that it reversed the district court's order ruling § 9.63(3) unconstitutionally vague and remand for reinstatement of the district court's order of dismissal with regard to Gasper and Smith and dismissal of the pending criminal prosecution against Lehnen. Having determined that § 9.63(3) is unconstitutional, we need not address Lehnen's arguments concerning the jury instructions in his case.

Reversed and remanded for dismissal of defendants' criminal prosecutions. We do not retain jurisdiction.

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

PEOPLE v IANNUCCI

Docket No. 323604. Submitted January 5, 2016, at Detroit. Decided January 19, 2016. Approved for publication March 8, 2016, at 9:05 a.m.

Yann Iannucci and his former wife had two children. Defendant's consent judgment of divorce included an order for child support, and there was no dispute that from August 2011 to January 2013 defendant failed to comply with the order. Defendant was convicted in the Macomb Circuit Court of failure to pay child support. He was sentenced to 60 months of probation with five days to be served in jail. The court, Matthew Switalski, J., ordered defendant to pay $21,951 in unpaid child support. Defendant appealed.

The Court of Appeals *held*:

Defendant's challenge in a criminal proceeding to the amount of child support he was ordered to pay after a civil proceeding involving the matter was an impermissible collateral attack on the validity of the underlying support order. In this case, defendant did not contest his conviction on appeal. Rather, defendant challenged the amount of child support he was ordered to pay; according to defendant, his veteran's disability benefits should not have been included in his income, which was used to calculate the amount of child support he was obligated to pay. Defendant was not denied his right to due process by the Court's failure to consider defendant's argument because defendant had more than one opportunity to present his arguments to the civil court. Defendant made only cursory reference to alleged improprieties in the civil court proceedings, none of which provided a legitimate reason for ignoring his impermissible collateral attack on the underlying support order.

Affirmed.

CHILD SUPPORT — FELONY NONSUPPORT — CHALLENGE TO AMOUNT OF CHILD SUPPORT — IMPERMISSIBLE COLLATERAL ATTACK.

A defendant engages in an impermissible collateral attack when he or she challenges a judgment in a manner other than by direct appeal; a defendant's challenge, in his or her appeal of a felony nonsupport conviction, to the amount of child support he or she is

obligated to pay—an amount determined in a *civil* proceeding—is an impermissible collateral attack.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *R. Paul Viar, Jr.* and *Patrick J. O'Brien*, Assistant Attorneys General, for the people.

Yann Iannucci *in propria persona*.

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

PER CURIAM. Defendant, proceeding *in propria persona*, appeals his conviction after a jury trial of failure to pay child support, MCL 750.165, for which he was sentenced to 60 months' probation, with five days to be served in jail, and ordered to pay $21,951 in unpaid child support. For the reasons provided, we affirm.

Defendant and his former wife have two children. Their 2008 marriage ended on August 9, 2011, after the parties signed a consent judgment of divorce that included an order for child support, which was later modified. There is no dispute that from August 9, 2011, to January 11, 2013, defendant did not comply with the child support order. The factual basis for defendant's conviction—his actual failure to comply with his obligation under the child support order—is not at issue. Rather, the crux of defendant's several arguments is that, as a disabled veteran, his veteran's disability benefits should not have been considered as income for purposes of calculating child support and that such an inclusion was illegal and contrary to federal law.

Defendant's arguments challenging the amount of child support he was ordered to pay are impermissible collateral attacks on the validity of the underlying support order. These challenges were not within the

purview of the circuit court in his criminal prosecution and are not properly before this Court in defendant's appeal of his criminal conviction. The felony nonsupport statute provides that "[i]f the court orders an individual to pay support . . . for a child of the individual, and the individual does not pay the support . . . , the individual is guilty of a felony . . . ." MCL 750.165(1). The elements of this criminal offense are simply that (1) the defendant was required by a divorce order to support a child, (2) the defendant appeared in or received notice of the action in which the order was issued, and (3) the defendant failed to pay the required support at the time ordered or in the amount ordered. *People v Herrick*, 277 Mich App 255, 257; 744 NW2d 370 (2007). Felony nonsupport is a strict liability offense. *People v Adams*, 262 Mich App 89, 100; 683 NW2d 729 (2004). At trial, there was no dispute that defendant had been ordered by the Macomb Circuit Court to support his children, that he was aware of the ordered support obligation, and that he failed to timely pay the amount ordered.

Pursuant to MCL 600.1021, the family division of circuit court has sole and exclusive jurisdiction over cases of divorce and ancillary matters, including those matters set forth in the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*. "[A] support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due . . . with the full force, effect, and attributes of a judgment of this state . . . ." MCL 552.603(2). The civil court that issues a child support order has continuing, exclusive jurisdiction over that support order and the related proceedings. MCL 552.2205(1). An impermissible "collateral attack occurs whenever challenge is made to judgment in any manner other than through a direct

appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). This is precisely what defendant seeks to do here. Defendant has not set forth any authority in the felony nonsupport statute, or in any of the cases interpreting it, that would permit him to collaterally attack in this criminal case the underlying support order.

Furthermore, denying defendant redress in criminal court simply because he did not obtain a favorable result in the underlying civil proceeding is not a denial of due process. Defendant had the opportunity, and took that opportunity on more than one occasion, to make his arguments before the civil court, albeit unsuccessfully. Therefore, he was afforded due process. See *Grannis v Ordean*, 234 US 385, 394; 34 S Ct 779; 58 L Ed 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *People v Herrera (On Remand)*, 204 Mich App 333, 339; 514 NW2d 543 (1994) (stating that one of the minimum requirements of due process is the opportunity to be heard).

Defendant's additional cursory complaints about alleged improprieties surrounding the proceedings in civil court do not provide a legitimate reason for ignoring his impermissible collateral attack on the underlying support order or for considering these claims. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Defendant also asks this Court to exercise its power of superintending control to, *inter alia*, vacate the child support order and his conviction. Defendant did not file a complaint for superintending control in the circuit court in accordance with MCR 3.302(E), nor did he file an original action for superintending control in this Court in accordance with MCR 7.206(D). Therefore, this request is not properly before this Court, and we need not review it. *J & P Market, Inc v Liquor Control Comm*, 199 Mich App 646, 651 n 1; 502 NW2d 374 (1993). Further, a complaint seeking superintending control may not be filed by a party who has another adequate remedy available. MCR 3.302(B); *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 127; 457 NW2d 349 (1990). When an appeal in the Court of Appeals is available, "that method of review must be used." MCR 3.302(D)(2). Defendant has pursued an appeal of his criminal conviction. If he believed that the April 2012 modified support order was improper, he could have filed an application for leave to appeal that order. Therefore, an order of superintending control is not appropriate. See *Bd of Ed of the Standish-Sterling Community Sch Dist v Court of Appeals*, 483 Mich 1252 (2009).

We further reject defendant's claims that his five-day jail sentence is unconstitutionally unusual under the Eighth Amendment and that confinement for failure to pay court-ordered child support creates a debtor's prison. Because defendant did not raise these claims below, these issues are unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Our Supreme Court has held that a party defaulting on a judgment for child support may be imprisoned because child support is not considered a debt. *Toth v Toth*, 242 Mich

23, 26-27; 217 NW 913 (1928). Further, defendant has abandoned any claim that a five-day confinement is unconstitutionally unusual because it denies medical care to disabled veterans; defendant failed to provide any factual or relevant legal support for this claim. *McPherson*, 263 Mich App at 136; *Kelly*, 231 Mich App at 640-641.

Affirmed.

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

CALVERT BAIL BOND AGENCY, LLC v ST CLAIR COUNTY

Docket No. 324824. Submitted March 1, 2016, at Detroit. Decided March 10, 2016, at 9:00 a.m.

Calvert Bail Bond Agency, LLC, brought an action in the St. Clair Circuit Court against St. Clair County, alleging that it was entitled under MCL 600.4835 to the return of money it had paid defendant on certain bond-forfeiture judgments that resulted when criminal defendants for whom plaintiff was surety failed to appear in district court as required. Plaintiff had paid the forfeiture judgments and later brought the criminal defendants into custody, but not until more than 56 days after the judgments were entered. The court, Michael L. West, J., concluded that plaintiff had no cause of action under MCL 600.4835 because, by amending MCL 765.28 in 2002, the Legislature intended to make that statute the exclusive method of recovering forfeited recognizances. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.4835 provides that a circuit court may, on good cause shown, remit any penalty when it determines that doing so would be just and equitable. Under MCL 600.4801(c), the term "penalty" includes judgments after bond forfeiture.

2. MCL 765.28 was amended in 2002. Subsection (1) provides that after a criminal defendant fails to appear and after default on the recognizance has been entered, if the surety is unable to show good cause for the criminal defendant's absence before the court, the court must enter a forfeiture judgment for any amount up to the full price of the bail. Under MCL 765.28(2), a court may set aside a forfeiture judgment, remit the money, and discharge the surety bond if within one year from entry of the judgment, the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person. However, MCL 765.28(3) provides that the mandatory remittal in Subsection (2) does not apply if the defendant was apprehended more than 56 days after the forfeiture judgement was entered and the surety did not fully pay the forfeiture judgment during that 56-day period.

3. The trial court erred by holding that plaintiff had no cause

of action under MCL 600.4835 to recover the money it paid for the forfeiture judgments. When it amended MCL 765.28 in 2002, the Legislature did not express the intention that it be the exclusive remedy by which a commercial surety could obtain relief from a forfeiture judgment. Instead, MCL 600.4835 and MCL 765.28 do not conflict and are *in pari materia* because both statutes address the return of forfeited recognizances. Recovery of the forfeited recognizance under MCL 600.4835 does not render MCL 765.28 nugatory because each statute may be given its full effect without affecting the other. Specifically, under MCL 765.28, remittance is required if the conditions set forth in MCL 765.28(2) are met, while recovery under MCL 600.4835 is not mandatory but instead limited by the trial court's discretion on the basis of equitable considerations.

Reversed and remanded.

SURETYSHIP AND GUARANTEE — FORFEITURE OF SURETY BONDS — RECOVERY OF FORFEITED RECOGNIZANCE.

A surety may seek recovery of a forfeited recognizance under either MCL 600.4835 or MCL 765.28.

Law Offices of Michael S. Maloney (by *Michael S. Maloney*) for plaintiff.

Fletcher Fealko Shoudy & Francis, PC (by *T. Allen Francis*), for defendant.

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

SAAD, P.J. Plaintiff is in the business of becoming surety on bonds for compensation in criminal cases in the state of Michigan. Plaintiff, pursuant to MCL 600.4835, sought a return of the sums it paid to defendant on bond-forfeiture judgments. The trial court dismissed plaintiff's claims and held that the exclusive remedy for the return of such funds was through MCL 765.28.[1] Because the Legislature's

[1] As explained herein, plaintiff's prior attempt to recover under MCL 765.28 was denied and is not part of this appeal.

amendment of MCL 765.28 did not establish that it was to be the exclusive remedy in these instances, we reverse and remand.

The parties do not dispute the underlying facts. Plaintiff became surety for many criminal defendants. In each of the instances at issue in this case, the criminal defendant did not appear at district court as required, which resulted in a forfeiture judgment being entered against plaintiff. Plaintiff paid the judgment in all of these cases, although in nearly all of them, the payment occurred more than 56 days after the entry of the judgment. Further, in most of the criminal cases, plaintiff later brought the criminal defendant into custody more than 56 days after entry of the corresponding forfeiture judgment.

In the district court, plaintiff sought recovery of the funds it paid under MCL 765.28. The district court denied the various requests. Plaintiff then brought the instant action in circuit court and sought to recover the funds under MCL 600.4835. As already mentioned, the trial court found no cause of action because it determined that the sole remedy for the return of the bail forfeitures was under MCL 765.28.

The issue before us is one of statutory interpretation, which we review de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. . . . When given their common and ordinary meaning, the words of a statute provide the most reliable

> evidence of its intent . . . . [*Id*. at 156-157 (citations, quotation marks, and brackets omitted).]

In addition, "[t]his Court should presume that each statutory word or phrase has meaning, thus avoiding rendering any part of a statute nugatory." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 217; 818 NW2d 478 (2012). Further,

> [s]tatutes 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. The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. To the extent that statutes that are *in pari materia* are unavoidably in conflict and cannot be reconciled, the more specific statute controls. [*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) (citations and quotation marks omitted).]

At issue is MCL 600.4835, which provides the following:

> The circuit court for the county in which such court was held, or in which such recognizance was taken, may, upon good cause shown, remit any penalty, or any part thereof, upon such terms as appear just and equitable to the court. But this section does not authorize such court to remit any fine imposed by any court upon a conviction for any criminal offense, nor any fine imposed by any court for an actual contempt of such court, or for disobedience of its orders or process.

By its plain language, MCL 600.4835 permits a circuit court to "remit any penalty" when it determines that doing so would be "just and equitable." MCL 600.4835 also requires the party requesting the remittance to show "good cause." Pursuant to MCL 600.4801, the term "penalty" as used in MCL 600.4835 "includes

fines, forfeitures, and forfeited recognizances." MCL 600.4801(c). As a result, a penalty under MCL 600.4835 includes judgments after bond forfeitures, like those at issue in this case. *People v Evans*, 434 Mich 314, 332; 454 NW2d 105 (1990). It is further beyond dispute that before 2002, MCL 600.4835 was the means by which sureties could seek recoupment for forfeitures that were paid.[2] See *id*. at 331-332.

In 2002, the Legislature amended MCL 765.28 to allow for a forfeiture judgment to be set aside. The statute now provides as follows:[3]

> (1) If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than

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[2] Although not relevant for the issue presented on appeal, *Evans* addressed the then-existing split authority on whether a surety could recover its forfeited bonds under MCL 765.15. *Evans*, 434 Mich at 316, 318-319. The *Evans* Court held that while MCL 765.15 did not apply to surety bonds, *id*. at 323-325, a remedy was still available through MCL 600.4835, *id*. at 331-332. The Court explained that "after a judgment has been entered against a surety, it stands as any judgment rendered in a personal action, and . . . '[i]t is enforceable, reviewable and appealable by way of the same provisions and by other statutes and court rules which may apply to the specific situation . . . .' " *Id*. at 331, quoting *People v Johnson*, 72 Mich App 702, 709; 250 NW2d 508 (1976).

[3] The Legislature's 2004 amendment to the statute is captured here as well, but it bears no significance on the issue before us. 2004 PA 332.

> the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution shall be awarded and executed upon the judgment in the manner provided for in personal actions.
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> (2) Except as provided in subsection (3), the court shall set aside the forfeiture and discharge the bail or surety bond within 1 year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person. If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety.
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> (3) Subsection (2) does not apply if the defendant was apprehended more than 56 days after the bail or bond was ordered forfeited and judgment entered and the surety did not fully pay the forfeiture judgment within that 56-day period. [MCL 765.28.]

Thus, under MCL 765.28(1), when a criminal defendant fails to appear before the trial court, "default shall be entered on the record," and after the default is entered, notice must be given to the surety that the criminal defendant failed to appear and that default on the recognizance has been entered. The court is then required to give the surety "an opportunity to appear before the court . . . and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond." *Id*. If the surety is unable to show good cause for the criminal defendant's absence before the court, this subsection requires the court to enter a judgment against the surety for any amount up to the full price of the bail.

After the forfeiture judgment has been entered pursuant to MCL 765.28(1), a surety can have the judg-

ment set aside and the money remitted, so long as certain requirements are met. The trial court must set aside the forfeiture judgment and discharge the surety bond if, within one year from entry of the judgment, "the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person." MCL 765.28(2). That mandatory remittal, however, is subject to the requirements of MCL 765.28(3). Specifically, MCL 765.28(3) renders MCL 765.28(2) inapplicable in instances in which the criminal defendant is apprehended more than 56 days after entry of the judgment of forfeiture and the surety has not paid the entire judgment within those same 56 days. In other words, when a criminal defendant is apprehended more than 56 days after the judgment is entered, before even considering if a surety is entitled to have the judgment set aside and the bond remitted pursuant to MCL 765.28(2), a court must consider whether the surety paid the entire judgment within 56 days of when it was entered. If the surety did not, relief under that statute is not permitted. MCL 765.28(3).

The sole question on appeal is whether the remedy under MCL 600.4835 remains viable after the Legislature's 2002 amendment of MCL 765.28. We hold that it is.

The two statutes at issue relate to the same subject matter. MCL 600.4835 governs the return of penalties, which under MCL 600.4801(c) includes forfeited recognizances. And MCL 765.28 expressly concerns the return of forfeited recognizances under certain circumstances. Thus, these two provisions are *in pari materia*.

Contrary to the trial court's view, to permit recovery under MCL 600.4835 would not "effectively render

MCL 765.28 nugatory." In our view, MCL 765.28(2) and (3) provide a "safe harbor" in which, if certain conditions are satisfied,[4] a surety is *entitled* to a remittance of the forfeiture it paid.[5] A court lacks any discretion in this instance—the forfeited recognizance must be returned. MCL 600.4835, on the other hand, gives the court discretion to remit forfeited recognizances, "or any part thereof, upon such terms as appear just and equitable to the court." While these concepts overlap, they do not conflict because each statute can be given its full effect without affecting the other. Obviously, if a plaintiff seeks a remittance under MCL 600.4835 and outside the safe harbor of MCL 765.28, (1) the plaintiff is not guaranteed any remittance and (2) even if the court authorizes a remittance, it does not have to be for the full amount of the forfeited recognizance.

If the Legislature intended the amendment of MCL 765.28 in 2002 to create the sole remedy by which a commercial surety could obtain relief from judgment, it could have used such express language. Because it did not, and because the two statutes do not conflict, the trial court erred by ruling that plaintiff could not seek recovery under MCL 600.4835.[6]

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[4] Again, those conditions are (1) the criminal defendant was apprehended no more than 56 days after the judgment was entered, (2) the surety paid the judgment within that same 56-day period, (3) the ends of justice have not been thwarted, and (4) the county has been repaid its costs for apprehending the defendant.

[5] The Legislature's use of the term "shall" in MCL 765.28(2) denotes a mandatory action, as opposed to a permissive one. See *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 631; 838 NW2d 183 (2013).

[6] Defendant argues that plaintiff cannot invoke MCL 600.4835 because it is an equitable remedy and "where by *statute* a full and adequate legal remedy has been provided, it is generally held that *equity* will not entertain jurisdiction." *Sovereign v Sovereign*, 354 Mich 65, 96; 92 NW2d 585 (1958) (emphasis added); see also *Tkachik v Mandeville*, 487 Mich 38, 45-46, 52; 790 NW2d 260 (2010). But reliance on this legal

The trial court opined that to permit recovery under MCL 600.4835 would render MCL 765.28 nugatory because commercial sureties would have no reason and no incentive to comply with MCL 765.28. The court averred, "The surety could pay or apprehend whenever it wished and still assert its claim for equitable remitter [under MCL 600.4835]." The court further stated that to allow a surety to ignore the time requirements of MCL 765.28 would frustrate the administration of justice.

The trial court erred when it weighed policy concerns regarding why the purpose of MCL 765.28 would be frustrated by allowing relief under MCL 600.4835. As our Supreme Court stated in *Evans*, "We need not resort to considerations of proper public policy in order to interpret [statutory language]." *Evans*, 434 Mich at 326. The question is not whether the Legislature's 2002 amendment of MCL 765.28 *should* be treated as creating an exclusive remedy, but rather whether it *does*. See *id*. at 327. As already discussed, the statutes do not conflict, and the Legislature did not express an intent to make MCL 765.28 the sole remedy for commercial sureties. Moreover, while we agree with the trial court that a surety could ignore the requirements of MCL 765.28, it does so at its own risk because any recovery is at the discretion of the court.

Of course, the trial court is correct that in an ideal world, a surety would apprehend its criminal defen-

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doctrine is misplaced. While MCL 600.4835 allows a court to grant relief if it "appear[s] just and equitable," thereby invoking principles of equity, it nonetheless is a remedy provided by *statute*, not the common law. This is distinguishable from the equitable claims in *Sovereign* and *Tkachik*, which were not based on any statute. *Tkachik*, 487 Mich at 47-48; *Sovereign*, 354 Mich at 96. Defendant has provided no authority that, merely because a statute uses equitable principles, it is no longer considered a remedy at law.

dant within 56 days of the entry of a forfeiture judgment. However, in those instances when that does not happen (even if due to no fault on the surety's part), if MCL 765.28 were the sole and exclusive remedy, then a surety would have zero incentive to continue efforts to apprehend the defendant, which would further frustrate the administration of justice. Would more absconding criminal defendants be produced if sureties knew that their only pathway to recover a forfeited recognizance was to comply with MCL 765.28, or is justice better served by allowing them the possibility of still obtaining some recovery through MCL 600.4835, after the 56-day period has expired? Reasonable minds could differ on what is the wisest approach, but those types of questions are not to be resolved by any court. Instead, this is for the Legislature to determine, as our role is merely to interpret the laws as they are written. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002) ("[O]ur function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.").

Plaintiff also argues that when applying MCL 600.4835, it is entitled to relief because it demonstrated good cause. But because the trial court determined that MCL 600.4835 did not apply and never got to the issue of good cause, we decline to address it for the first time on appeal. On remand, the trial court is to evaluate plaintiff's claims under MCL 600.4835.

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

SAWYER and HOEKSTRA, JJ., concurred with SAAD, P.J.

In re COLLIER

Docket No. 328172. Submitted March 8, 2016, at Detroit. Decided March 15, 2016, at 9:00 a.m.

Respondent's parental rights to his child, JC, were terminated in the St. Clair Circuit Court, Family Division, in June 2015. The termination hearing followed a May 2014 adjudication hearing at which respondent failed to appear. Before the adjudication hearing, respondent's counsel asked to be dismissed from the case because respondent had failed to contact her during the month before the adjudication hearing. The hearing referee excused her, and she did not participate in the remainder of the hearing. The referee indicated that he would enter a default judgment against respondent because of respondent's absence from the adjudication hearing, but he permitted petitioner to present its case against respondent. Two witnesses testified that JC's mother, KR, had been seen with JC, contrary to an order instructing respondent to avoid contact with KR. Following petitioner's presentation, the referee concluded that a preponderance of the evidence supported the court's jurisdiction over JC, and the referee established that JC was a temporary ward of the state. Respondent attended hearings during the dispositional phase, including a permanency planning hearing five days after the missed adjudication hearing, but respondent was not represented by counsel for approximately one year after the adjudication hearing. Counsel was appointed for respondent in April 2015 before a show-cause hearing concerning respondent's failure to comply with the no-contact order prohibiting him from having contact with KR. Three weeks after the show-cause hearing, petitioner filed a supplemental petition requesting that respondent's parental rights be terminated. Testimony at the termination hearing indicated that respondent had been doing well and that he and JC had "a really great bond," but that in the few months before the termination hearing, respondent's compliance "really went downhill." The foster-care worker testified that she received information that respondent had been in contact with KR after KR's parental rights were terminated and that respondent used marijuana during this time. The trial court terminated respondent's parental rights, finding that clear and convincing evidence supported termination on three statu-

tory grounds—MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). Respondent appealed.

The Court of Appeals *held*:

1. Respondent's due-process rights were violated, and he was effectively denied an adjudication, when the hearing referee went forward with an adjudication hearing even though respondent was absent and no attorney appeared on respondent's behalf to advocate his interests at the hearing. Due process requires that a respondent first be specifically adjudicated unfit before the state may interfere with the respondent's constitutionally protected right to the companionship, care, custody, and management of his or her child. Without first having fairly adjudicated respondent, it was improper to proceed to the dispositional phase of the process required to terminate respondent's parental rights. In this case, the hearing referee indicated that a default judgment would enter against respondent, but the referee did not explain what a default judgment meant in the context of an adjudication hearing. In fact, the applicable court rules do not authorize entry of a default judgment against a respondent at an adjudication hearing. In addition, even after the referee declared a default, the referee allowed petitioner, unopposed, to present evidence against respondent. It offends a respondent's constitutional right to due process to conduct the adjudicative phase of a child protective proceeding when the respondent is not in attendance at the adjudication hearing and when the respondent is not represented by counsel at the hearing. There was no evidence that respondent had waived his right to counsel or that he had terminated the attorney-client relationship. In this case, respondent was entitled to assume that his appointed counsel would be at the adjudication hearing to represent respondent even if respondent himself was not present.

2. Respondent's challenge to the propriety of his adjudication was not an impermissible collateral attack on his adjudication, even though respondent did not challenge the adjudication by direct appeal and even though an order terminating his parental rights had already entered. Dispositional orders, including orders of termination, may not be entered against an unadjudicated respondent. In this case, although respondent did not file a direct appeal of the referee's default order, his present appeal is not an impermissible collateral attack because he was effectively unadjudicated given that the adjudication was not conducted in conformity with the requirements of due process.

Vacated and remanded.

1. CHILD PROTECTIVE PROCEEDINGS — ADJUDICATION HEARINGS — DUE-PROCESS VIOLATIONS — RESPONDENT FAILED TO APPEAR AND COUNSEL DID NOT PARTICIPATE.

Due process requires that a parent be specifically adjudicated unfit before the state may interfere with that parent's constitutionally protected rights to the companionship, care, custody, and management of his or her child; a parent remains unadjudicated when the parent is absent from the adjudication hearing and no counsel is present to advocate the parent's interests.

2. CHILD PROTECTIVE PROCEEDINGS — UNADJUDICATED RESPONDENTS — CHALLENGE TO JURISDICTION IN APPEAL OF TERMINATION ORDER — NOT AN IMPERMISSIBLE COLLATERAL ATTACK.

In a termination of parental rights case, a respondent who is effectively unadjudicated because the adjudication hearing was not conducted in conformity with the requirements of due process may appeal the trial court's jurisdiction over him or her even though an order terminating the respondent's parental rights has already been entered and the respondent failed to challenge the adjudication through direct appeal.

Michael D. Wendling, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for petitioner.

Brandon R. McNamee PLC (by *Brandon R. McNamee*) for respondent.

Before: TALBOT, C.J., and WILDER and BECKERING, JJ.

PER CURIAM. Respondent appeals as of right the trial court's order terminating his parental rights to his child, JC. The trial court determined that a statutory basis for termination existed under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), MCL 712A.19b(3)(g) (failure to provide proper care and custody), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). Because we find that respondent was effectively deprived of an adjudication hearing, we vacate and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

JC is the child of respondent and KR. At the time the proceedings in this case began, KR and respondent shared joint physical and legal custody of JC. On June 21, 2013, JC was removed from KR's care and placed in the custody of respondent. JC was removed from KR's care due in large part to KR's significant substance abuse, including the use of methamphetamine, cocaine, and marijuana, as well as her involvement in manufacturing methamphetamine. She had also failed to provide proper supervision of JC. The trial court ordered that as a condition of respondent's care of JC, the "[m]other shall not have any contact with [JC] outside of visitation arranged by [the Department of Health and Human Services (DHHS)] and any other contact permitted by [DHHS]." Following a preliminary hearing, a petition filed by DHHS was authorized; KR pleaded no contest to the petition, and the trial court entered an order of adjudication with regard to KR.

On March 13, 2014, JC was removed from respondent's care. DHHS, hereafter petitioner, filed a supplemental petition alleging that despite respondent's being aware of KR's intractable drug problem, he nevertheless continued to allow KR unauthorized and unsupervised contact with JC on multiple occasions. At an April 10, 2014 pretrial hearing, Lesley Clark, KR's attorney, indicated that she would be representing respondent at the adjudication hearing, and that respondent was seeking a bench trial. On April 14, 2014, the court entered an order appointing Clark to serve as respondent's attorney.

On May 14, 2014, the date scheduled for the adjudication hearing, respondent did not appear. Clark stated on the record that since the last hearing, she

had given respondent her telephone number and address and asked him to call her and make an appointment to come and see her. She stated that to her knowledge, he had not done so, and thus she did not feel she could adequately represent him. She moved to be "dismissed from the case," and the hearing referee "thank[ed] and excuse[d]" Clark from representing respondent. Clark did not participate in the remainder of the hearing.

Immediately after excusing Clark, the referee announced that "[t]he Court will enter a default." Without elaborating on what that meant, the referee indicated that counsel for petitioner could proceed. What followed was testimony from two witnesses, spanning seven pages of transcript. The first witness, Samantha Dixon, testified that she was employed at JC's daycare facility and, thus, she knew JC. Dixon testified that she had seen JC with a woman she "assumed" was her mother, KR.[1] Respondent, whom Dixon also knew, was not with JC and the woman. Dixon described the woman with JC as "skinny" with "dark hair, glasses," and her hair pulled back. The second witness, Child Protective Services worker Andrea Smallenberg, testified that the description Dixon gave was consistent with KR's appearance. Smallenberg also testified that she had spoken to an employee at KR's doctor's office, who indicated that KR had been in the office on March 1, 2014, with a child she believed was JC. Smallenberg testified that after being shown a picture of JC, the employee verified that it was JC she had seen with KR.

Following the testimony, the referee stated on the record that "[b]ased on the evidence presented the Court finds" that "there is a preponderance of the

[1] Dixon testified she assumed it was KR, adding "I've seen her [KR] once or twice."

evidence to establish a temporary Wardship pursuant to the statutory grounds in the petition." The referee indicated that an order to that effect would be entered. A subsequent written order noted that the referee "entered a default against [respondent] for failure to appear and proceeded in a default manner." The order concluded that "for the reasons stated on the record, or in a written opinion, the Court finds that the minor children [sic] shall remain under the jurisdiction of the Court."

Although respondent failed to attend the adjudication hearing, the record reveals that he attended subsequent hearings during the dispositional phase, including a permanency planning hearing on May 19, 2014, five days after the date of the adjudication hearing. Respondent did not have counsel present at the May 19, 2014 hearing. Nor does it appear from our review of the record that he had counsel for quite some time. According to the record provided to us, it appears that respondent was without counsel for approximately one year.[2]

Indeed, the record next contains an order appointing counsel for respondent on April 9, 2015, for a show-cause hearing that took place on April 13, 2015, for the purpose of allowing respondent to show why he should not be held in contempt for violating a no-contact order with KR.[3] At the show-cause hearing, foster-care

[2] We have not been provided with transcripts from various dispositional review hearings.

[3] KR voluntarily agreed to relinquish her parental rights on February 4, 2015. It appears that the court imposed a no-contact order between respondent and KR in February 2015, after KR voluntarily relinquished her parental rights. On February 19, 2015, the trial court issued a restraining order. In the order, the trial court noted that KR's parental rights had been terminated and she had been ordered to have no contact with respondent, with whom JC was placed. The trial court found that

worker Samantha Mullens testified that it appeared there had been contact between respondent and KR after KR's parental rights had been terminated. Mullens's testimony was based on certain text messages between respondent and KR. Mullens testified that one message sent from KR to respondent stated, "Will you let me call [JC] when you get her? I would love to talk to her on the phone so I can tell her I'm going to get her some new shoes and stuff today. lol." Respondent replied, "I do not have a phone . . . . I will see if I can take her to my mom's house again." "Immediately after that," Mullens testified, "I received a text message from [respondent] stating, am I allowed to take my [child] to my mom's house[?]" Respondent pleaded guilty to violating the trial court's no-contact order and admitted he had violated the order, explaining that his contact with KR was in part due to a "soft part" he had in his heart for her, and that when he looks at his child, he sees KR in her. He avowed, however, that such contact would not happen again. "I messed up[;] I made a big mistake," respondent stated. But he assured the court that he had "learned from it."[4]

Three weeks later, petitioner filed a supplemental petition requesting termination of respondent's parental rights in light of the information that came out at the show-cause hearing. On May 18, 2015, the court appointed counsel for respondent for the impending termination hearing.

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despite this prohibition against contact between KR and respondent, "contact with mother has been occurring and is detrimental to said minor."

[4] The trial court indicated that it was going to order respondent to serve 10 days in the county jail, but it would hold that order in abeyance, subject to respondent's performance of 20 hours of community service.

At the June 10, 2015 termination hearing, social worker Jessica Leenanegt testified that she worked with respondent through the Family Together Building Solutions (FTBS) Program from October 2014 until February 2015. She testified that respondent was successful in obtaining suitable housing, and he already had employment by the time she became involved with him at FTBS. Leenanegt observed respondent's visits with JC; she testified that he and JC had a positive relationship, a loving bond, and for the most part, he demonstrated good parenting skills. At the beginning of Leenanegt's contact with respondent, respondent and KR were doing their supervised parenting visits together, but once the petition was filed to terminate KR's parental rights, respondent took over visits by himself and he was advised not to have contact with KR. Leenanegt worked with respondent on understanding the difference between healthy and unhealthy relationships, and they talked about how a relationship with KR would be unhealthy because her substance abuse could be dangerous to JC. Respondent assured her that he was not having contact with KR. Although Leenanegt believed she had successfully closed respondent's case in February, she agreed that if he had in fact been having contact with KR, she would say he was not successful in the program with regard to the healthy-relationships aspect of the program.

Mullens testified regarding her observations of respondent over the previous year. She noted that respondent had successfully obtained suitable housing, and he had a legal source of income. He had been having supervised parenting visits together with KR in accordance with his permanency plan until a petition was filed in December 2014 seeking termination of KR's parental rights. At that time, KR's visits ceased. Respondent's visits with JC were changed to unsuper-

vised as of January 2015 "due to the progress that he was making." Mullens testified that respondent engaged well with JC and that they had "a really great bond." However, Mullens discovered that respondent and KR had been in contact between February and "mid-March," after KR's parental rights had been terminated. Mullens testified that KR had provided her with text messages documenting this contact. There were allusions to drug use by respondent and KR in the messages. Mullens testified that at one point respondent had accumulated so many negative drug screens that petitioner stopped requiring the tests. But after the text messages implied that he was using, he was tested again and had two positive tests and two missed tests. Mullens summed it up by saying that respondent had been doing "very well," and he was "one hundred percent compliant," but "then in the last month or two it really went downhill."

Respondent acknowledged that he had used marijuana and stated he "had a miss-relapse," but denied that he had a marijuana problem. Consistently with his testimony at the show-cause hearing, respondent admitted having had contact with KR, and when asked why, he stated, "Stupidity, wasn't thinking." Respondent explained he had "messed up," "made a couple of mistakes," "slipped up," "fumbled," but vowed that "it won't happen again."

The trial court found that statutory grounds for termination existed under MCL 712A.19b(3)(c)(*i*), (g), and (j) stemming from respondent's contact with KR—including their use of marijuana together—despite respondent's claim that he was not in contact with her, the court's knowledge of the evidence presented at the show-cause hearing, and evidence that respondent arranged in February 2015 for KR to have contact with

JC by phone pursuant to KR's request. The trial court stated that it was aware that JC was in a relative placement, but it still believed termination of respondent's parental rights was in the child's best interests because she was three years old and in need of permanence.

II. ANALYSIS

Respondent challenges the adjudicative phase of the proceedings on multiple grounds. Respondent also questions whether the trial court clearly erred when it found statutory grounds for termination and concluded that termination was in the best interests of the child. We first consider respondent's contention that the referee violated his right to due process by proceeding in a default manner against him with regard to adjudication. "Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

A. ADJUDICATION

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *Id*. at 404. Generally, during the first phase, a court determines whether it can take jurisdiction over the child. *Id*. "Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being." *Id*.

Petitioner may initiate child protective proceedings by filing "a petition containing facts that constitute an offense against the child under the juvenile code." *Id*.

at 405, citing MCR 3.961. The parent may demand a trial—an adjudication—at which he or she has the right to a jury and to which the rules of evidence "generally apply," or the parent may admit to the allegations contained in the petition or plead no contest. *Id*. "[T]he petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition, MCR 3.972(E)." *Id*. "When the petition contains allegations of abuse or neglect against a parent . . . and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit." *Id*. "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because [t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id*. at 406 (quotation marks and citation omitted; alteration in original).

In *Sanders*, our Supreme Court considered the constitutionality of the one-parent doctrine; this doctrine is not at issue here, but a brief discussion of the doctrine is merited. In short, "[i]n cases in which jurisdiction ha[d] been established by adjudication of only *one* parent, the one-parent doctrine allow[ed] the court to then enter dispositional orders affecting the parental rights of *both* parents." *Id*. at 407. The Court struck down the one-parent doctrine, noting that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children." *Id*. at 409. The Court emphasized that this right "cannot be overstated." *Id*. at 415. Because this right is fundamental and protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, it "cannot be infringed without *some* type of fitness hearing." *Id*. Therefore, the Court concluded that "due process requires that every parent receive an

adjudication hearing before the state can interfere with his or her parental rights." *Id*. The adjudication required by due process is "a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Id*. at 422. The Court rejected the one-parent doctrine as a violation of due process because it "allow[ed] the court to deprive a parent of this fundamental right without any finding that he or she [was] unfit . . . ." *Id*.

B. RESPONDENT WAS EFFECTIVELY DENIED AN ADJUDICATION

Although the one-parent doctrine is not at issue in this case, we find that respondent was effectively denied the adjudication to which he was entitled. The hearing referee who conducted the adjudication hearing stated that a default would be entered against respondent because he failed to appear for the hearing. We are aware of no authority for the proposition that a respondent in a child protective proceeding can be defaulted. In fact, the court rules are clear that a default cannot be entered in child protective proceedings. MCR 3.901(A)(1) sets forth the court rules that are applicable to child protective proceedings; the rule pertaining to defaults, MCR 2.603, is not among the rules specifically incorporated into juvenile or child protective proceedings. Moreover, MCR 3.901(A)(2) declares that "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court *only when this subchapter specifically provides*." (Emphasis added.) Thus, respondent should not have been defaulted for failing to appear. Furthermore, as recognized in *Sanders*, 495 Mich at 422, due process requires an adjudication of a parent's unfitness "before the state can infringe the constitutionally protected parent-child relationship." It is axiomatic that a de-

fault is not an adjudication of a respondent's fitness as a parent, and we have not encountered any authority that a default can serve as a substitute for adjudication. Although an adjudication hearing "is only the first step in child protective proceedings, it is of critical importance because '[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation' of their parental rights." *Id*. at 406 (citation omitted). As such, the hearing referee denied respondent his right to due process by entering a default against him for his failure to appear at the adjudication hearing and by infringing his fundamental right to make decisions regarding the care and custody of his minor child.[5]

Petitioner argues that respondent, despite having a default entered against him, nevertheless received an adjudication hearing. Examining the record and the manner in which the alleged adjudication hearing proceeded, we do not agree.[6] To begin with, we note that respondent's counsel was excused from the adjudication hearing before it started, and that counsel did not advocate on respondent's behalf during the pro-

[5] Our decision by no means indicates that a respondent can choose to not show up for an adjudication hearing and somehow stymie the adjudication process. Practitioners in the field of child protective proceedings know well that some parents do not always show up for hearings. In those instances, assuming proper notice was given, a parent's interests are protected by counsel. This case is unique because the referee chose to dismiss respondent's counsel at the outset of the proceeding, with no indication that respondent had any intention of proceeding without counsel or otherwise forgoing his due process rights.

[6] Despite the fact that a cursory proceeding occurred after the hearing referee stated that it was entering a default, the subsequent order exercising jurisdiction over the child with regard to respondent stated that it was entered "for the reasons stated on the record, or in a written opinion[.]" Thus, it is unclear why the court exercised jurisdiction, and it is not apparent that the court even relied on the cursory proceeding that followed the default.

ceeding. And respondent was not present. Thus, respondent had no representation whatsoever during the adjudication hearing, and petitioner was simply left to put on evidence, unopposed.[7] Plowing forward with an adjudication hearing in the absence of both respondent and an attorney who could represent respondent offends due process by any stretch of the imagination.[8] See *Bye v Ferguson*, 138 Mich App 196, 203-205; 360 NW2d 175 (1984). Indeed, "[d]espite [respondent's] apparent lack of interest in participating in his own defense, he was entitled to assume that he would be represented at trial." *Pascoe v Sova*, 209 Mich App 297, 300; 530 NW2d 781 (1995). That is, having had counsel appointed for him in April 2014, respondent was entitled to assume that counsel would represent him at the adjudication hearing, notwithstanding his unexcused absence from the hearing. While similar issues resulted in error requiring reversal in civil cases such as *Bye* and *Pascoe*, we find the problem even more egregious in the instant case, a child protective proceeding. It is well established that "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *Sanders*, 495 Mich at 409 (quotation marks and citation omitted; alteration in original). Therefore, even assuming that respondent was not simply defaulted and that an adjudication hearing occurred, we find a violation of due process given that petitioner was

[7] We note that the guardian ad litem for JC was present to represent JC's interests.

[8] Again, we do not attempt to excuse respondent's failure to appear for the adjudication hearing; however, we note our concern that respondent was effectively railroaded when the adjudication hearing—to the extent it was even conducted given the referee's remarks about a default—was conducted without any semblance of representation for respondent.

permitted to proceed unopposed at the adjudication hearing, thereby effectively depriving respondent of an adjudication.

On a related note, respondent was deprived of the assistance of counsel during the adjudication proceeding. See MCR 3.915(B)(1) (explaining that a respondent has the right to counsel, including appointed counsel, at the respondent's first court appearance and "at any hearing" conducted thereafter); *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009) (recognizing that a respondent in a child protective proceeding has the right to counsel, including appointed counsel). In April 2014, respondent requested counsel, and there is no indication that he waived his right to counsel before the May 14, 2014 adjudication hearing.[9] Nor is there any indication that he terminated the attorney-client relationship on the basis of what was characterized as a one-month-long failure to communicate with counsel. In *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991), this Court held that the respondent "effectively terminated the attorney-client relationship, thereby 'waiving' or relinquishing her right to counsel," by failing to contact her appointed counsel for 16 months. In this case, although respondent's counsel indicated that she was not in contact with him for approximately one month, we do not find that respondent's conduct indicated that he effectively terminated the attorney-client relationship or otherwise waived his right to be represented by counsel. Rather, respondent's lack of communication with counsel spanned only one month, and it came on the heels of respondent's specific request for counsel.

[9] We are also troubled by the fact that it appears, from the record before us, that respondent did not have counsel for nearly the entire dispositional phase of the proceedings.

In addition to the fact that the adjudication hearing was essentially an ex parte proceeding, we note that the brief "trial" that occurred lacked some of the hallmarks of a typical trial. Notably, petitioner was allowed to present inadmissible hearsay evidence from Smallenberg, who testified that JC was with KR based on an out-of-court conversation she had with an employee at KR's doctor's office. See MRE 802. Unlike at the dispositional phase of protective proceedings, the rules of evidence apply to adjudication hearings. MCR 3.972(C)(1); *Sanders*, 495 Mich at 405. Thus, Smallenberg's testimony should not have been admitted against respondent. Moreover, the only other testimony about whether JC was with KR was speculative testimony from Dixon, who testified that she "assumed" the woman with JC was KR. The presentation of this evidence spanned only seven pages of trial transcript. The flimsy nature of the evidence and the proceeding was a manifestation of the larger problems in this case: the "trial" was a perfunctory default proceeding, respondent had no representation, and petitioner was allowed to present its case against him unopposed.

In light of the foregoing issues, we hold that respondent was effectively denied an adjudication in this matter. In *Sanders*, 495 Mich at 422, our 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." Given all that occurred in this case, we simply cannot conclude that respondent was afforded a "specific adjudication" regarding his fitness or lack thereof. Accordingly, we hold that respondent was denied his right to due process. *Id*.

C. RESPONDENT'S CHALLENGE IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK

Petitioner argues that despite any deficiencies in the adjudication, we should deny respondent's challenge because it is an impermissible collateral attack on the court's exercise of jurisdiction. We disagree.

When, as occurred in this case, a termination of parental rights occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order, any attack on the adjudication is an impermissible collateral attack. *In re SLH, AJH, & VAH*, 277 Mich App 662, 668; 747 NW2d 547 (2008) ("Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights."). See also *In re Hatcher*, 443 Mich 426, 437-438; 505 NW2d 834 (1993). "Instead, [m]atters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision[.]" *In re Kanjia*, 308 Mich App 660, 667; 866 NW2d 862 (2014) (quotation marks and citation omitted; alterations in original). In this case, respondent failed to file a direct appeal of the trial court's adjudication order and instead waited to raise any issue with regard to the adjudication until after the order was entered terminating his parental rights. Accordingly, were we to apply the rule from *Hatcher* and *SLH*, we would find that respondent's challenge to the adjudication was an impermissible collateral attack because his appeal was not filed until after his parental rights had been terminated.

However, we decline to conclude that the collateral-attack rule bars respondent's challenge in the instant case. In so holding, we are guided by this Court's decision in *Kanjia*. Like *Sanders*, *Kanjia* was a case involving the application of the one-parent doctrine.

Id. at 666. Recognizing that an adjudication cannot ordinarily be collaterally attacked following an order terminating parental rights, the panel in *Kanjia* addressed the issue whether the respondent "may now raise the issue for the first time on direct appeal from the order of termination . . . ." *Id*. at 667. This Court held that "a *Sanders* challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority." *Id*. at 669. In so holding, this Court recognized that *Sanders* "held that due process protections prevent a trial court from entering dispositional orders—including orders of termination—against an *unadjudicated* respondent." *Id*. at 669-670 (emphasis added). Thus, an unadjudicated respondent raising a challenge to the lack of adjudication

> on direct appeal from a trial court's order of termination is not collaterally attacking the trial court's exercise of jurisdiction, but rather is directly challenging the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., an adjudication hearing at which the respondent's fitness as a parent was decided. [*Id*. at 670.]

Although the instant case did not involve the application of the one-parent doctrine, we nevertheless conclude that the same problem present in *Kanjia* exists in this case: respondent never effectively received an adjudication regarding his fitness as a parent. This is also the same due process issue identified in *Sanders*. See *Sanders*, 495 Mich at 422 ("We accordingly hold that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship."). Consequently, just as in *Kanjia*, 308 Mich

App at 670, we conclude that respondent "is not collaterally attacking the trial court's exercise of jurisdiction, but rather is directly challenging the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., an adjudication hearing at which the respondent's fitness as a parent was decided."[10] "Therefore, we hold that respondent is entitled to raise his . . . challenge on direct appeal from the trial court's order of termination, notwithstanding the fact that he never appealed the initial order of adjudication." *Id*. at 671.

III. CONCLUSION

Because respondent was effectively unadjudicated, we vacate the order terminating his parental rights and the order of adjudication, and we remand for further proceedings consistent with this opinion.[11] We do not retain jurisdiction.

TALBOT, C.J., and WILDER and BECKERING, JJ., concurred.

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[10] Furthermore, in this case, we note the problem with requiring respondent to file a direct appeal from the order of adjudication. As noted earlier in this opinion, respondent was deprived of his right to counsel and the adjudication hearing proceeded with no representation for respondent whatsoever. To expect respondent to appeal an order entered after a proceeding at which his counsel withdrew, without his knowledge, and at which he was not present, would be to impose a heavy burden on respondent. For this reason, we are also uncomfortable with petitioner's characterization of this issue as being unpreserved. We question how respondent could reasonably have been expected to raise the issues about which he complains on appeal when there was no one present at the adjudication hearing to represent his interests. And it appears he did not receive appointed counsel again until nearly one year later.

[11] Because we vacate the order terminating respondent's parental rights, we need not address respondent's remaining arguments.

BRONSON HEALTH CARE GROUP, INC v TITAN INSURANCE COMPANY

Docket No. 324847. Submitted March 9, 2016, at Grand Rapids. Decided March 15, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 951.

Bronson Health Care Group, Inc., brought an action under the no-fault act, MCL 500.3101 *et seq*., in the Kalamazoo Circuit Court against Titan Insurance Company, seeking penalty interest under MCL 500.3142 and attorney fees and costs under MCL 600.2591. Plaintiff provided medical services to Amber French for injuries she sustained during an accident when she was a passenger in a vehicle. Plaintiff submitted applications for personal protection insurance benefits to the Michigan Automobile Insurance Placement Facility. Plaintiff sought payment under the Michigan Assigned Claims Plan (MACP) for the services it had provided to French. After plaintiff submitted documentation that the owner of the vehicle did not have automobile insurance for the vehicle on the date of the accident and that French and the driver of the vehicle also did not have automobile insurance on that date, MACP assigned plaintiff's claim for benefits to defendant. Defendant received itemized statements from plaintiff regarding the charges for services it provided to French, a "UB04" form, medical records, and the police report, but defendant did not approve payment for the charges until more than nine months later, after defendant had independently confirmed French's eligibility for benefits. Plaintiff moved for penalty interest under MCL 500.3142 because defendant had failed to pay plaintiff's claim within 30 days of reasonable proof of the fact and of the amount of loss sustained, and plaintiff also moved for attorney fees and costs under MCL 600.2591. The trial court, Pamela L. Lightvoet, J., denied plaintiff's motion for penalty interest, concluding that defendant had paid plaintiff's claim within the required period because it made the payment within 30 days of when it independently confirmed French's eligibility for benefits. The court also denied plaintiff's motion for attorney fees under MCL 600.2591, reasoning that plaintiff was not entitled to attorney fees and costs because it found meritorious defendant's defense of payment within 30 days of independent confirmation. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 500.3142(1) provides that personal protection insurance benefits are payable as loss accrues. Under MCL 500.3142(2), those benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. In this case, the trial court erred by concluding that defendant properly delayed paying personal protection insurance benefits until after its independent investigation confirmed that French was eligible for those benefits under MACP. By doing so, the trial court improperly read into the statute that penalty interest was not available until more than 30 days after an assigned carrier confirms for itself, on its own timeline, a claimant's eligibility for benefits. Instead, defendant was required to pay the benefits within 30 days of receiving reasonable proof of that fact and of the amount of loss sustained, regardless of the insurer's own investigation. Remand was necessary for the trial court to find when defendant received reasonable proof of the fact and of the amount of loss sustained and for a calculation of penalty interest under MCL 500.3142, if necessary, following those findings.

2. MCL 600.2591(1) requires that costs and fees be assessed against the nonprevailing party if a court finds that a defense in a civil action was frivolous. For purposes of MCL 600.2591, a defense is "frivolous" when the party's legal position was devoid of arguable legal merit. A defense is devoid of arguable legal merit when it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent. In this case, defendant's argument that it was not liable for penalty interest because it paid the benefits within 30 days of its own investigation confirming French's eligibility for benefits was devoid of arguable legal merit because it was contrary to longstanding and unmistakably evident precedent. The defense was frivolous, and the trial court erred by denying plaintiff's request under MCL 600.2591(1) for attorney fees.

Reversed and remanded.

INSURANCE — NO FAULT — PERSONAL PROTECTION INSURANCE — OVERDUE PAYMENTS BY INSURER.

An assigned insurer must be provided reasonable proof of both the fact and the amount of a loss sustained for the insurer to be liable under MCL 500.3142 for penalty interest on payments of personal protection insurance benefits not made within 30 days after such proof is received by the insurer; the 30-day period begins running once the insurer is provided reasonable proof of both the fact and

> the amount of a loss sustained, not when the insurer independently confirms, on its own timeline, the insured's eligibility for benefits.

Miller Johnson (by *Thomas S. Baker* and *Christopher J. Schneider*) for Bronson Health Care Group, Inc.

Harvey Kruse, PC (by *Lanae L. Monera* and *Daniel J. James*), for Titan Insurance Company.

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

MARKEY, J. In this action under the no-fault act, MCL 500.3101 *et seq*., plaintiff Bronson Health Care Group, Inc., appeals by right the trial court's order denying its motions for penalty interest from defendant Titan Insurance Company under MCL 500.3142 and for attorney fees and costs from Titan under MCL 600.2591. Because defendant failed to comply with MCL 500.3142, we reverse and remand to the trial court.[1]

On May 9, 2013, Amber French, a passenger in a vehicle driven by John Capp, was involved in an automobile accident. French suffered multiple fractures, respiratory problems, and a dislocated left hip. Bronson provided French with medical care from May 9, 2013, to May 14, 2013, and on May 16, 2013. Bronson charged $51,596.13 for French's care.

On July 31, 2013, and August 29, 2013, Bronson submitted applications for personal protection insurance benefits to the Michigan Automobile Insurance

[1] Titan Insurance Company filed a third-party complaint against State Farm Mutual Automobile Insurance Company in the trial court. That complaint was dismissed, and no issues regarding that complaint are raised on appeal.

Placement Facility. Bronson sought payment under the Michigan Assigned Claims Plan (MACP) for the services it had provided to French.[2] Those applications were denied by the MACP because they did not contain information regarding whether the owner of the vehicle (neither French nor Capp owned the vehicle) had automobile insurance for the vehicle.

On September 12, 2013, Bronson submitted a third application for benefits under the MACP that indicated the owner of the vehicle did not have automobile insurance for the vehicle on the date of the accident and that French and Capp did not have automobile insurance at the time of the accident. On September 24, 2013, the MACP assigned Bronson's claim for benefits regarding its treatment of French to Titan. After the assignment, Titan received itemized statements regarding Bronson's charges for the medical care Bronson provided to French, a "UB04 form," medical records, and a police report regarding the May 9, 2013 accident. Although Titan received this information on September 24, 2013, it did not issue payment to Bronson within 30 days.

On January 14, 2014, Bronson filed its complaint against Titan, alleging that it was owed (1) payment of personal protection insurance benefits from Titan, (2) penalty interest on the unpaid charges until they were paid in full, and (3) attorney fees.

French was deposed on July 10, 2014, and she testified that at the time of the accident she was not living with relatives, she did not own or use a vehicle, and she was not married. On August 4, 2014, Titan sent a letter to Bronson, indicating that it was willing

[2] The Michigan Automobile Insurance Placement Facility has the responsibility to adopt and maintain an assigned claims plan. MCL 500.3171; MCL 500.3301 *et seq*.

to pay Bronson's charges in the amount of $51,596.13, but refused to pay penalty interest for its delay in paying the claim. Thus, Titan did not pay the claim until on or after August 4, 2014.

On September 4, 2014, Bronson filed its motion for penalty interest under MCL 500.3142 and for attorney fees and costs under MCL 600.2591. On September 19, 2014, Titan filed its response and argued that at the time it received Bronson's claim from the MACP on September 24, 2013, contradictory information in Bronson's three applications to the MACP created questions related to French's eligibility to obtain personal protection insurance benefits through the MACP. Titan argued that its investigation into French's eligibility concluded when French was deposed and her testimony provided evidence that she was eligible for insurance benefits through the MACP. Titan concluded that because it paid Bronson's claim within 30 days of its investigation confirming French's eligibility for benefits, it was not liable to pay penalty interest. For the same reason, Titan argued that Bronson was not entitled to attorney fees or costs.

On September 29, 2014, the trial court held a hearing on Bronson's motions for penalty interest under MCL 500.3142 and for attorney fees and costs under MCL 600.2591. It entered an order on October 10, 2014, denying Bronson's motions on the basis of Titan's reasoning.

On appeal, Bronson argues that the trial court erred by denying its request for penalty interest pursuant to MCL 500.3142. MCL 500.3142(1) provides that "[p]ersonal protection insurance benefits are payable as loss accrues," and MCL 500.3142(2) provides in relevant part that "[p]ersonal protection insurance benefits are overdue if not paid within 30 days after an insurer

receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(3) provides that "[a]n overdue payment bears simple interest at the rate of 12% per annum." The penalty interest provision in MCL 500.3142(2) is "intended to penalize an insurer that is dilatory in paying a claim." *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002). A trial court's finding regarding "whether a communication qualifies as reasonable proof of the fact or amount of a claim" is reviewed for clear error. *Id*. The proper interpretation of a statute and its application to the facts present questions of law reviewed de novo. *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 196; 826 NW2d 197 (2012).

Titan argues that it had no obligation to pay personal protection insurance benefits to or on behalf of French until it was demonstrated that French was eligible to obtain those benefits through the MACP, notwithstanding that the MACP only itself assigns a claim after reviewing a claimant's eligibilty. The trial court agreed with Titan's argument when denying Bronson's request for penalty interest. We disagree with both Titan's and the trial court's analysis. Michigan courts have repeatedly construed MCL 500.3142(2) in accordance with its plain language (requiring "reasonable proof of the fact and of the amount of loss sustained") and have not allowed an assigned insurer additional time beyond the statutory 30 days to conduct its own investigation regarding the eligibility of the claimant to receive benefits.[3] See *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 596; 648

[3] MCL 500.3173a(1) requires the "Michigan automobile insurance placement facility [to] make an initial determination of a claimant's eligibility for benefits under the assigned claims plan," and unless the claimant is obviously ineligible, MCL 500.3174 requires it to "promptly assign the claim in accordance with the plan[.]" "An insurer to whom

NW2d 591 (2002) (explaining that once an insurer receives "reasonable proof of the fact and of the amount of loss sustained," the statute clearly requires the benefits be paid within 30 days, or they are overdue); *Roberts v Farmers Ins Exch*, 275 Mich App 58, 67; 737 NW2d 332 (2007) ("Benefits are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of the loss sustained."); *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 735; 650 NW2d 129 (2002) (stating that under MCL 500.3142, a claimant is not required to prove that the insurer acted arbitrarily or unreasonably delayed in payment of benefits; an insurer is liable for penalty interest if it does not pay the claim within 30 days after receiving reasonable proof of loss). Accordingly, the trial court erred by concluding that Titan's initial position that French *might* be ineligible for personal protection insurance benefits justified Titan's failure to comply with MCL 500.3142(2) until it conducted enough discovery to satisfy itself that French was, indeed, eligible for benefits.

In *Williams*, 250 Mich App at 267, this Court held that the plaintiff's letter setting forth the total bill for medical services and accompanied by a statement from the hospital constituted "reasonable proof of the fact and of the amount of loss sustained" as required by MCL 500.3142(2). In this case, Titan received documents on September 24, 2013, that provided evidence French was in an automobile accident, injured, sustained significant medical bills for her care and treatment, and that neither she, the driver, nor the vehicle owner was covered by insurance. It is undisputed that

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claims have been assigned shall make prompt payment of loss in accordance with this act." MCL 500.3175(1).

Titan paid the claim on or after August 4, 2014. A trial court's finding regarding "whether a communication qualifies as reasonable proof of the fact or amount of a claim" is reviewed for clear error, *id*. at 265, but the trial court here made no finding as to whether the information communicated to Titan qualified as reasonable proof of the fact and amount of a claim in accord with MCL 500.3142(2). Instead, the trial court focused on Titan's arguments regarding French's eligibility for benefits. In doing so, the trial court improperly read a requirement into the statute: that penalty interest was not available until more than 30 days after an assigned carrier confirms for itself and on its own timeline a claimant's eligibility for benefits. Courts cannot read a requirement into a statute that the Legislature has "seen fit to omit." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013). Accordingly, we reverse the trial court's denial of penalty interest under MCL 500.3142(2) and remand for findings regarding when Titan received "reasonable proof of the fact and of the amount of loss sustained," as that phrase is interpreted by caselaw, and for a calculation of penalty interest.

Bronson also argues that the trial court erred by denying its request for attorney fees and costs under MCL 600.2591. MCL 600.2591(1) provides that

> if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

A defense is "frivolous" when "[t]he party's legal position was devoid of arguable legal merit."

MCL 600.2591(3)(a)(*iii*); see also *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35-36; 666 NW2d 310 (2003) (recognizing the definition of "frivolous" as set forth in MCL 600.2591(3)). A defense is "devoid of arguable legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, long-standing, and unmistakably evident precedent." *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 369; 844 NW2d 143 (2013) (quotation marks and citation omitted). A trial court's findings regarding whether a claim or defense was frivolous and whether sanctions may be imposed are reviewed for clear error. *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009).

Again, Titan's argument before the trial court was that because it paid Bronson's claim within 30 days of its own investigation confirming French's eligibility for benefits, it was not liable to pay penalty interest under MCL 500.3142. But as discussed earlier in this opinion, Titan's argument regarding its liability to pay penalty interest under MCL 500.3142 was devoid of arguable legal merit because it was contrary to "basic, longstanding, and unmistakably evident precedent." *Adamo Demolition Co*, 303 Mich App at 369. Accordingly, Titan's defense to penalty interest pursuant to MCL 500.3142 was frivolous under MCL 600.2591, and the trial court clearly erred by denying Bronson's request for attorney fees. *1300 Lafayette East Coop, Inc*, 284 Mich App at 533 (explaining that this Court reviews for clear error a trial court's findings on whether a claim or defense was frivolous). We reverse the trial court's denial of attorney fees and costs pursuant to MCL 600.2591 and remand to the trial court for a determination of appropriate sanctions.

We reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

In re LETT ESTATE

Docket No. 326657. Submitted March 9, 2016, at Grand Rapids. Decided March 17, 2016, at 9:00 a.m.

Craig Lett, personal representative of the estate of John Lett, filed a petition in the Kent County Probate Court, asking that the proceeds of a life insurance policy be paid to the estate. Nancy Henson and John Lett had divorced in 2009, and John died in 2014. The judgment of divorce extinguished any interest each of the parties had in the other party's life insurance proceeds. As part of the judgment of divorce, a Home Equity Line of Credit (HELOC) debt was divided equally between Nancy and John, and John was instructed to obtain a life insurance policy payable to Nancy for no less than $28,500, the amount he owed for his portion of the HELOC debt. John never obtained a life insurance policy for that purpose, and he initially failed to make payments on the debt. Nancy filed a motion for contempt in the Barry Circuit Court, and by the time of the contempt hearing, John was current with his payments toward the debt. The court dismissed the contempt petition and ordered that the terms of the judgment of divorce remained in full force and effect. Contemporaneously with the contempt hearing, John signed a life insurance beneficiary form making Nancy the sole beneficiary of the life insurance policy he had through his employer, Kent County. John paid off his HELOC obligation in 2012 and died two years later without having changed the beneficiary designated to receive the proceeds of his life insurance policy. Craig, John's son, filed the probate court petition requesting that John's life insurance proceeds be paid to John's estate because Craig believed that John had only changed the beneficiary of his life insurance to satisfy the provision in the judgment of divorce that John obtain a life insurance policy to ensure payment of his HELOC debt. According to Craig, the debt to Nancy had been paid, and it would be unjust for her to receive the life insurance proceeds simply because John had neglected to remove Nancy as his beneficiary. Both parties moved for summary disposition. Nancy asserted that Craig produced no evidence that John intended someone else to be the beneficiary of his life insurance policy. Shortly after denying both motions, the probate court, David M. Murkowski, J.,

conducted a one-day trial at which three witnesses testified. The probate court concluded that the parties did not like each other and that John's only reason for making Nancy the beneficiary was to avoid future contempt charges. The probate court further stated that after John satisfied his obligation to pay half of the HELOC, the requirement in the judgment of divorce that John have a life insurance policy to ensure payment for the HELOC was extinguished and that Nancy no longer had any right to John's life insurance proceeds. The probate court ordered that Nancy receive none of the life insurance proceeds and that the proceeds should be paid to the first surviving class of beneficiaries—John's sons, Craig and Marc Lett. Nancy appealed.

The Court of Appeals *held*:

The provision in the judgment of divorce eliminating Nancy's and John's interests in the opposing party's life insurance policy applied only if, at the time of the divorce, Nancy or John was a named beneficiary of the other party's life insurance policy then in effect. Nothing in the statute governing a court's duty to determine Nancy's right to the proceeds of John's insurance policy, MCL 552.101, prohibited John from naming Nancy as the beneficiary of a life insurance policy *after* the judgment of divorce entered. MCL 552.101 does not revoke by operation of law a party's designated beneficiary; the statute simply mandates that a court's judgment of divorce must determine all of the divorcing parties' rights to each other's life insurance policies existing at the time of the divorce. The judgment of divorce did not require John to revoke Nancy as his beneficiary after the debt was paid. And the court was not allowed to read into the circumstances that John may have reasonably expected the designation to terminate after his debt was paid. Further, while a contract may be reformed on the basis of mutual mistake or severe stress, Craig's petition failed to allege any evidence that would have supported reforming the unambiguous beneficiary designation. The probate court erred by denying Nancy's motion for summary disposition, and the probate court's order effectively voiding her interest in the insurance proceeds had to be vacated.

Vacated and remanded.

ESTATES — LIFE INSURANCE PROCEEDS — DESIGNATED BENEFICIARIES — INTERESTS CANCELED IN A JUDGMENT OF DIVORCE.

Under MCL 552.101, a judgment of divorce must determine the rights of each party to the proceeds of any life insurance policy in which one of the parties is designated a beneficiary if the designation was executed before or during the marriage; a judg-

> ment of divorce that cancels both parties' rights to the proceeds of the other party's life insurance policy applies only to the beneficiaries then named in life insurance policies in effect at the time of the divorce; nothing prohibits a party from naming his or her former spouse as a beneficiary of a life insurance policy after the judgment of divorce has entered; a provision in the judgment of divorce cancelling each party's right to the proceeds of the other's life insurance policy does not eliminate a party's right to proceeds of a life insurance policy when the former spouse was named as the beneficiary after the judgment of divorce entered.

Nicewander, Berens & DeVries PLLC (by *Terry L. Berens*) for petitioner.

Damon, Ver Merris, Boyko & Witte, PLC (by *James W. Alexander* and *C. Mark Stoppels*), for respondent.

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

PER CURIAM. Appellant Nancy Henson (Nancy) is the former spouse of the decedent, John Lett (John). At issue in this case is Nancy's right to collect $120,000 as John's sole named beneficiary of a group life insurance policy provided as a benefit by John's employer, Kent County. Appellee Craig Lett (Craig) was appointed personal representative of John's estate and filed a petition in the probate court praying that the proceeds of John's life insurance be paid to his estate. After denying Nancy's motion for summary disposition, the probate court conducted a trial, ruled in favor of Craig's petition, and entered an order on March 9, 2015, effectively voiding Nancy's interest in the insurance proceeds "pursuant to MCL 552.101 and in light of the specific waiver language in the Judgment of Divorce . . . ." For the reasons discussed, we vacate the probate court's order of March 9, 2015, and remand for entry of an order dismissing the petition and granting Nancy summary disposition.

I. SUMMARY OF FACTS AND PROCEEDINGS

During their marriage John had designated Nancy as the sole named beneficiary of his employer-provided life insurance policy. John and Nancy were granted a divorce by a judgment entered on August 24, 2009, in the Barry Circuit Court. Consistently with MCL 552.101, which requires the trial court to determine the rights of each spouse to any contract of life insurance on the life of the other spouse, the judgment provided:

> **IT IS FURTHER ORDERED AND ADJUDGED** that all interest of either party hereto, in and to the proceeds of any policy or contract of Life Insurance upon the life of the other, through any employer or otherwise, is hereby canceled.

The judgment divided the marital property by simply assigning to each spouse the property they possessed. The judgment further assigned the couple's smaller debts to John. The one large debt, a home equity line of credit (HELOC) in the amount of $57,000—secured by real property owned and acquired by Nancy before the marriage—was divided equally so that each party was responsible for paying $28,500. The judgment required John to pay Nancy his share of the HELOC in monthly installments of $1,100, starting 30 days after entry of the judgment. The judgment also required John to maintain a policy of life insurance of not less than $28,500 with Nancy as the beneficiary. The following provision appears in the judgment immediately following the provision for cancellation of each spouse's interest in any existing life insurance:

> **IT IS FURTHER ORDERED AND ADJUDGED** that the Defendant shall name the Plaintiff as the beneficiary on a separate life insurance policy, the name and policy number of which must be provided to the Plaintiff within

> 60 days of the entry of this Judgment, in an amount not less than $28,500.00 until the obligation of the Defendant under the *Debts* paragraph of this Judgment is satisfied in full.

It is undisputed that John never purchased a separate life insurance policy to secure his obligation to Nancy for one-half of the HELOC. Nancy testified that she never initiated enforcement action regarding this provision. When John initially failed to make his payments on the HELOC as required by the judgment of divorce, Nancy initiated contempt proceedings in the Barry Circuit Court by filing a petition on February 8, 2010. John commenced making payments on his HELOC obligation at some point in April 2010. A transcript of a contempt sentencing hearing held in the Barry Circuit Court on April 29, 2010, shows that Nancy's attorney, C. Marcel Stoetzel, informed the trial court that John was then current in his obligations under the judgment of divorce. The trial court stated it would dismiss the contempt citation:

> At this point I will dismiss the contempt citation and the--just remind everybody that the judgment of divorce remains in full force and effect. If there other--are other terms that need to be fulfilled they do need to be fulfilled otherwise there is the potential for contempt--or further contempt citations.

On September 7, 2005, during his marriage to Nancy, John named her as his beneficiary of a life insurance policy he had through Kent County, his employer. After the divorce, on November 5, 2009, John removed Nancy as his beneficiary of any employer-provided benefits. But on April 6, 2010, contemporaneously with the contempt proceedings, John signed a Kent County Life Insurance Beneficiary Form naming Nancy as the "100%" beneficiary of the basic benefit

and also of any supplemental benefit of the group basic life and accidental death and indemnity policy. John paid off his HELOC obligation in July 2012. He did not, however, change the beneficiary designation on his life insurance policy before he died on July 27, 2014.

Craig Lett was appointed personal representative of John's estate. On September 3, 2014, Craig filed a petition in the probate court praying that the proceeds of John's life insurance be paid to his estate. Craig asserted his belief that John only added Nancy as his beneficiary because of his obligation under the divorce judgment and the contemporaneous contempt proceedings. Craig also asserted his belief that John did not intend Nancy to benefit from his life insurance once John had satisfied his divorce obligation and that it would be unjust for Nancy "to receive an additional windfall of $120,000 just because [John] failed to change his beneficiary designation" after the debt was satisfied. Craig contended that if Nancy received the insurance payment it would be "fraudulent or wrongful retention of the policy proceeds because of her execution of a waiver . . . except as to her security for payment" of John's debt, citing *Moore v Moore*, 266 Mich App 96; 700 NW2d 414 (2005), and *MacInnes v MacInnes*, 260 Mich App 280; 677 NW2d 889 (2004). Craig further alleged that John's April 6, 2010 beneficiary designation was void under the judgment of divorce and MCL 552.101.

On January 5, 2015, after discovery by interrogatories and requests for admissions, Nancy moved for summary disposition under MCR 2.116(C)(8) and (10). Nancy asserted that, at best, Craig's petition alleged that John forgot to change his beneficiary designation after satisfying his divorce obligation, but Craig had produced no evidence that John intended someone

other than Nancy as his beneficiary. And, Nancy asserted, because Craig had not alleged or produced any evidence of fraud or mutual mistake of fact, the life insurance policy could not be reformed. See *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). *Moore* and *MacInnes* were distinguishable, Nancy argued, because the beneficiary designations in those cases were made before the divorce judgments were entered.

Craig responded to Nancy's motion and also moved for summary disposition. Craig asserted that John never intended Nancy to receive a "$120,000 windfall" that would render the estate insolvent. Craig also argued that because John had fully paid the HELOC debt by July 2012, Nancy's receipt of the insurance proceeds could be "fraudulent or wrongful retention" because of her waiver of such benefits in the judgment of divorce. Craig argued that *Moore* and *MacInnes* applied because the insurance policy at issue existed at the time of the divorce judgment.

The trial court denied both parties' motions for summary disposition, and days later, conducted a trial. Three witnesses testified: Mario Pena, a former coworker of John's; Nancy Henson; and David Henson, Jr. (David). The essence of Pena's testimony was that at the time of the divorce, and while the 2010 contempt proceedings were pending, John expressed animosity toward Nancy and feared the contempt proceedings might affect his employment. Pena also testified that the county's human resources department would annually send forms to employees and request that employees update beneficiary designations. Employees were required to sign and return the forms. John did not change his designation. Nancy denied taking enforcement action regarding the insurance provision in

the judgment of divorce, stated that she never discussed insurance with John, and only learned after his death that John had named her his beneficiary. Nancy offered speculation as to why John not only named her his beneficiary, but also kept her as his named beneficiary even after he no longer owed her money. David testified regarding an alleged statement Craig made that suggested Craig believed Nancy was entitled to the insurance payment, and provided a postdivorce e-mail from John expressing some kind sentiments toward Nancy.

At the conclusion of the one-day trial and without permitting oral argument, the court made certain findings of fact. The court rejected Nancy's speculation, found that John and Nancy did not like one another, and found that John's "purpose of adding Ms. Henson to the beneficiary form was solely to avoid contempt of court" related to his noncompliance with the divorce judgment. The court then reasoned that once "the [divorce] obligation was extinguished by full payment," Nancy "had no other right to the proceeds from the insurance policy."

The probate court entered its order on March 9, 2015. It based its decision on the allegations in the petition regarding MCL 552.101 and the language in the judgment of divorce. The court's order provided that none of the life insurance proceeds would "inure to the benefit of Nancy (Foote) Henson." Rather, the court ordered, the proceeds should be distributed, in accordance with the terms of the policy, to the first surviving class of beneficiaries: John's children, Craig and Marc Lett.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposi-

tion. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence, the substance or content of which would be admissible at trial. *Id*. at 120-121; *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. A court should grant the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). "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). Where undisputed evidence shows one party is entitled to judgment as a matter of law, the court may enter judgment for that party. *In re Baldwin Trust*, 480 Mich 915; 739 NW2d 868 (2007).

Under MCR 2.116(C)(8), summary disposition may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under this rule tests the legal sufficiency of a claim by the pleadings alone; factual allegations are accepted as true and viewed in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119-120. The motion may be granted only when a claim is so clearly unenforceable that no factual development could justify recovery. *Id*. at 119.

Issues of statutory interpretation are questions of law reviewed de novo on appeal. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). Whether contract language is ambiguous and the proper interpretation of a contract are also questions of law reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

III. DISCUSSION

The only bases Craig alleged to "void" John's postdivorce designation of Nancy as the sole beneficiary of John's life insurance policy were the language in the judgment of divorce and MCL 552.101. But the plain language of MCL 552.101 does not affect John's postjudgment actions, and the plain language of the judgment merely cancelled any interest Nancy may have had in any insurance on John's life at the time the judgment was entered. Because neither the judgment of divorce nor MCL 552.101 prohibited John from naming Nancy as his beneficiary *after* the judgment was entered,[1] and because Craig alleged no other basis to void John's beneficiary designation—such as fraud, severe stress, or mutual mistake of fact—the probate court erred by not granting Nancy's motion for summary disposition under MCR 2.116(C)(8). Further, because a motion under this rule tests the legal sufficiency of a claim by the pleadings alone, Craig's argument that discovery was incomplete is unavailing. See *Maiden*, 461 Mich at 119-120.

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[1] *Moore* and *MacInnes*, addressing forgotten predivorce beneficiary designations, are clearly distinguishable from the present case, which unequivocally involves an affirmative postdivorce beneficiary designation. See *Starbuck v City Bank and Trust Co*, 384 Mich 295, 299; 181 NW2d 904 (1970).

The statute at issue in this case, MCL 552.101(2),[2] provides:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce.

Our Supreme Court reiterated pertinent principles of statutory construction in *Joseph*, 491 Mich at 205-206:

> Our primary goal when interpreting statutes is to discern the intent of the Legislature. To do so, we focus on the best indicator of that intent, the language of the statute itself. The words used by the Legislature are given their common and ordinary meaning. If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted. [Citations omitted.]

The plain language of the first sentence of MCL 552.101(2) requires a trial court granting a judgment

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[2] A mirror provision regarding the "rights of the husband" is found in MCL 552.101(3).

of divorce to determine the rights of a wife to the proceeds of any insurance policy on the life of her husband when "the wife was named or designated as beneficiary . . . during the marriage or in anticipation of marriage." This sentence does not void the wife's interest in insurance on the life of her husband; it merely requires the trial court to "determine all rights of the wife." Thus, "MCL 552.101 does not revoke [beneficiary] designations by operation of law but mandates that a trial court's judgment of divorce contain some language that disposes of the parties' rights to such benefits." *Moore*, 266 Mich App at 101. Second, and pertinent to this case, the statute only operates by its plain language on beneficiary designations executed before or during the marriage.

Our Supreme Court discussed this last aspect of the statute's similarly worded precursor in *Starbuck v City Bank and Trust Co*, 384 Mich 295, 299; 181 NW2d 904 (1970):

> The effect of [MCL 552.101], as stated in the title to the statute, in the judgment of divorce, and, in the statute itself, was to affect the interest of the *wife* in the insurance policy and thus cure the situation where a divorced wife could *inadvertently receive* the proceeds of a perhaps forgotten policy. "Inadvertently receive" should be stressed **for the statute does not prohibit the husband or the divorce judgment itself from retaining or renaming the wife as the primary beneficiary**. It simply requires affirmative action on the part of the court or husband to retain the divorced wife as the primary beneficiary and thus eliminate what could be, and usually appears to be, the inadvertent payment of the life insurance proceeds to a divorced wife. [Bold emphasis added.]

In this case, the judgment of divorce determined each spouse's interest arising from any beneficiary designation executed before entry of the judgment, i.e.,

before or during the marriage. Specifically, the judgment provided that "all interest of either party hereto, in and to the proceeds of any policy or contract of Life Insurance upon the life of the other, through any employer or otherwise, is hereby canceled." Consequently, the second sentence of MCL 552.101(2), which provides that if the judgment "does not determine the rights of the wife in and to a policy of life insurance . . . the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates," does not apply. The third sentence of MCL 552.101(2), which addresses the potential liability of an insurance company, also does not affect the validity of a postjudgment beneficiary designation. In sum, nothing in MCL 552.101(2) operates to invalidate the postjudgment beneficiary designation John executed on April 6, 2010, approximately eight months after the judgment of divorce. The judiciary may not read anything into a statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011).

The so-called "waiver" in the judgment of divorce also does not prohibit either party from designating the other as the beneficiary of a life insurance policy after the divorce judgment was entered. A settlement reached to end litigation, here placed on the record and embodied in a judgment of divorce, becomes a contract between the parties. *In re Draves Trust*, 298 Mich App 745, 767; 828 NW2d 83 (2012). "A settlement agreement, such as a stipulation and property settlement in a divorce, is construed as a contract." *MacInnes*, 260 Mich App at 283. The same legal principles that generally govern the construction and interpretation of contracts also govern a settlement agreement in a

judgment of divorce. *Myland v Myland*, 290 Mich App 691, 700; 804 NW2d 124 (2010). Settlement contracts in divorce proceedings, like other contracts between consenting adults, are enforced according to the terms to which the parties agreed. *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006). Thus, a consent judgment of divorce is a contract that must be interpreted according to the plain and ordinary meaning of its terms; "[a] court may not rewrite clear and unambiguous language under the guise of interpretation." *Woodington v Shokoohi*, 288 Mich App 352, 373-374; 792 NW2d 63 (2010). A court "cannot read words into the plain language of a contract." *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013).

In this case, the first paragraph of the section in the divorce judgment that addresses the parties' life insurance policies merely cancels any then-existing interest of either party in the proceeds of the other party's life insurance benefits. While this provision affected any interest that existed at the time the judgment was entered on August 24, 2009, there is nothing in the plain terms of this provision that prohibits either party from naming the other party as the beneficiary of a life insurance policy after entry of the judgment of divorce. Nothing may be read into the judgment that is not apparent from its plain terms. *Id.*; *Woodington*, 288 Mich App at 373-374.

Indeed, the second paragraph of the insurance section of the judgment required John to name Nancy as the beneficiary of a "separate life insurance policy" of "an amount not less than $28,500" until John's debt obligation under the judgment was satisfied. Clearly, the divorce judgment not only permitted but also required John to name Nancy as the beneficiary of a

life insurance policy after the judgment was entered to at least ensure that he fulfilled his obligation. The plain terms of the first and second provisions regarding life insurance must be read together as a whole. See *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444, 462; 761 NW2d 846 (2008). Additionally, nothing in the plain terms of the judgment required John to revoke the beneficiary designation after his divorce obligation was satisfied. A court may not read into John's postjudgment beneficiary designation a sunset provision that John did not clearly express or implement. *Northline Excavating*, 302 Mich App at 628; *Woodington*, 288 Mich App at 374. Nor may the court read into John's beneficiary designation its termination by merely concluding that John would have reasonably expected the designation to terminate after he satisfied his divorce debt obligation. *Westfield Ins Co v Ken's Service*, 295 Mich App 610, 615; 815 NW2d 786 (2012); *Northline Excavating*, 302 Mich App at 628.

The life insurance beneficiary form John signed on April 6, 2010, named Nancy, his "Ex-Wife", the "100%" beneficiary of the policy. The beneficiary designation form contains no provision limiting its application and Nancy's proceeds to $28,500, the amount of John's debt obligation under the divorce judgment, nor does the beneficiary designation form provide that it was to terminate when John's debt was satisfied. We find it significant that John did not even provide for a contingent beneficiary. Clearly, he could have easily crafted these terms. Moreover, John had several opportunities and reminders to revoke Nancy's designation as sole beneficiary after he fully satisfied his divorce obligation in July 2012, and there was no longer any concern about another circuit court enforcement action, but he did not do so. This fact must be considered also with the additional facts that he had the time and the

opportunity to do so, was described as "careful" and aware of money matters, and received annual reminders about his benefits from his Kent County employer. In sum, Craig's petition does not allege any evidence of fraud, severe stress, or mutual mistake that would support reforming the clear and unambiguous beneficiary designation. See *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990) (holding that a party will not be relieved of a contract "in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act" of the party); *Casey*, 273 Mich App at 398 (while clear and convincing evidence of a mutual mistake of fact will support reformation of a contract, unilateral mistake will not).

Reading the petition in this case in the light most favorable to Craig, we agree that when John designated Nancy as his sole beneficiary, he was under the stress of a circuit court enforcement action for not making payments on his debt obligation as required by the judgment of divorce. There is no allegation, however, that this stress was so severe that it rendered John incapable of "understanding in a reasonable manner the nature and effect of the act" of naming Nancy his sole life insurance beneficiary of the entire amount of the policy. *Keyser*, 182 Mich App at 269-270. Viewed in the light most favorable to petitioner, we again agree that the stress of the enforcement action arising from the debt under the judgment of divorce could have been a motivating factor for John's naming Nancy his beneficiary in 2010. But this stress would have ended in 2012 after John had satisfied his divorce obligation. Nor does the stress explain why he did not limit the extent to which Nancy would benefit or name any contingent beneficiaries. The petition itself shows

that any stress from possibly having the judgment enforced would have dissipated when, as alleged in the petition, John paid his debt in full two years before his death.[3] Moreover, the judgment provision requiring John to maintain insurance as security for the debt would also have been moot after 2012 when the debt was paid in full. Therefore, stress from a possible enforcement action, or simply the desire to comply with the judgment of divorce, does not account for John's retaining Nancy as his sole beneficiary for an additional two years after his debt was paid and until his death. Consequently, even assuming that John was initially motivated to name Nancy as his sole beneficiary because of the terms of the judgment of divorce or the stress of the judgment enforcement action, we find the petition alleges no factual or legal basis to set aside the clear and unambiguous beneficiary designation John left in place for two full years after his divorce debt was paid in full. Furthermore, even characterizing John's failure to act as "inertia" and viewing it in the light most favorable to petitioner, one could at best deem it a unilateral mistake of some sort that does not justify granting petitioner relief. *Casey*, 273 Mich App at 398.

In summary, Craig's petition to void John's postdivorce designation of Nancy as his life insurance beneficiary on the basis of the language in the judgment of divorce and MCL 552.101 fails to state a claim for relief. Neither the judgment of divorce nor MCL 552.101 proscribed John's postjudgment action of naming Nancy the sole beneficiary of his life insurance policy. The petition alleges no other basis to void John's

[3] Paragraph 6 of the petition states that John's divorce debt was "paid in full" and refers to Exhibit F, John's handwritten record showing the debt was paid in full on "7/1/12."

beneficiary designation, such as fraud, severe stress, or mutual mistake of fact. Even viewed in the light most favorable to petitioner, the facts show that the alleged stress of a potential judgment enforcement action ended two years before John's death and provide no basis to reform his beneficiary designation. See *Casey*, 273 Mich App at 398; *Keyser*, 182 Mich App at 269-270. Further, because a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone and is properly granted only when a claim is so clearly unenforceable that no factual development could justify recovery, *Maiden*, 461 Mich at 119, Craig's argument that discovery was incomplete is unavailing. The trial court erred by not granting Nancy's motion for summary disposition under MCR 2.116(C)(8).

IV. CONCLUSION

We vacate the probate court's order of March 9, 2015, by which the court ignored the beneficiary designation of John's life insurance policy, and we remand this case to the probate court for entry of judgment in favor of Nancy. We do not retain jurisdiction. As the prevailing party, Nancy may tax costs under MCR 7.219.

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

In re McCANN DRIVING RECORD

(PEOPLE v McCANN)

Docket No. 325281. Submitted March 2, 2016, at Lansing. Decided March 22, 2016, at 9:00 a.m.

Marcus McCann pleaded guilty in the Bay Circuit Court to charges of operating a vehicle while under the influence of liquor causing serious impairment of a body function (OUIL), MCL 257.625(5), operating a vehicle with a forged license, MCL 257.324(1), and operating a vehicle with a blood alcohol level of .17 or more, MCL 257.625(1)(c). In accordance with a plea agreement, the court, Joseph K. Sheeran, J., delayed sentencing on the OUIL conviction under MCL 771.1. An abstract of the convictions was sent to the Secretary of State, which resulted in the revocation of defendant's driving privileges. Pursuant to the amended plea agreement, defendant's OUIL guilty plea was subsequently withdrawn, the charge was dismissed, and a modified abstract was sent to the Secretary of State. After the dismissal, the trial court granted defendant's motion to amend the original abstract and ordered the Secretary of State to remove the OUIL conviction from defendant's driving record. Thereafter, the court denied the Department of State's motion for relief from judgment. The Court of Appeals granted the department's delayed application for leave to appeal.

The Court of Appeals *held*:

MCL 257.732 provides, in part, that when a defendant is convicted of a violation under the Michigan Vehicle Code, MCL 257.1 *et seq*. (Vehicle Code), the municipal judge or clerk of the court is required to prepare and forward to the Secretary of State an abstract of the court record. With certain exceptions, MCL 257.732(22) prohibits a trial court from ordering expunction of any violation reported to the Secretary of State under MCL 257.732. In this case, defendant's plea of guilty to the charge of OUIL constituted a "conviction" for purposes of the Vehicle Code, MCL 257.8a, and, in accordance with MCL 257.732, the trial court sent an abstract of that conviction to the Secretary of State. The trial court erred by ordering expunction of defendant's OUIL conviction from his driving record. Under MCL 257.732(22), the

trial court was prohibited from ordering expunction even though defendant withdrew his plea and the charge was dismissed following delayed sentencing. The reporting requirement is for purposes of public safety, and the trial court's decision to dismiss the charge following delayed sentencing did not alter the fact that defendant committed and pleaded guilty to the offense of OUIL.

Reversed.

CRIMINAL LAW — MICHIGAN VEHICLE CODE — CONVICTION REPORTABLE TO SECRETARY OF STATE — DISMISSAL OF CONVICTION FOLLOWING DELAYED SENTENCING — EXPUNCTION FROM DRIVING RECORD.

The provision forbidding a trial court from ordering expunction of a Michigan Vehicle Code violation reportable to the Secretary of State under MCL 257.732 prohibits the trial court from ordering the Secretary of State to expunge from a defendant's driving abstract his or her plea-based conviction even when, after delayed sentencing, the plea is later withdrawn and the charge dismissed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *David C. Cannon*, Assistant Attorney General, for the Department of State.

Reyes & Bauer (by *Brooke A. Bauer*) for Marcus McCann.

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

PER CURIAM. The Department of State appeals by leave granted the trial court order denying it relief from judgment in connection with an order requiring the Secretary of State to strike defendant's conviction of operating a vehicle while under the influence of liquor causing serious impairment of a body function (OUIL), MCL 257.625(5), from defendant's driving record and directing that defendant's driving privileges be adjusted accordingly. Because MCL 257.732(22) precludes the trial court from ordering the expunction of defendant's conviction from defendant's Secretary of State driving record, we reverse.

Defendant was the driver of a vehicle involved in an accident on December 26, 2010. He ultimately pleaded guilty of OUIL; operating with a forged license, MCL 257.324(1); and operating a vehicle with a blood alcohol level of .17 or more, MCL 257.625(1)(c). The plea agreement included a recommendation that the OUIL plea be accepted for delayed sentencing under MCL 771.1.

On August 20, 2012, defendant was sentenced to deferred time of 88 days in jail for operating with a forged license and 180 days for operating a vehicle with a blood alcohol level of .17 or more, while sentencing on OUIL was delayed. An abstract of defendant's convictions was created and sent to the Secretary of State, which resulted in defendant's driving privileges being revoked. On May 5, 2014, pursuant to an amended plea agreement, defendant's plea to OUIL was withdrawn and the charge was dismissed. A modified abstract was created and sent to the Secretary of State.

In August 2014, defendant moved to amend his Secretary of State driving abstract to remove the OUIL conviction, because it still appeared on his driving record and precluded him from having his driving privileges reinstated. At the conclusion of a hearing at which no representative from the Secretary of State appeared, the trial court granted the requested relief.

The department moved for relief from judgment, and at the conclusion of a hearing on the motion, the trial court stated that it would rule in favor of defendant based on MCL 771.1. The trial court opined that because defendant performed as required under the delayed-sentencing provision, the ends of justice did not require defendant to suffer penalties from the Secretary of State for a conviction that was dismissed. The trial court ordered defendant's driving record be

amended to reflect the dismissal of the OUIL count and his eligibility to obtain driving privileges be adjusted accordingly. The trial court entered an order consistent with its ruling and denied the department's motion for relief from judgment on December 4, 2014. We granted the department leave to appeal that decision.

The department contends that the Michigan Vehicle Code, MCL 257.1 *et seq*. (Vehicle Code), prohibits the trial court from ordering the Secretary of State to strike defendant's conviction from his driving record even though the conviction was dismissed by the trial court under a delayed-sentence plea agreement. We agree.

The scope of a trial court's powers is a question of law, calling for review de novo. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). The interpretation of a statute presents a question of law, which this Court also reviews de novo. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

This case concerns the interplay between certain provisions of the Vehicle Code and MCL 771.1, which permits delayed sentencing as follows:

> (1) In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant

suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

(2) In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay. [MCL 771.1.]

The Vehicle Code, at MCL 257.732, provides in part:

(1) Each municipal judge and each clerk of a court of record shall keep a full record of every case in which a person is charged with or cited for a violation of this act or a local ordinance substantially corresponding to this act regulating the operation of vehicles on highways and with those offenses pertaining to the operation of ORVs or snowmobiles for which points are assessed under section 320a(1)(c) or (i). Except as provided in subsection (16), the municipal judge or clerk of the court of record shall prepare and forward to the secretary of state an abstract of the court record as follows:

(a) Not more than 5 days after a conviction, forfeiture of bail, or entry of a civil infraction determination or default judgment upon a charge of or citation for violating or attempting to violate this act or a local ordinance substantially corresponding to this act regulating the operation of vehicles on highways.

(b) Immediately for each case charging a violation of section 625(1), (3), (4), (5), (6), (7), or (8) or section 625m or a local ordinance substantially corresponding to section

625(1), (3), (6), or (8) or section 625m in which the charge is dismissed or the defendant is acquitted.

* * *

(3) The abstract or report required under this section shall be made upon a form furnished by the secretary of state. An abstract shall be certified by signature, stamp, or facsimile signature of the person required to prepare the abstract as correct. An abstract or report shall include all of the following:

(a) The name, address, and date of birth of the person charged or cited.

(b) The number of the person's operator's or chauffeur's license, if any.

(c) The date and nature of the violation.

(d) The type of vehicle driven at the time of the violation and, if the vehicle is a commercial motor vehicle, that vehicle's group designation.

(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

(f) Whether bail was forfeited.

(g) Any license restriction, suspension, or denial ordered by the court as provided by law.

(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

(i) Other information considered necessary to the secretary of state.

* * *

(15) Except as provided in subsection (16), the secretary of state shall keep all abstracts received under this section at the secretary of state's main office and the abstracts shall be open for public inspection during the office's usual business hours. Each abstract shall be en-

> tered upon the master driving record of the person to whom it pertains.
>
> * * *
>
> (19) If a conviction or civil infraction determination is reversed upon appeal, the person whose conviction or determination has been reversed may serve on the secretary of state a certified copy of the order of reversal. The secretary of state shall enter the order in the proper book or index in connection with the record of the conviction or civil infraction determination.
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> * * *
>
> (21) Notwithstanding any other law of this state, a court shall not take under advisement an offense committed by a person while operating a motor vehicle for which this act requires a conviction or civil infraction determination to be reported to the secretary of state. A conviction or civil infraction determination that is the subject of this subsection shall not be masked, delayed, diverted, suspended, or suppressed by a court. Upon a conviction or civil infraction determination, the conviction or civil infraction determination shall immediately be reported to the secretary of state in accordance with this section.
>
> (22) Except as provided in this act and notwithstanding any other provision of law, a court shall not order expunction of any violation reportable to the secretary of state under this section.

At issue in this case is whether MCL 257.732(22) prohibits the trial court from ordering the Secretary of State to expunge from defendant's driving record his plea-based OUIL conviction when he was subsequently allowed to withdraw his plea and the charges were dismissed following delayed sentencing. This Court has addressed issues involving a trial court's requiring the Secretary of State to amend an individual's driving record. In *Droog*, 282 Mich App at 69, for

example, the defendant was convicted of obtaining a controlled substance by fraud, which conviction was reported to the Secretary of State as required by MCL 257.732(4)(i). After serving a term of probation and performing community service, the defendant sought to have her conviction set aside under MCL 780.621. *Id*. The trial court held that although the defendant had satisfied that statute's requirements for having her conviction set aside, it could not properly do so because of the decree in MCL 257.732(22) that " 'a court shall not order expunction of any violation reportable to the secretary of state under this section.' " *Id*. at 70, quoting MCL 257.732(22). This Court reversed, explaining that "the expunction of a record maintained by the Secretary of State is a much different matter from the setting aside of a criminal conviction." *Droog*, 282 Mich App at 72. "The two statutes have to do with different subjects and, thus, their provisions are not in conflict." *Id*. The *Droog* Court therefore held that "[t]he Vehicle Code limitation on a court's authority to order the expunction of a Secretary of State record does not affect the authority granted by the Code of Criminal Procedure to set aside a criminal conviction." *Id*. at 72.

In *Matheson v Secretary of State*, 170 Mich App 216, 220-221; 428 NW2d 31 (1988), disapproved on other grounds in *People v Yost*, 433 Mich 133, 140 n 16 (1989), this Court also noted the different purposes behind revocation of driving privileges and criminal punishments:

> [R]evocation or suspension of a person's driving privileges by the Secretary of State is not enhancement of a punishment against the person, but rather is an administrative action aimed at the protection of the public. Revocation of a license to operate a motor vehicle upon conviction of certain offenses is not a criminal penalty nor part of the

> sentence of the court and is not punishment for the offense. While suspension or revocation may have a chastening effect, the purpose of those procedures is for public safety. [Citations omitted.]

Clearly, the Vehicle Code does not prevent removal of convictions from a criminal record. *Droog*, 282 Mich App at 72. However, removal of a conviction from a criminal record does *not* require its removal from a report maintained by the Secretary of State under the Vehicle Code.

This Court has recognized that the Secretary of State's driving records are distinct from criminal records in both purpose and scope. *Droog*, 282 Mich App at 72; *Matheson*, 170 Mich App at 220-221. Although a trial judge has discretion to delay sentencing or otherwise exercise leniency following a guilty plea, MCL 771.1, the Vehicle Code regards a guilty plea as a conviction. MCL 257.8a.[1] The reasoning behind the distinction also likely hinges on the purpose of criminal penalties versus administrative driving sanctions. Under MCL 771.1(1), a trial court may delay sentencing when it "determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law . . . ." In contrast, the Secretary of State is concerned with public safety. *Matheson*, 170 Mich App at 221. The trial court's decision to mitigate the legal consequences of

[1] MCL 257.8a(a) defines "conviction" for purposes of the Vehicle Code to include "a plea of guilty or nolo contendere if accepted by the court . . . ." For this reason, it is of no consequence that the instant case concerns an order dismissing the charge entirely upon the prosecution's request for *nolle prosequi* after a period of delayed sentencing while *Droog* concerned a motion to set aside a formally entered conviction after the defendant's sentence was served. It is simply a distinction without a difference.

defendant's felony driving conviction does not change the fact that defendant committed that violation.

In this case, the trial court forwarded to the Secretary of State an abstract listing the OUIL conviction following defendant's guilty plea. Although the Vehicle Code also requires a trial court to forward abstracts to the Secretary of State following the dismissal of charges, MCL 257.732(1)(b), it does not command the Secretary of State to take specific action in response. On the other hand, the Vehicle Code is clear that "[e]xcept as provided in this act and notwithstanding any other provision of law, a court shall not order expunction of any violation reportable to the secretary of state under this section." MCL 257.732(22). Moreover, this Court noted in *Droog*, 282 Mich App at 74, that if a conviction is a violation reportable to the Secretary of State, the Secretary of State cannot be required to expunge the record of the violation if the underlying conviction has been set aside. By analogous reasoning, a trial court may not require the Secretary of State to amend driving records when a conviction is dismissed following guilty plea and delayed sentencing.

Reversed.

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

In re DENG

Docket No. 328826. Submitted March 2, 2016, at Detroit. Decided March 22, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 860.

Following a petition by the Department of Health and Human Services, Jasmine K. Thuc (respondent) and her husband were adjudicated in the Kent Circuit Court, Family Division, as being unfit parents. Under MCL 712A.2(b)(1) and (2) (part of the juvenile code, MCL 712A.1 *et seq*.), the court, Paul J. Denenfeld, J., assumed jurisdiction over their children, made the children temporary wards of the court, and placed them in out-of-home foster care. Respondent and her husband both received a case service plan, with the aim of reuniting the family. At a permanency planning hearing, the foster care worker requested an order requiring that the children be vaccinated, but respondent objected to vaccination on religious grounds. Following an evidentiary hearing, the court ordered the physician-recommended vaccinations over respondent's religious objections. Although the court recognized that parents generally enjoy the right under MCL 333.9215(2) and MCL 722.127 to prevent vaccinations on religious grounds, the court reasoned that those provisions did not apply to parents who had been adjudicated as being unfit. The court noted that MCL 712A.18(1)(f) and MCL 722.124a gave it authority to direct the medical care of children within the court's jurisdiction, so the court, not respondent, was required to make medical decisions, including those regarding vaccinations. The trial court also determined that respondent could not raise a constitutional challenge to vaccination because respondent did not have the same level of constitutional rights with respect to child-rearing decisions as a fit parent would. The Court of Appeals granted respondent leave to appeal, and the family court stayed the enforcement of its order.

The Court of Appeals *held*:

1. The family court did not exceed its authority by ordering vaccination of the children over respondent's objections. Parents have a fundamental liberty interest in the companionship, care, custody, and management of their children and enjoy the right to

the free exercise of religion. Following adjudication proceedings establishing a parent as unfit, however, the parent relinquishes the right to object on religious grounds to the vaccination of his or her children and must yield to the family court's orders regarding the child's welfare. During the dispositional phase of child protective proceedings, the court has the authority under MCL 712A.18(1)(f) to order vaccination of a child when the facts proved and ascertained demonstrate that immunization is appropriate for the welfare of the juvenile and society. A parent's right to control the custody and care of children is not absolute, and the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the children. When a parent has been found unfit, the state may interfere with the parent's right to direct the care, custody, and control of a child. The court is given broad powers under numerous statutes and court rules, including MCL 712A.18, MCL 712A.18f(4), MCL 712A.6, MCR 3.973(F), and MCR 3.975(G), to enter orders for the welfare of the child and the interests of society and to make decisions regarding a host of issues that would normally fall to the parent to decide, including the authority to decide the child's placement, order medical or other healthcare for the child, provide clothing and other incidental items as necessary, order compliance with case service plans, allow parental visits with the child, enter orders affecting adults, and, more generally, enter orders the court considers necessary for the interests of the child. Given respondent's adjudication as being an unfit parent and the safeguards that afforded her due process for the protection of her rights during the child protective proceedings, there was no constitutional basis on which she could prevent the court's interference with her control of her children and, in particular, with respect to the vaccination of her children.

2. Respondent also contended that she had the statutory authority to object to the vaccination of her children and that this right persisted even after her adjudication as an unfit parent. The Public Health Code, MCL 333.1101 *et seq*., sets forth a scheme governing vaccinations. Under MCL 333.9205, MCL 333.9208(1), and MCL 333.9211(1), parents are required to have their children immunized at certain ages and to present a certificate of immunization when enrolling their child in school or preschool programs. MCL 333.9215(2), however, provides an exception to these requirements if the parent submits a written statement indicating that the vaccination requirements cannot be met because of religious convictions or other objections to vaccination. Were respondent a fit parent entitled to the control and custody of her children, MCL 333.9215(2) would allow her to forgo the immuni-

zation of her children otherwise required by the Public Health Code on the grounds of a religious objection. That statute did not apply in this case, however, because the family court did not order the children's vaccinations under any provision of the Public Health Code but instead exercised its broad authority to enter dispositional orders for the welfare of children under its jurisdiction, including the authority to enter dispositional orders regarding medical treatment. Another statute, MCL 722.124a(1), part of the childcare organizations act, MCL 722.111 *et seq*., provides that the family court may consent to routine, nonsurgical medical care or emergency medical and surgical treatment of a child placed in out-of-home care. MCL 722.127, however, provides that nothing in the rules adopted pursuant to that act authorizes or requires medical examination, vaccination, or treatment for any child whose parent objects on religious grounds. Respondent argued that MCL 722.127 therefore gave her an ongoing right to prevent the vaccination of her children. That provision, however, applies only in the context of the childcare organizations act, not the juvenile code, and to the extent that a conflict exists between the limitations in MCL 722.127 and a court's broader authority under the juvenile code, the juvenile code prevails as the more specific grant of authority.

Affirmed.

CHILD PROTECTIVE PROCEEDINGS — OBJECTIONS TO VACCINATIONS OF CHILDREN ON RELIGIOUS GROUNDS — UNFIT PARENTS.

The Public Health Code, MCL 333.1101 *et seq*., sets forth a scheme governing the vaccination of children; under MCL 333.9205, MCL 333.9208(1), and MCL 333.9211(1), parents are required to have their children vaccinated at certain ages and present a certificate of immunization when enrolling their child in school or preschool programs; MCL 333.9215(2) provides an exception to those requirements if the parent submits a written statement indicating that the vaccination requirements cannot be met because of religious convictions or other objections to vaccination; if a parent is determined in the adjudicative phase of a child protective proceeding under the juvenile code, MCL 712A.1 *et seq*., to be unfit, however, the parent relinquishes the right to object on religious grounds to the vaccination of his or her children and must yield to the orders of the family division of the circuit court regarding the child's welfare; during the subsequent dispositional phase, the family court has the authority under MCL 712A.18(1)(f) to order the vaccination of the children when the facts proved and ascertained demonstrate that immunization is appropriate for the welfare of the juvenile and society.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), *William A. Forsyth*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the Department of Health and Human Services.

Terese A. Paletta for Jasmine K. Thuc.

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

HOEKSTRA, J. In these child protective proceedings under the juvenile code, MCL 712A.1 *et seq*., respondent appeals by leave granted a dispositional order requiring that respondent's children receive physician-recommended vaccinations. Because the trial court has the authority to make medical decisions over a respondent's objections to vaccination for children under its jurisdiction and the court did not clearly err by determining that vaccination was appropriate for the welfare of respondent's children and society, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Respondent and her husband have four children together, all under the age of six. Following a hearing on December 23, 2014, respondent and her husband were both adjudicated as unfit parents. The facts leading to this adjudication included periods of homelessness and unstable housing, failure to provide financial support and food for the children, improper supervision of the children, and respondent's mental-health and substance-abuse issues, including suicidal ideation prompting respondent's hospitalization. Given these circumstances, the trial court found by a preponderance of the evidence that statutory grounds existed to exercise jurisdiction over the children pursuant to MCL 712A.2(b)(1) and (2). The children were made temporary wards of the court and placed in out-of-

home foster care. Respondent and her husband both received a case service plan, with the aim of reuniting the family.

At a permanency planning hearing on June 3, 2015, the foster care worker assigned to the case requested an order from the trial court requiring the children to be vaccinated. Respondent objected to vaccination on religious grounds.[1] The trial court granted petitioner's request for vaccination, but afforded respondent an opportunity to file written objections and to present evidence at a hearing. At the evidentiary hearing, respondent testified regarding her religious objections to vaccination, and the trial court also heard medical testimony from the children's pediatrician, who testified regarding the benefits of immunization, both to protect the children from disease and to protect society by preventing of the spread of disease. The pediatrician opined that the benefits of vaccination outweighed the risks, and she specified that vaccinations were recommended by the American Academy of Pediatrics and the Centers for Disease Control and Prevention.

Following the hearing, the trial court issued a written opinion and order, requiring the physician-recommended vaccinations over respondent's religious objections. The trial court indicated that it would "assume" that respondent's religious objections were sincere. But despite the sincerity of her objections, the trial court nonetheless concluded that respondent could not prevent the inoculation of her children on religious grounds because she had been adjudicated as unfit and had thus "forfeited the right" to make vaccination decisions for her children. In particular, the

[1] Respondent's husband also initially objected to vaccination of his children on religious grounds, but he did not participate in the evidentiary hearing and he is not a party to this appeal.

trial court noted that MCL 712A.18(1)(f) and MCL 722.124a afford the court authority to direct the medical care of a child within the court's jurisdiction, so that it fell to the court, and not respondent, to make medical decisions, including immunization decisions. In this context, although parents generally enjoy the right to prevent vaccinations on religious grounds under MCL 333.9215(2) and MCL 722.127, the trial court reasoned that these provisions did not apply to parents who had been adjudicated as "unfit." Apart from these specific statutory provisions, the trial court determined that, more generally, respondent could not raise a constitutional challenge to vaccination because Free Exercise Clause challenges to vaccinations have been routinely rejected by the courts and, in any event, after being adjudicated as unfit, respondent did not have "the same level of constitutional rights of child-rearing decisions for her children in care as a fit parent would . . . ." Ultimately, the trial court concluded that it had authority to order vaccination over respondent's objections. Because it concluded that the giving of vaccines would benefit the children and society, the trial court entered an order for the children to receive the physician-recommended vaccinations.

Respondent filed an application for leave to appeal and a motion for immediate consideration, both of which we granted.[2] Pending the outcome of this appeal, the trial court has stayed enforcement of its inoculation order.

On appeal, respondent argues that she has the right to object to the vaccination of her children on religious grounds and that the trial court therefore erred by entering an order requiring the vaccination of her

[2] *In re Deng Minors*, unpublished order of the Court of Appeals, entered October 23, 2015 (Docket No. 328826).

children. Relying on MCL 722.127 and briefly citing provisions in the Public Health Code, MCL 333.1101 *et seq*., respondent primarily claims a statutory right to object to the vaccination of her children. Interwoven with this statutory argument, respondent also emphasizes that she has a protected liberty interest in religious freedom and the determination of the care, custody, and nurturance of her children. According to respondent, under the principles set forth in *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), her rights survived even after she had been adjudicated unfit. Consequently, respondent contends that she has an ongoing right under MCL 722.127 to object to the vaccination of her children on the basis of her sincerely held religious beliefs.

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

A trial court's dispositional orders, entered after the court assumes jurisdiction over the child, "are afforded considerable deference on appellate review[.]" *In re Sanders*, 495 Mich 394, 406; 852 NW2d 524 (2014). While dispositional orders must be " 'appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained,' " they will not be set aside unless clearly erroneous. *Id*., quoting MCL 712A.18(1); see also *In re Macomber*, 436 Mich 386, 399; 461 NW2d 671 (1990). Likewise, any factual findings underlying the trial court's decision are reviewed for clear error. *In re Morris*, 300 Mich App 95, 104; 832 NW2d 419 (2013). To the extent the trial court's order in this case implicates questions of statutory interpretation and constitutional law, our review of these questions of law is de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006).

The goal of statutory interpretation is to give effect to the Legislature's intent. *In re AJR*, 496 Mich 346, 352; 852 NW2d 760 (2014). To ascertain the Legislature's intent, we begin with the language of the statute, giving words their plain and ordinary meaning. *In re LE*, 278 Mich App 1, 22; 747 NW2d 883 (2008). "The Legislature is presumed to have intended the meaning it plainly expressed, and when the statutory language is clear and unambiguous, judicial construction is neither required nor permitted." *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

III. ANALYSIS

Religious freedom and the right to "bring up children" are among those fundamental rights "long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923). "Generally, the state has no interest in the care, custody, and control of the child and has no business interfering in the parent-child relationship." *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009). Instead, "the custody, care and nurture of the child reside first in the parents . . . ." *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). Indeed, "[i]t is undisputed that parents have a fundamental liberty interest in the companionship, care, custody, and management of their children." *In re B & J*, 279 Mich App 12, 23; 756 NW2d 234 (2008). Moreover, parents and their children enjoy the right to the free exercise of religion, and parents have the right to give their children "religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it . . . ." *Prince*, 321

US at 165. See also *Wisconsin v Yoder*, 406 US 205, 213; 92 S Ct 1526; 32 L Ed 2d 15 (1972).

However, a parent's right to control the custody and care of children "is not absolute, as the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor . . . ." *Sanders*, 495 Mich at 409-410 (citation and quotation marks omitted). "When a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest." *Id*. at 416. That is, "there is a presumption that fit parents act in the best interests of their children." *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). Thus,

> so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. [*Id*. at 68-69.]

See also *AP*, 283 Mich App at 591.

In contrast, when a parent has been found "unfit," the state may interfere with a parent's right to direct the care, custody, and control of a child. See *Sanders*, 495 Mich at 418; *AP*, 283 Mich App at 592-593. This intervention may be initiated under the abuse-and-neglect provisions of the juvenile code by the state's filing of a petition, requesting that the court take jurisdiction over a child. *Sanders*, 495 Mich at 404-405; *In re Kanjia*, 308 Mich App 660, 664; 866 NW2d 862 (2014). Once a petition has been filed, there are two phases to child protective proceedings in Michigan: the adjudicative phase and the dispositional phase. *Sanders*, 495 Mich at 404. During the adjudicative phase, the court determines by accepting a parent's plea or

conducting a trial regarding the allegations in the petition whether it can take jurisdiction over the child. *Id*. at 404-405. See also MCL 712A.2(b); MCR 3.971; MCR 3.972. The procedural safeguards in place during the adjudicative phase " 'protect the parents from the risk of erroneous deprivation' " of their rights. *Sanders*, 495 Mich at 406, quoting *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Ultimately, "[w]hen the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit." *Sanders*, 495 Mich at 405.

After the parent has been found unfit, the trial court assumes jurisdiction over the child and the dispositional phase of proceedings begins. *Id*. at 406. "The purpose of the dispositional phase is to determine 'what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . .' " *Id*., quoting MCR 3.973(A) (emphasis omitted). To effectuate this purpose, the court holds periodic review hearings at which the respondent has a right to be present, examine reports, and cross-examine the individuals making those reports. MCR 3.973(D)(2) and (E)(3); *Sanders*, 495 Mich at 406-407. In determining what measures to take with respect to a child, the court must consider the case service plan prepared by Michigan's Department of Health and Human Services (DHHS) as well as information provided by various individuals, including the child's parent. MCL 712A.18f(4); MCR 3.973(E)(2) and (F)(2); *Sanders*, 495 Mich at 407.

"The court has broad authority in effectuating dispositional orders once a child is within its jurisdiction." *Sanders*, 495 Mich at 406. And the court may enter "orders that govern all matters of care for the child."

In re AMB, 248 Mich App 144, 177; 640 NW2d 262 (2001). See also *Macomber*, 436 Mich at 389. For example, relevant to the present dispute, under MCL 712A.18(1), if the court finds that a child is under its jurisdiction, the court may enter orders of disposition that are "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained," including an order to "[p]rovide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship . . . ." MCL 712A.18(1)(f). See also MCL 712A.18f(4); *AMB*, 248 Mich App at 176-177.

With this framework in mind, the question before us in this case is a narrow one—namely, whether a parent who has been adjudicated as unfit has the right during the dispositional phase of the child protective proceedings to object to the inoculation of her children on religious grounds.[3] We conclude that, by virtue of adjudication proceedings establishing a parent as unfit, the parent relinquishes this right and must yield to the trial court's orders regarding the child's welfare. Consequently, during the dispositional phase, the trial court has the authority to order vaccination of a child when the facts proved and ascertained demonstrate that immunization is appropriate for the welfare of the juvenile and society. MCL 712A.18(1)(f).

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[3] While the trial court more generally considered the right to object to childhood vaccinations on religious grounds and concluded that Free Exercise Clause challenges cannot be maintained against physician-recommended vaccines, even by fit parents, we find it unnecessary to decide this broader constitutional question and instead limit our holding to parents who have been adjudicated as unfit in the course of child protective proceedings. See generally *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("[T]here exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case.").

In particular, as noted, parents have a fundamental liberty interest in the care and control of their children and a fundamental right to the free exercise of their religion, including the right to raise their children in that religion. *Meyer*, 262 US at 399. These rights do "not evaporate simply because they have not been model parents . . . ." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Nonetheless, it is only "fit" parents who are presumed to act in the best interests of their children, and only "fit" parents who enjoy the control, care, and custody of their children unfettered by governmental interference. See *Troxel*, 530 US at 68-69; *Sanders*, 495 Mich at 410. In contrast, through the course of child protective proceedings, particularly the adjudicative phase, the parent loses the presumption of fitness, at which time the state becomes empowered to interfere in the functioning of the family for the welfare of the child and to infringe on the parent's ability to direct the care, custody, and control of the child. See *Sanders*, 495 Mich at 418; *AP*, 283 Mich App at 592-593. Parental rights have not been irrevocably lost at this stage, but a determination of "unfitness so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship." *In re Clausen*, 442 Mich 648, 687 n 46; 502 NW2d 649 (1993).

As a result, the court gains broad powers to enter orders for the welfare of the child and the interests of society and make decisions regarding a host of issues that would normally fall to the parent to decide, including the ability to decide the child's placement, order medical care or other healthcare for the child, provide clothing and other incidental items as necessary, order compliance with case service plans, allow parental visitation with the child, enter orders affecting adults, and, more generally, enter orders that the

court considers necessary for the interests of the child. MCL 712A.18; MCL 712A.18f(4); MCL 712A.6; MCR 3.973(F); MCR 3.975(G). See also *Sanders*, 495 Mich at 406-407. Quite simply, following adjudication, which affords a parent due process for the protection of his or her liberty interests, the parent is no longer presumed fit to make decisions for the child and that power, including the power to make medical decisions involving immunization, rests instead with the court. See MCL 712A.18(1)(f); *Sanders*, 495 Mich at 409-410, 418. Consequently, given respondent's adjudication as an unfit parent and the safeguards affording her due process for the protection of her rights during the child protective proceedings, we find no constitutional basis on which respondent may prevent the court's interference with her control of her children and, in particular, the vaccination of her children when the facts proved and ascertained in this case demonstrate that inoculation is appropriate for the welfare of her children and society.[4] MCL 712A.18(1)(f).

Aside from her espousal of general constitutional principles, respondent contends on appeal that she has the statutory authority—which was designed for the protection of her constitutional rights—to object to the vaccination of her children and that this right persists even after her adjudication as an unfit parent. With regard to immunization, Michigan has a statutory scheme, set forth in the Public Health Code, governing vaccinations. As empowered by the Legislature, the DHHS[5] has the authority to establish procedures for

[4] Respondent does not challenge the trial court's factual findings and, on the basis of the evidence presented at the evidentiary hearing, we see nothing clearly erroneous in the trial court's conclusion that vaccination of the children served their welfare and that of society.

[5] The statute refers to the former Department of Community Health (DCH). See MCL 333.5456(1). However, the DCH merged with the

the control of diseases and infections, including the ability to establish vaccination requirements. MCL 333.5111(2)(c). Regarding children in particular, the DHHS may promulgate rules related to childhood immunization, including ages for vaccinations and the minimum number of doses required. MCL 333.9227(1). Parents are required to provide for the vaccination of their children "within an age period" prescribed by the DHHS, MCL 333.9205, and present a certificate of immunization when enrolling their child in school or preschool programs, MCL 333.9208(1) and MCL 333.9211(1). However, as an exception to this requirement, a child is exempt from vaccination requirements if the child's parent provides a written statement indicating that the vaccination requirements "cannot be met because of religious convictions or other objection to immunization." MCL 333.9215(2). See also MCL 333.5113(1) and MCL 380.1177(1)(b).

We recognize that, were respondent a fit parent entitled to the control and custody of her children, MCL 333.9215(2) would undoubtedly allow her to forgo the vaccination of her children otherwise required by the Public Health Code on the grounds of a religious objection. However, this provision is inapplicable on the present facts for the simple reason that the children are not being immunized as a result of provisions in the Public Health Code. That is, the trial court did not order the children's vaccinations under any provision in the Public Health Code; rather, as discussed, the court exercised its broad authority to enter dispositional orders for the welfare of a child under its

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Department of Human Services (DHS) and is now known as the DHHS. *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 488 n 1; 887 NW2d 226 (2016), citing Executive Order No. 2015-4. The authority and responsibilities of the DCH and the DHS were transferred to the DHHS. See MCL 400.227.

jurisdiction, including the authority to enter dispositional orders regarding medical treatment. See MCL 712A.18(1)(f); *Sanders*, 495 Mich at 406. This authority is conferred on the trial court by MCL 712A.18(1)(f) of the juvenile code, following the adjudication of the parent as unfit. See MCL 712A.2(b). The juvenile code includes no provision restricting the trial court's authority to enter dispositional orders affecting a child's medical care on the basis of a parent's objections to vaccinations, and it would be inappropriate to graft on such an exception from the Public Health Code. See generally *Grimes v Dep't of Transp*, 475 Mich 72, 85; 715 NW2d 275 (2006) ("[R]eliance on an unrelated statute to construe another is a perilous endeavor to be avoided by our courts."); *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007) (" '[C]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.' ") (citation omitted). Instead, as a statutory matter, after a parent has been found unfit, MCL 712A.18(1)(f) affords courts the broad authority to make medical decisions for a child under their jurisdiction, and respondent cannot rely on provisions in the Public Health Code to trump this broad grant of judicial authority.

Similarly, as a statutory matter, respondent relies heavily on MCL 722.127 of the childcare organizations act, MCL 722.111 *et seq*. The childcare organizations act concerns the care of children in childcare organizations, including childcare institutions, child-placing agencies, children's camps, nursery schools, daycare centers, foster homes, and group homes. See MCL 722.111. Under MCL 722.124a(1),

> [a] probate court,[6] a child placing agency, or the [DHHS] may consent to routine, nonsurgical medical care, or emergency medical and surgical treatment of a minor child placed in out-of-home care pursuant [MCL 400.1 to MCL 400.121 and MCL 710.21 to MCL 712A.28] or this act. If the minor child is placed in a child care organization, then the probate court, the child placing agency, or the [DHHS] making the placement shall execute a written instrument investing that organization with authority to consent to emergency medical and surgical treatment of the child. The [DHHS] may also execute a written instrument investing a child care organization with authority to consent to routine, nonsurgical medical care of the child. If the minor child is placed in a child care institution, the probate court, the child placing agency, or the [DHHS] making the placement shall in addition execute a written instrument investing that institution with authority to consent to the routine, nonsurgical medical care of the child.

"By its language, this statute applies to children 'placed in out-of-home care' pursuant to a variety of statutes concerning child welfare, adoption, and protection, including protective proceedings under the Juvenile Code." *AMB*, 248 Mich App at 178 (citation omitted). This provision is more general than the statutes relating to the court's authority to enter a dispositional order under the juvenile code in the sense that, unlike a court's authority to enter orders during the dispositional phase of child protective proceedings, MCL 722.124a(1) is not "related to any particular phase in any of the varied child welfare proceedings to which it applies." *Id*. at 178-179. Rather, the court's authority to enter treatment under this statute "pri-

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[6] The authority of the probate court under this section is now exercised by the family division of the circuit court. MCL 600.1009; MCL 600.1021.

marily depends on whether the child has been 'placed in out-of-home care.' " *Id*. at 179.

Aside from this provision authorizing the family court, a child-placing agency, or the DHHS to consent to a child's treatment when the child is placed in out-of-home care, the childcare organizations act states that the DHHS[7] "is responsible for the development of rules for the care and protection of children in organizations covered by this act . . . ." MCL 722.112(1). In addition, MCL 722.127 of the childcare organizations act protects a parent's ability to object to medical immunization on religious grounds. It states, "Nothing in the rules adopted pursuant to this act shall authorize or require medical examination, immunization, or treatment for any child whose parent objects thereto on religious grounds." MCL 722.127.

Respondent argues that MCL 722.127 applies to children placed in out-of-home care and it thus affords her the ongoing right to prevent the vaccination of her children. Assuming that MCL 722.127 functions as a limit on judicial authority under MCL 722.124a,[8] the obvious flaw in respondent's argument is that MCL 722.127 plainly applies in the context of "this act," and "this act" is the childcare organizations act, not the juvenile code. As discussed, the juvenile code contains no provision limiting the court's broad authority to

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[7] The statute refers to the DHS. MCL 722.112. But as noted in note 5 of this opinion, the DHS has merged with the DCH to become the DHHS.

[8] We note that MCL 722.127 applies to "*the rules* adopted pursuant to this act," and "the rules" are developed by DHHS pursuant to MCL 722.112(1). (Emphasis added.) See, e.g., Mich Admin Code, R 400.12413(1)(d). Given that the DHHS, and not the family court, develops rules under the childcare organizations act, it is questionable whether MCL 722.127 functions as a limitation on the court's authority to consent to medical care under MCL 722.124a.

make medical decisions in the face of a parental objection to vaccinations, and it is not our role to create such an exception in the juvenile code.

Moreover, to the extent that MCL 722.124a covers the same subject matter as provisions in the juvenile code and there is an arguable conflict between the limitations in MCL 722.127 and a court's broader authority under the juvenile code, the juvenile code prevails as the more specific grant of authority. See *Detroit Pub Sch v Conn*, 308 Mich App 234, 251; 863 NW2d 373 (2014); *In re Harper*, 302 Mich App 349, 358; 839 NW2d 44 (2013). That is, the juvenile code and MCL 722.124a of the childcare organizations act may overlap in situations, such as this one, in which a child has been placed in out-of-home care following an adjudication of parental unfitness. In those cases, the court could potentially rely on either MCL 722.124a or MCL 712A.18(1)(f) when considering the medical needs of the child. However, MCL 712A.18(1)(f) is a more specific provision insofar as it applies to the court's authority to enter dispositional orders, while MCL 722.124a applies whenever a child is placed in out-of-home care without regard to any particular phase of any of the various child welfare proceedings to which it applies. See *AMB*, 248 Mich App at 178-179. As the more specific provision governing the court's authority to order medical care after a parent has been adjudicated unfit during child protective proceedings, MCL 712A.18(1)(f) prevails over the court's more general authority as set forth in MCL 722.124a. See *Detroit Pub Sch*, 308 Mich App at 251; *Harper*, 302 Mich App at 358. Because the juvenile code contains no vaccination-related limitations on the trial court's broad authority to enter dispositional orders for the welfare of the children and society, the court acted

within its statutory authority under MCL 712A.18(1)(f) when entering the order in this case.

Finally, we note that respondent's reliance on *Hunter* is misplaced. *Hunter* involved a child custody dispute between a birth mother and the children's paternal aunt and uncle, who had provided the children with an established custodial environment during a period when the mother was incarcerated and addicted to crack cocaine. *Hunter*, 484 Mich at 252. The trial court concluded that the mother was an unfit parent and ultimately awarded custody to the aunt and uncle, reasoning that they had an established custodial environment and the children's best interests were served by remaining in that environment. *Id*. at 253-256. On appeal, the Supreme Court considered provisions of the Child Custody Act, MCL 722.21 *et seq*., and, in particular, the interplay between the presumption in favor of parental custody set forth in MCL 722.25(1) and the presumption in favor of an established custodial environment in MCL 722.27(1)(c). *Hunter*, 484 Mich at 257-259. The Supreme Court concluded that the parental presumption prevails over the presumption in favor of an established custodial environment. *Id*. at 265-266, 273. In so holding, the Court expressly rejected the proposition that the statutory presumption in favor of natural parents applies only to fit parents. *Id*. at 271. The Court reasoned that MCL 722.25(1) did not mandate a fitness determination for the presumption to apply and thus the presumption contained in this provision applies to all natural parents, not merely fit parents. *Id*. at 270-272.

Respondent now argues on appeal that *Hunter* supports the proposition that her right to object to the vaccination of her children does not depend on whether

she is a fit or unfit parent because the statutory provisions on which she relies contain no references to "fit" parents. Contrary to respondent's argument, *Hunter* does not support her position, and it does not affect the rights of parents adjudicated as unfit in child protective proceedings. Rather, by its express terms, *Hunter* distinguished custody proceedings from other proceedings involving parental rights and made plain that *Hunter*'s application was limited to cases involving the Child Custody Act. The Court explained:

> (1) This case deals with custody actions initiated under the [Child Custody Act] involving both the parental presumption in MCL 722.25(1) and the established custodial environment presumption in MCL 722.27(1)(c). This opinion should not be read to extend beyond [Child Custody Act] cases that involve conflicting presumptions or to cases that involve parental rights generally but are outside the scope of the [Child Custody Act].
>
> (2) This opinion does not create any new rights for parents. The United States Supreme Court decisions regarding the constitutional rights of parents previously discussed in this opinion provide guidance that informs our analysis. This opinion does not magically grant parents additional rights or a constitutional presumption in their favor. It does not grant unfit parents constitutional rights to their children other than due process rights. [*Hunter*, 484 Mich at 276.]

Therefore, *Hunter* does not apply in this case because the present case does not involve the Child Custody Act or the application of the parental presumption found in MCL 722.25(1). Instead, the proceedings are child protective proceedings under the juvenile code, which, unlike the presumption found in MCL 722.25(1), fully contemplates a trial court's assessment of parental fitness during the adjudicative phase, MCL 712A.2(b); *Sanders*, 495 Mich at 405, and

expressly authorizes the court to order medical care for a child within its jurisdiction, after a finding of parental unfitness, during the dispositional phase, MCL 712A.18(1)(f). Quite simply, *Hunter* is inapplicable in the context of the child protective proceedings at hand.

In sum, respondent's reliance on MCL 722.127 and the provisions of the Public Health Code is misplaced. After her adjudication as an unfit parent, respondent lost, at least temporarily, the right to make immunization decisions for her children. That responsibility now rests with the trial court, and the trial court did not exceed its authority by ordering vaccination of the children over respondent's objections given that the facts proved and ascertained demonstrate that vaccination is appropriate for the welfare of the children and society. MCL 712A.18(1)(f).

Affirmed.

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

PEOPLE v AGAR

Docket No. 321243. Submitted August 4, 2015, at Detroit. Decided February 2, 2016. Approved for publication March 22, 2016, at 9:10 a.m. Reversed in part and Part III vacated 500 Mich 891.

Thomas J. Agar was convicted by a jury in the St. Clair Circuit Court of distributing and possessing child sexually abusive material, MCL 750.145c(3) and (4); using a computer to commit a crime, MCL 752.796; and resisting and obstructing a police officer, MCL 750.81d(1), after his Internet protocol (IP) address was identified by a detective as one that had possibly traded or shared child pornography. Before trial, defendant had moved for the appointment of a forensic computer expert witness to rebut the detective's testimony and, because he was indigent, requested $1,500 of public funds to retain the expert he had chosen. The court, Michael L. West, J., denied the motion on the ground that there was an insufficient connection between the specifics of the issue involved and the need for an expert. Defendant appealed his convictions on this and other grounds.

The Court of Appeals *held*:

1. The trial court abused its discretion by denying defendant's request for public funds to retain a computer forensics expert. MCL 775.15 authorizes a court to provide public funds for indigent defendants to retain expert witnesses. Under MCL 775.15, the defendant bears the burden of demonstrating that there is a material witness in the defendant's favor within the jurisdiction of the court without whose testimony the defendant cannot safely proceed to a trial. The first portion of defendant's burden was to show a nexus between the facts of the case and the need for an expert. Defendant met that burden by establishing that an expert was necessary to support his defense that the child sexually abusive material was inadvertently downloaded to his computer when, in the course of performing a repair, he copied another person's hard drive to his computer. He further required an expert to support his defense that files containing child pornography could have been on his computer as the result of his unprotected and open wireless network and to explain that a program he had copied called Shareaza was programmed to share files and, once down-

loaded onto his computer, resumed file-sharing without input from him. The detective's testimony was the centerpiece of the preliminary examinations on the initial and amended informations and of the trial, and much of the detective's testimony involved the technical process for extracting the thumbnail fingerprints of child pornography from defendant's computer and the process for initially identifying the IP address to which the files migrated. However, defendant asserted that the files were loaded at a time when he did not have control of the computer, and the detective was unable to identify when the files were loaded. Further, the detective also acknowledged that certain software was required to view the files and that he did not know whether defendant's computer possessed the software. The logical nexus between the facts of the case and defendant's need for an expert was clear.

2. Defendant was denied his right to present a defense by the court's failure to appoint the requested expert. Due process and fundamental fairness require that the state not deny defendants an adequate opportunity to present their claims fairly. To prove that defendant's requested expert might have changed the outcome of the trial, defendant had to show that the expert's testimony would have been favorable to his defense. Defendant's theory at trial was that certain files containing child sexually abusive material were inadvertently downloaded, and he posited multiple theories about how that could have happened. The detective acknowledged that it was possible that if the Shareaza program was uninstalled and reinstalled elsewhere, it could continue prior searches and downloads on a new device. The detective also admitted that he did not know whether the Shareaza program had an automatic feature to continue searches and downloads once it was reinstalled. The trial court's decision to deny the opportunity for an impartial, scientifically trained expert to corroborate defendant's account effectively denied defendant the support necessary to explain to the jury how his theory was plausible, and it also hindered effective cross-examination.

3. Defendant's arguments relating to the sufficiency of the evidence supporting his convictions, the failure to provide him a copy of the search warrant under MCL 780.655(1), and ineffective assistance of counsel were without merit.

Convictions for distributing and possessing child sexually abusive material and using a computer to commit a crime vacated; conviction for resisting and obstructing a police officer affirmed; case remanded for a new trial.

Judge GLEICHER, concurring, joined the majority's opinion in full and wrote separately to expand on the majority's due-process analysis. She noted that the prosecution was required to prove that defendant knowingly engaged in prohibited conduct, that the sole defense was that defendant never intentionally or knowingly downloaded child sexually abusive material, that this defense hinged on proof that the material could have made its way to defendant's computer inadvertently, and that it was impossible to determine without the assistance of an expert whether the detective's characterization of the evidence could have been refuted. She further noted that the cost of affording defendant meaningful access to justice in this case would have been minimal.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

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

Thomas J. Agar *in propria persona*.

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

STEPHENS, J. Defendant appeals as of right his jury trial convictions of distributing child sexually abusive material, MCL 750.145c(3); possessing child sexually abusive material (three counts), MCL 750.145c(4); using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(d); and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to serve 18 months to 7 years for his convictions of distribution and use of a computer to commit a crime, 18 months to 4 years for each count of possession, and 1 to 2 years for resisting and obstructing a

police officer, the sentences to be served concurrently. We vacate in part and remand for a new trial.

I. BACKGROUND

Defendant's computer-related convictions arose after his Internet protocol (IP) address was identified by Detective Eric Stevens as one that was possibly trading or sharing child pornography.

At defendant's preliminary examination on the distribution and possession charges, Detective Stevens testified as an expert in computer forensics to explain the Ephex software that he used to find defendant's IP address and the Shareaza software he believed defendant used to possess and share child pornography. After a second preliminary examination on the amended information that added charges of resisting and obstructing an officer and using a computer to commit a crime, defendant was bound over on all charges.

Defendant moved pretrial for the appointment of a forensic computer expert witness to rebut Detective Stevens and to investigate and support defendant's theories of how defendant could have inadvertently downloaded child pornography. Defense counsel and the court admitted to a lack of sophistication regarding computer issues in general. Defendant argued that the appointment of an expert witness was necessary to examine defendant's computer, to prepare for trial, and to effectively rebut the testimony offered by the prosecution's expert, Detective Stevens. Defendant identified Larry A. Dalman, a retired career state police officer, as the expert he wanted to retain. Defendant stated that he was indigent and needed $1,500 of public funds to retain Dalman.

The prosecution's position was that defendant had not shown a sufficient "nexus between the facts of the case and the need for an expert" as required by *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995) (quotation marks and citation omitted). Further, the prosecution argued that defendant only wanted an expert because the prosecution had one and to grant defendant's request would make all indigent requests for public funds for an expert automatically approved. The prosecution also asserted that defendant had not shown that any expert he retained would obtain different results from his examination of the computer than Detective Stevens had or that the detective's methodology was deficient.

The trial court denied defendant's motion for an expert. The court concluded that, based on its review of the caselaw, there needed to be "a greater connection between the specifics of the issue that [were] involved in [defendant's] case and the need for an expert in order to get to the meat of the matter." The court identified that defendant was requesting an expert to show that in the process of copying the hard drives of others, defendant inadvertently copied child sexually abusive material to his own computer. The court found the theory plausible, but also that it was a fairly simple concept. The court held that an expert was not critically important to defendant's defense.

II. ABUSE OF DISCRETION

Defendant first claims that the trial court abused its discretion by denying his request for public funds to retain his own computer forensics expert. We agree.

"This Court reviews for abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert wit-

ness." *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006), citing MCL 775.15. An abuse of discretion occurs when a trial court selects an outcome that is not within the range of reasonable and principled outcomes. *Id*. at 617.

MCL 775.15 authorizes a court to provide public funds for indigent defendants to retain expert witnesses. However, "[a] trial court is not compelled to provide funds for the appointment of an expert on demand." *Carnicom*, 272 Mich App at 617, citing *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Under MCL 775.15, the defendant bears the burden of demonstrating that "there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial . . . ." The first portion of defendant's burden is to "show a nexus between the facts of the case and the need for an expert." *Jacobsen*, 448 Mich at 641 (quotation marks and citation omitted). Defendant met that burden.

Defendant in this case cited his need for an expert as threefold: (1) to support his defense that the child sexually abusive material was inadvertently downloaded to his computer when, in the course of performing a repair, he copied another person's hard drive to his computer; (2) to support his defense that files containing child pornography could have been on his computer as the result of his unprotected and open wireless network; and (3) to explain that the Shareaza program he copied was already programmed to share files and, once downloaded onto his computer, resumed file-sharing. Detective Stevens's testimony was the centerpiece of both of the preliminary examinations and the trial. Much of the testimony from Detective Stevens involved the technical process for extracting

the thumbnail fingerprints of child pornography from defendant's computer and the process for initially identifying the IP address to which the files migrated. Additionally, in this case the defense was that the files were loaded at a time when defendant did not have control of the computer. Even Detective Stevens was unable to identify when the files were loaded. Thus, the logical nexus is clear.

The prosecution also opposed the motion on the basis that defendant did not offer any evidence that the expert's examination of the computer would produce any different results than Detective Stevens had, and that the mere possibility that the expert might be of assistance to defendant was not enough to warrant appointment of an expert at public expense. The prosecution cited *Jacobsen*, *Carnicom*, and *Tanner*. We are troubled by the logic that a defendant who admits technical ignorance and who has no resources from which to acquire technical expertise is asked to present evidence of what evidence an expert would offer in order to receive public funds to hire the expert. However, even assuming that these cases require some showing of what the expert would do to assist defendant, we find an abuse of discretion in this case because it is factually distinguishable from *Jacobsen*, *Tanner*, and *Carnicom*.

In *Jacobsen*, the defendant requested public funds for the appointment of an expert to testify that, due to an unreasonable delay in conducting a Breathalyzer test, the results of the tests were unreliable. *Id*. at 640-641. The Court concluded that the "mere allegation that the delay was unreasonable" was not sufficient, without more, to warrant the appointment of an expert at public expense, noting that there was no indication that any circumstance existed that would

call into question the results of the tests administered. *Id*. at 641-642. In this case, it was clear that even Detective Stevens could not pinpoint the timing of the downloads. Because this issue was crucial, additional testimony would have been of great significance.

In *Carnicom*, the defendant, believing "that his expert witness would be able to offer testimony that would explain the presence of methamphetamine in his bloodstream at the time of [his] arrest" based on his use of Adderall, requested public funds for the appointment of an expert toxicologist to perform independent testing of the defendant's blood and present testimony at trial, but "did not make any indication or offer any evidence that expert testimony would likely benefit him." *Carnicom*, 272 Mich App at 618. "Besides [the] defendant's assertion, there was nothing before the trial court to suggest that Adderall could cause a false positive for methamphetamine," and the defendant did not claim that the expert would have benefited the defense. *Id*. at 618. This Court concluded, "[a]bsent an indication that the expert testimony would have likely benefited the defense, the trial court did not abuse its discretion in denying defendant's motion for appointment of an expert toxicologist." *Id*. at 619. In this case, counsel's admission that he needed help in understanding the technical issues at play supplies clear information that the defense would have benefited from an adequately educated counsel, even in the examination of the people's expert.

In *Tanner*, the Court upheld the trial court's denial of the appointment of a serology expert at public expense when the defendant failed to show that the expert would offer testimony that would "likely benefit the defense[.]" *Tanner*, 469 Mich at 443-444 (quotation marks and citation omitted). Noting that the defen-

dant did not argue that an expert might refute the serology evidence, the Court concluded that the "mere possibility" that the appointment of an expert "might have provided some unidentified assistance to the defense . . . falls short of satisfying defendant's burden of showing that she could not safely proceed to trial without such expert assistance." *Id*. at 444. While the wise husbanding of public resources calls for careful examination of a request for public funds for an expert, this case is not one in which the leap between the request and the likely benefit was spanned only by speculation.

Importantly, there are indications in the instant case that call into question the results obtained by the prosecution's expert. It is noteworthy that a majority of Detective Stevens's evidence was retrieved from what he called unallocated space or a place where the item's contents had been deleted but the name of the item still existed. While the actual video file was not retrievable, the jury was to infer that a file name was representative of the contents of the video. Detective Stevens's search of defendant's desktop hard drive produced deleted child pornographic thumbnail images and remnants of the names of deleted files. The thumbnails represented both boys and girls, and Detective Stevens found that unusual, alluding that he would expect to find a user's preference to be one or the other. The prosecution's theory was that defendant downloaded the images and deleted them after viewing them. However, Detective Stevens could not testify based on his examination when the items were downloaded. In regards to some items, the entire file path to an exhibit was not displayed, which could have shown where an item originated. The detective also acknowledged that certain software was required to view AVI,

MPG, and MP4 files[1] and that he did not know whether defendant's computer possessed the software.

It is an abuse of discretion to refuse to appoint an expert when the defendant has presented information demonstrating that there is a connection between the facts of the case and the need for a defense expert. See *In re Klevorn*, 185 Mich App 672, 678-679; 463 NW2d 175 (1990). The trial court's denial of defendant's motion for funds to retain an expert was based on its finding that transferring information from one hard drive to another in the process of repairing a computer was a "fairly simple concept." At the least, this was an oversimplification of the real issues in this case. At the most, the trial court's decision did not address defendant's full need for a defense expert and the tests delineated in MCL 775.15 or *Jacobsen*, 448 Mich at 641. The facts in this case were that some evidence of child pornography was on defendant's desktop and laptop computer and that there was further child abusive material available for defendant's IP address to download. The contested issues in this case were how the material came to be on defendant's computer and whether defendant intentionally used the Shareaza program to obtain and distribute the same.

In minimizing defendant's need for an expert, the prosecution argues that an expert would not have helped defendant when its forensic evidence overwhelmingly demonstrated defendant's guilt. The prosecution's presentation of an experienced expert witness who tends to inculpate defendant does not demonstrate, by itself, defendant's guilt. "Prosecution experts, of course, can sometimes make mistakes . . . [and] [s]erious deficiencies have been found in the

[1] Detective Stevens recognized the extensions as meaning that the files were videos of some sort.

forensic evidence used in criminal trials. . . . This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses[.]" *Hinton v Alabama*, 571 US ___, ___; 134 S Ct 1081, 1090; 188 L Ed 2d 1 (2014) (quotation marks and citations omitted). It was an abuse of discretion to deny defendant access to an expert witness.

III. DENIAL OF DUE PROCESS

Defendant next argues that he was denied his right to present a defense by the court's failure to appoint the requested expert. US Const, Am VI; Const 1963, art 1, § 20; *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Again, we agree. Whether a defendant has been denied the right to present a defense is a constitutional issue subject to review de novo. *Steele*, 283 Mich App at 480.

"Under the Due Process Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). "[F]undamental fairness requires that the state not deny [defendants] an adequate opportunity to present their claims fairly within the adversary system." *Id*. at 580-581 (quotation marks and citations omitted). To prove that defendant's requested expert might have changed the outcome of the trial, defendant must show that the expert's testimony would have been favorable to his defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant's theory at trial was that certain files containing child sexually abusive material were inadvertently downloaded. He posited multiple subtheories as to how that could have happened. Detective Stevens acknowledged that it was possible that if the Shareaza program was uninstalled and reinstalled elsewhere, it could continue prior searches and downloads on a new device. Detective Stevens also admitted that he did not know if the Shareaza program had an automatic feature to continue searches and downloads once it was reinstalled. The prosecution argues that a defense expert testifying on the same issues as Detective Stevens would be repetitious and a waste of judicial resources. That argument, in our view, is not in line with fundamental fairness. Regardless of the detective's candor, his admissions of "not knowing" leave us with the impression that there is room for expert debate in this case. The defense was left with counsel's argument as to the detective's admission of lack of information and whether his expert conclusions supplied proof of guilt beyond a reasonable doubt.

"Had an impartial, scientifically trained expert corroborated the defendants' theory, the defendant's account . . . would not have existed in a vacuum of his own self-interest." *People v Ackley*, 497 Mich 381, 397; 870 NW2d 858 (2015). Similarly, the trial court's decision in this case effectively denied defendant the expert testimonial support necessary to explain to the jury how defendant's theory was plausible. The factfinders should have before them both the views of the prosecution and the defense, in order to competently "uncover, recognize, and take due account of . . . shortcomings" in each party's respective theory. *Ake v Oklahoma*, 470 US 68, 84; 105 S Ct 1087; 84 L Ed 2d 53 (1985) (quotation marks and citation omitted). "Without a[n] [expert's] assistance, the defendant cannot

offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." *Id*. There was room to challenge Detective Stevens's testimony and admittedly more to be learned about the operating capabilities of the Shareaza program. The denial of an expert prevented defendant from testing the conclusions reached by the prosecution's expert. It also hindered effective cross-examination. The record illustrated that counsel educated himself to the best of his abilities, but admittedly, he was not a computer forensic expert. " 'To make a reasoned judgment about whether evidence is worth presenting, one must know what it says.' " *Ackley*, 497 Mich at 393, quoting *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011). We find that defendant's presentation of a defense was impaired in this case and that an expert might have changed the outcome of the trial.

IV. STANDARD 4 BRIEF

Defendant raises additional challenges to the sufficiency of the evidence to support his convictions and the effectiveness of trial counsel in his Standard 4 brief.[2] In light of our foregoing conclusion that the trial court abused its discretion by refusing to provide defendant with public funds to retain an expert, we find it unnecessary to address defendant's challenges to the sufficiency of the evidence as they relate to his convictions that required expert testimony, namely the distribution and possession of child sexually abusive material and the use of a computer to commit a crime.

We address the remainder of defendant's claims *in propria persona* below.

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

A. SUFFICIENCY OF THE EVIDENCE

"A challenge to the sufficiency of the evidence is reviewed de novo." *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010), overruled in part on other grounds *People v Jackson*, 498 Mich 246, 268 n 9; 869 NW2d 253 (2015). "When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. " 'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' " *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence." *Malone*, 287 Mich App at 654. Accordingly, "[t]he reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict." *Id*.

1. OBSTRUCTING AND RESISTING A POLICE OFFICER

Defendant was convicted of violating MCL 750.81d(1), which provides that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both." The elements of resisting or obstructing under this provision are: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant

assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010). " 'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

Detective Stevens testified that, before entering defendant's home to execute the search warrant, he informed defendant that he was a detective with the St. Clair County Sheriff's Office and showed defendant his badge, explained that he was conducting an Internet investigation, and told defendant that he had a search warrant for defendant's computers and needed to enter the home to take his computers. From this testimony, a rational jury could conclude that defendant knew or had reason to know that Detective Stevens was a police officer performing his duties in execution of a search warrant. *Corr*, 287 Mich App at 503; *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004).

The testimony also sufficiently established that defendant obstructed and resisted Detective Stevens during the execution of the search warrant. *Corr*, 287 Mich App at 503. Testimony indicated that Detective Stevens explained to defendant that he needed to preserve the information on the computers as it existed at the time of the search, discussed in "extreme detail" that defendant could not turn on the computers, and "made it clear" that defendant was not to touch the computers. Despite Detective Stevens's commands not to touch the computers, the testimony of Stevens and other detectives present during the search indicated that, as defendant walked back into the living room after securing his dogs in the back bedroom, he went

directly to the computer, bent down, and pushed the button to activate the computer, prompting Stevens to quickly "yank" the computer cord out from the back of the computer. Detective Colleen Titus testified that, as defendant moved directly toward the computer, Detective Stevens said, "I thought we had an understanding you weren't going to touch that," but defendant did not stop moving toward the computer. Further, Detective Kelsey Wade testified that he also saw defendant approaching the computer and heard Detective Stevens say, "Sir, I told you not to do that" or "I told you not to turn this on, sir." Detectives Stevens and Titus testified that defendant then began "flailing his arms around in [an] agitated state," and both Stevens and Titus heard defendant shouting or yelling at the officers, "Get the fuck out of my house." Detective Stevens grabbed defendant's shoulder and arm and pulled him away from the computer, and, as Stevens was trying to get defendant under control, Stevens and defendant ended up colliding into a chair or tripping over a coffee table, falling over a chair that had flipped over, and landing on the ground with Stevens on top of defendant. Detective Stevens testified that defendant did not comply with his efforts to handcuff him and, after giving commands more than once, he eventually got defendant's hands out and placed them in handcuffs that Detective Wade handed to him. Further, Detectives Wade and Titus testified that defendant was "resisting," Detective Stevens was "struggling" as he attempted to handcuff defendant, there was screaming and yelling, and defendant was not compliant with Stevens's commands to put his hands behind his back or Stevens's efforts to handcuff him.

This testimony, viewed in a light most favorable to the prosecution, was sufficient for the jury to conclude that defendant engaged in conduct that hindered or

obstructed the officers from executing the search warrant, and also resisted Detective Stevens during his attempt to arrest him. *Malone*, 287 Mich App at 654; *Corr*, 287 Mich App at 503. Although defendant claims that he assisted and facilitated Detective Stevens in his investigation and did not resist or obstruct the detectives, the detectives' testimony established otherwise. It was for the jury to resolve issues of witness credibility and to weigh the evidence. *Malone*, 287 Mich App at 654. We must "draw all reasonable inferences and examine credibility issues in support of the jury verdict." *Id*. It is apparent from the verdict that the jury did not believe defendant's claim. "This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence." *Id*.

Further, while defendant correctly asserts that MCL 750.81d does not abrogate the common-law right to resist unlawful police conduct, such as an unlawful arrest or other unlawful invasions of private rights, *People v Moreno*, 491 Mich 38, 48, 58; 814 NW2d 624 (2012), the record does not indicate that the search was unlawful. To the contrary, as discussed in the next section, testimony suggests that the search was lawful, conducted pursuant to a warrant supported by probable cause, and that the detectives acted within the scope of the warrant by entering the home and seizing defendant's computers pursuant to the warrant. See *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992); MCL 780.651(1). An individual does not have the right to resist or obstruct lawful actions of the police. See *Moreno*, 491 Mich at 46-47.

2. UNLAWFUL SEARCH

Defendant next claims that the officers' lack of compliance with MCL 780.655(1), by failing to provide

him with a copy of the search warrant, resulted in an unlawful search justifying the exclusion of the computer evidence seized from his home. Defendant failed to preserve this issue for our review by moving to suppress the evidence seized in the search on the basis of errors in the search warrant process. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). Thus, our review is limited to plain error that affected substantial rights. *Carines*, 460 Mich at 763.

The officers' failure to comply with MCL 780.655(1), which requires that officers conducting a search pursuant to a warrant give a copy of the search warrant to the person from whose premises property was taken or to leave a copy of the warrant at the premises searched, does not render the search illegal or warrant the exclusion of the evidence seized during the search. *People v Sobczak-Obetts*, 463 Mich 687, 708, 710; 625 NW2d 764 (2001). "The requirements of [MCL 780.655(1)] are ministerial in nature, and do not in any way lead to the acquisition of evidence; rather, these requirements come into play only *after* evidence has been seized pursuant to a valid search warrant." *Id*. at 710. Therefore, "[b]ecause the exclusionary rule pertains to evidence that has been illegally *seized*, it would not be reasonable to conclude that the Legislature intended to apply the rule to a violation of the postseizure, administrative requirements of [MCL 780.655(1)]." *Id*. Accordingly, the officers' alleged failure to comply with MCL 780.655(1) does not, in and of itself, "render the warrant itself invalid, or the search unreasonable," *id*. at 708, nor does it warrant the exclusion from evidence of the items seized during the search, *id*. at 710-712.

Moreover, the record suggests that the search was conducted pursuant to a warrant supported by prob-

able cause. *Stumpf*, 196 Mich App at 227. The testimony regarding the officers' investigative efforts suggests that a substantial basis existed for inferring a fair probability that evidence of a crime existed at the place to be searched—i.e., computer equipment containing child sexually explicit material existed at defendant's home. *Malone*, 287 Mich App at 663. On this record, defendant has failed to demonstrate that the search was unlawful or that the computers were illegally seized. *Id.*; *Stumpf*, 196 Mich App at 227.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was denied the effective assistance of counsel. Defendant failed to preserve this claim by moving for a new trial or evidentiary hearing before the trial court. *Snider*, 239 Mich App at 423, citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, our Court's review is limited to mistakes apparent on the existing record. *Ginther*, 390 Mich at 443; *Snider*, 239 Mich App at 423. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010) (citation omitted). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Id.*

1. FAILURE TO SECURE AN EXPERT WITNESS AT PUBLIC EXPENSE

Defendant's primary claim of ineffective assistance is that his trial counsel allowed the trial to proceed without securing an expert at public expense to inves-

tigate the evidence and testify for the defense. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence . . . ." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770; 178 L Ed 2d 624 (2011). "[F]ailure to investigate adequately and to attempt to secure suitable expert assistance in the preparation and presentation of [a] defense" may constitute ineffective assistance of counsel. *Ackley*, 497 Mich at 383.

> [A] defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand . . . . [*People v Trakhtenberg*, 493 Mich 38, 54 n 9; 826 NW2d 136 (2012) (quotation marks, citation, and emphasis omitted).]

The record indicates that defense counsel did recognize the need for an expert and did seek funds for one on defendant's behalf, but was denied by the trial court. Defendant was indigent and without the funds required to retain an expert. Defendant has not argued that there was an expert willing to testify pro bono that counsel failed to investigate. The record also evidences that counsel attempted to compensate for lack of an expert. Counsel's cross-examination of the prosecution's expert demonstrated that counsel investigated the type and operation of the software used. Counsel objected to computer-generated documents. Counsel sought to advance defendant's theory without expert support through defendant's own testimony and defense witnesses. On the record before us, we cannot conclude that it was counsel's failure that precluded that defense from obtaining an expert in its favor.

2. FAILURE TO INVESTIGATE WHETHER SEARCH WARRANT WAS LAWFULLY EXECUTED

Defendant next claims that defense counsel was ineffective by failing to investigate whether the search warrant was lawfully executed. A defense counsel has a duty to make reasonable investigations into his or her client's case. *Trakhtenberg*, 493 Mich at 52. The failure to conduct an adequate investigation constitutes ineffective assistance if it undermines confidence in the outcome of the trial. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defendant claims that his trial counsel failed to investigate whether the search warrant was validly executed because the officers never provided him with a copy of the warrant. However, the mere fact that the officers did not give defendant a copy of the search warrant in violation of MCL 780.655(1) does not render the warrant invalid or the search illegal. *Sobczak-Obetts*, 463 Mich at 708-712. It is further evident from the trial testimony that Detective Stevens obtained a search warrant supported by probable cause that evidence of a crime existed in defendant's home. *Stumpf*, 196 Mich App at 227. Counsel was not required to file a frivolous or meritless motion, and thus, was not ineffective in failing to challenge the validity of the search. *People v Gist*, 188 Mich App 610, 612-613; 470 NW2d 475 (1991) (concluding that defense counsel was not ineffective for failing to file a suppression motion predicated on a defect in compliance with the search warrant procedures set forth in MCL 780.655(1) because such arguments would not serve to invalidate a search).

On this record, defendant has not demonstrated a reasonable probability that the outcome would have been different had his counsel investigated the validity

of the warrant process, and thus, this claim of ineffective assistance fails. *Swain*, 288 Mich App at 643.

C. ADDITIONAL CLAIMS

Defendant also briefly claims that his trial counsel was ineffective by struggling to elicit key testimony from witnesses and failing to object to several inflammatory statements by the prosecutor. Defendant, however, fails to specify what testimony defense counsel failed to elicit or which inflammatory statements the prosecutor made that counsel did not object to, and defendant also fails to explain how these alleged instances of defective performance prejudiced him. " 'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments . . . .' " *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Additionally, a defendant claiming ineffective assistance bears the burden of demonstrating deficient performance and prejudice, and thus, bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *Ackerman*, 257 Mich App at 455-456. Defendant's generalized allegations of defense counsel's deficient performance are not sufficient to sustain a claim of ineffective assistance of counsel.

Defendant also briefly claims that his counsel was ineffective for "barely" addressing the charge of resisting and obstructing a police officer. Defendant, however, fails to specify what additional information defense counsel should have elicited through questioning of the witnesses or brought out during his argument,

and thus, has again failed to establish a factual predicate for this claim of ineffective assistance. *Carbin*, 463 Mich at 600. Regardless, it is apparent from a review of the record that defense counsel vigorously pursued and presented defendant's theory that he did not obstruct or resist Detective Stevens. Accordingly, defendant failed to establish that defense counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's performance. *Swain*, 288 Mich App at 643.

Reversal of defendant's convictions is also not warranted on the basis of the cumulative effect of the alleged instances of ineffective assistance because defendant has not established any such instances. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Defendant's convictions for distributing child sexually abusive material, possessing child sexually abusive material, and using a computer to commit a crime are vacated, and as to these charges, the matter is remanded for a new trial. Defendant's conviction for resisting and obstructing is affirmed.

Judgment vacated in part and case remanded for a new trial. We do not retain jurisdiction.

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

GLEICHER, J. (*concurring*). "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985). The "raw material" integral to Thomas Agar's defense amounted to $1,500, the sum needed to hire an expert in computer forensics.

The prosecution's case rested entirely on the testimony of a well-trained, experienced computer forensics investigator. Agar was relegated to constructing a rebuttal to the prosecution's expert through cross-examination uninformed by consultation with a similarly skilled computer specialist. The result was a fundamentally unfair trial. I fully concur with my colleagues' decision to reverse defendant's computer-related convictions and write separately to expand on the majority's due process analysis.

The prosecutor charged defendant with three crimes arising from defendant's alleged use of a computer to traffic in child sexually abusive material: distributing child sexually abusive material, MCL 750.145c(3); possessing child sexually abusive material, MCL 750.145c(4); and using a computer to commit a crime, MCL 752.796. Each offense requires the prosecution to prove beyond a reasonable doubt that defendant *knowingly* engaged in prohibited conduct. To convict a defendant of distributing child sexually abusive material, the prosecution must prove that the defendant "distributed . . . the material with criminal intent." *People v Tombs*, 472 Mich 446, 465; 697 NW2d 494 (2005). "[T]he mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3)." *Id*. Similarly, MCL 750.145c(4) requires that the prosecution prove that a defendant "knowingly possesses" child sexually abusive material. Our Supreme Court has explained that "unless one knowingly has actual physical control or knowingly has the power and intention at a given time to exercise dominion or control over a depiction of child sexually abusive material . . . one cannot be classified as a 'possessor' of such material." *People v Flick*, 487 Mich 1, 13-14; 790 NW2d 295 (2010). MCL 752.796 penalizes "the use of a computer

to commit a crime," *People v Loper*, 299 Mich App 451, 466; 830 NW2d 836 (2013), which inherently involves intentional conduct.

Agar's sole defense was that he never intentionally or knowingly downloaded child sexually abusive materials. Agar explained that he often downloaded mainstream adult and animated movies into his home computer system, which he had personally assembled from a "bare bones" kit. He had also repaired computers for students attending the Lawrence Tech Osborn Center, which sometimes involved copying a student's hard drive into his own computer's hard drive. During one such effort, Agar discovered that he had inadvertently copied a peer-to-peer file-sharing program called "Shareaza," which then took up residence in his hard drive. The Shareaza software harbored and disseminated the child sexually abusive material discovered by St. Clair County Sheriff's Detective Eric Stevens. Agar's defense hinged on proof that the child sexually abusive material found by Stevens could have made its way to Agar's computer inadvertently, through Shareaza.

Peer-to-peer networks such as Shareaza are "so called because users' computers communicate directly with each other, not through central servers." *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd*, 545 US 913, 919-920; 125 S Ct 2764; 162 L Ed 2d 781 (2005). The software allows users to search for files located in shared folders created by and stored in software used by other computers. A requesting user can download a sought file directly from the computer being "shared" through the software. *Id*. at 920-921. "The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that

folder." *Id*. Caselaw seems to indicate that Shareaza's default settings can provide for automatic, reciprocal sharing "and required additional steps if a user did *not* want to share files with others using the program." *United States v Spriggs*, 666 F3d 1284, 1286-1287 (CA 11, 2012) (emphasis added).

Agar and his counsel sought to investigate Shareaza's technical capabilities and its operation within Agar's computer by retaining Larry Dalman, a retired Michigan State Police officer and forensic computer expert. The trial court denied this request, declaring that although it seemed "possible" that defendant's version of events could be true, funding for an expert was unnecessary because "that's a fairly simple concept unless there's a whole lot more it to [sic] than I know[.]" The trial court encouraged defense counsel to "do[] your own investigation and research into that to find out what you can and cannot learn on that subject in order to prepare yourself for cross-examination."

Detective Stevens testified as an expert in computer forensics in support of the prosecutor's position that regardless of how Shareaza wound up on defendant's computer, defendant deliberately used Shareaza to share illegal videos. As was evident from Stevens's testimony and defense counsel's cross-examination, the trial court vastly overestimated the "simplicity" of the subject matter or the ease with which helpful admissions could be elicited. Further, cross-examination, no matter how skilled or effective, is not a substitute for the testimony of an opposing expert witness.[1]

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[1] Defense counsel's cross-examination proves this point. Although counsel took to heart the trial court's instruction to perform research and "find out what you can" about the subject matter, counsel was stuck with Stevens's answers. For example, counsel inquired whether Sharea-

The Due Process Clause guarantees that an indigent defendant facing the judicial power of the State must be afforded "a fair opportunity to present his defense." *Ake*, 470 US at 76. While this principle does not require a state to "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy," it does obligate the state to provide the " 'basic tools of an adequate defense[.]' " *Id*. at 77, quoting *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971). In *Ake*, the "basic tool" was the assistance of a consulting psychiatrist. The United States Supreme Court framed the issues presented in that case as "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Ake*, 470 US at 77.[2] The Court analyzed this question by weighing the three guideposts for determining the process due in a particular case as set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

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za's default setting included sharing. Stevens indicated that the user had "to check a box. You have to indicate: Yes, I do want to share." This answer appears contrary to the evidence discussed in *Spriggs*. In any case, it is a question that Agar was entitled to ask his own expert, and a subject potentially ripe for disagreement by an opposing expert.

[2] A number of courts have applied *Ake*'s reasoning to a defendant's requests for expert assistance in areas other than psychiatry. For a list and summary of the cases, see Giannelli, *Ake v Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L Rev 1305, 1367-1368 (2004), and *Moore v State*, 390 Md 343, 409; 889 A2d 325 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").

> probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As the Supreme Court observed in *Ake*, "[t]he interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily[.]" *Ake*, 470 US at 78. The State's interest is solely economic: husbanding the public fisc. This is so because "the State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." *Id*. at 79. "[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id*. The Supreme Court determined in *Ake* that the first two *Eldridge* criteria weighed heavily in the defendant's favor: "We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions." *Id*.

Agar's interest in leveling the expert-witness playing field is compelling. And even assuming that the prosecution's interest in shielding the county from economic intemperance had any legal legitimacy, the monetary stakes here were minimal: $1,500. Investment of this rather insubstantial sum in Agar's defense would have afforded him "[m]eaningful access to justice," *id*. at 77, and likely spared the county the far greater costs involved in a new trial of this case.

The last *Eldridge* component examines the "probable value of the additional or substitute procedural

safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id*. In *Ake*, the Supreme Court's evaluation of this factor centered on the critical role played by a psychiatric expert in a trial involving a defendant's mental condition. The Court elucidated:

> [T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. [*Id*. at 80-81 (citation omitted).]

The prosecution insists that no such risks exist in this case because Detective Stevens thoroughly discredited the defense theories raised by Agar's counsel during cross-examination. This argument proves too much. Were it accepted, no appellate claim challenging a denial of funding for expert assistance could ever

succeed; the jury's guilty verdict would suffice to eliminate any possible merit to an unheard defense expert's opinions.[3] As in *Ake*, Agar needed an expert's technical assistance to educate counsel regarding which questions to ask and which theories to pursue. Agar's guilt depended on proof beyond a reasonable doubt that he personally had downloaded the child sexually abusive images. An independent examination of Agar's computer would have guided Agar's counsel and potentially discredited Stevens. Absent record evidence of Dalman's findings, it is simply impossible to determine whether Stevens's characterization of the evidence is irrefutable.[4]

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[3] The prosecution's argument is essentially one of harmless error. At least one court has found the denial of funding for a necessary expert structural error not subject to review for harmlessness. *Rey v State*, 897 SW2d 333, 345 (Texas Crim App, 1995). As the Court pointed out in *Rey*, the Supreme Court in *Ake* reversed and remanded for a new trial without consideration of harmlessness.

[4] Recent exposés regarding the fallibility of prosecution scientists and laboratories should counsel pause when evaluating the validity of unchallenged testimony. See *Hinton v Alabama*, 571 US ___; 134 S Ct 1081, 1090; 188 L Ed 2d 1 (2014):

> That the State presented testimony from two experienced expert witnesses that tended to inculpate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials. . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Our Supreme Court recently emphasized that counsel's failure to secure expert assistance in preparing and presenting a defense constitutes ineffective assistance of counsel when expert testimony is central to the prosecution's proofs and when the underlying technical issues are "highly contested[.]" *People v Ackley*, 497 Mich 381, 393-394; 870 NW2d 858 (2015). Here, counsel did exactly what was needed to perform effectively: he sought expert help. By denying counsel an opportunity to obtain the assistance needed to effectively represent Agar, the trial court tied one hand behind counsel's back. The fight at the trial focused solely on whether Agar knowingly and deliberately downloaded the child sexually abusive material. The trial court's ruling ensured that Agar would lose that fight. My views echo those of the majority, and I join its opinion in full.

In re KOEHLER ESTATE

Docket Nos. 322996 and 322997. Submitted November 9, 2015, at Detroit. Decided March 24, 2016, at 9:00 a.m. Application for leave to appeal dismissed on stipulation 500 Mich 967.

Ernest Umble (Ernest) intervened in the Oakland County Probate Court in intestate proceedings involving the estate of Kenneth Koehler (Kenneth). Ernest was Kenneth's paternal uncle. Whether Ernest could inherit a share of Kenneth's estate turned on whether Kenneth's grandfather, Carl Cedrick Umble (Carl Cedrick), could have inherited from his son—Kenneth's father, Carl Koehler (Carl). Carl was the posthumous child of Carl Cedrick and Florence Koehlor (Florence). Carl Cedrick and Florence were unmarried. Carl Cedrick was killed in an altercation with Clyde Shadwick regarding Florence before Carl was born. The personal representative of Kenneth's estate, Sherry Bierkle (Bierkle), one of Kenneth's maternal relatives, moved for summary disposition, asserting that Ernest was precluded from inheriting under MCL 700.2114(4), which precludes inheritance through a child unless the parent has acknowledged the child and has not refused to support the child. The court, Kathleen A. Ryan, J., held an evidentiary hearing and determined that Carl Cedrick was Ernest's father, making him Carl's half-brother and Kenneth's uncle, and established him as Kenneth's only surviving paternal relative. The court decided that MCL 700.2114(4) did not apply to cases involving posthumous children and concluded that Ernest was entitled to half of Kenneth's estate. Bierkle appealed by delayed leave granted.

The Court of Appeals *held*:

1. The party asserting paternity has the burden of proving by a preponderance of the evidence that a man is the natural father of a child. In this case, a preponderance of the evidence showed that Carl Cedrick was Carl's father. Ernest produced Carl's birth certificate, which listed Carl Cedrick Umble as Carl's father. A newspaper article established that Carl Cedrick was killed in a fight prompted by his affection for Florence Koehler, Carl's mother. Ernest produced a death certificate indicating that Carl Cedrick's mother was Grace Umble, and Carl's obituary indicated

his grandmother was Grace Roberts. Finally, Ernest introduced Carl's marriage license on which Carl's father was listed as Carl Cedrick. Ernest's birth certificate indicated that his father was Carl Cedrick. The trial court's determination that Carl Cedrick was the father of both Carl and Ernest was well supported by the evidence presented.

2. The Legislature did not intend MCL 700.2114(4) to apply to a parent's right to inherit from or through his or her posthumous child. MCL 700.2114 overrides the common-law rule that denied children born out of wedlock the right to inherit from their biological fathers. The statute declares that an individual is the child of his or her natural parents regardless of the parents' marital status with three exceptions: adoption, termination of parental rights, and cases in which the natural father fails to openly acknowledge the child as his own and refuses to support the child. Because the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., expressly allows a party to establish paternity for inheritance purposes even when the natural father's death preceded a child's birth, it is unlikely that EPIC would also have created an almost insurmountable hurdle for a posthumous child's paternal relatives to inherit through the child. Requiring proof that a father who predeceased the birth of his child openly acknowledged the child as his own and did not refuse to support the child would present the proponent of the inheritance with a virtually impossible burden of proof. The probate court properly ruled that MCL 700.2114(4) did not apply to posthumous children and properly denied Bierkle's motion for summary disposition. The probate court correctly concluded that Ernest, as Kenneth's only surviving paternal relative, was entitled to half of Kenneth's estate.

Affirmed.

O'CONNELL, J., dissenting, would have reversed the probate court's ruling that MCL 700.2114(4) did not apply to cases in which a father predeceased his child. The case should have been remanded for further proceedings to determine whether Carl Cedrick satisfied the conditions under which a father may inherit from his son. Nothing in the provisions of EPIC indicates that MCL 700.2114 was not intended to apply to parents who predecease their children. Although satisfying the burden of proof required by MCL 700.2114(4) would be difficult, it was not impossible to gather evidence, if it existed, that Carl Cedrick openly acknowledged Carl as his son and that Carl Cedrick did not refuse to support Carl.

ESTATES AND PROTECTED INDIVIDUALS CODE (EPIC) — INTESTATE PROCEEDINGS — PARENTS' RIGHT TO INHERIT — POSTHUMOUS CHILD.

Under MCL 700.2114(4), inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers and has not refused to support the child; this subsection does not apply with regard to a posthumous child born outside of marriage.

Butzel Long (by *Mark T. Nelson* and *Amy Glenn*) for Sherry Bierkle.

Kemp Klein Law Firm (by *Richard Bisio* and *Joseph P. Buttiglieri*) for Ernest Umble.

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

GLEICHER, J. The law of intestate succession flows from parent-child relationships. What happens when an unmarried father dies before his child is born and no evidence exists that he would have willingly supported his child or openly acknowledged the child as his own? Does nature or nurture establish the familial link for inheritance purposes? We confront these questions here.

Our story begins in Colorado in 1931, with a fatal affray over a woman's affections. Soon after, the woman delivered a child. That child (who grew into a man and had a child of his own) is the linchpin to establishing the paternal line in this inheritance dispute.

The probate court determined that the murdered Coloradan, Carl Cedrick Umble, was the grandfather of the intestate deceased in this case, Kenneth Koehler. Kenneth Koehler's maternal relatives contend that Carl Cedrick Umble's sudden and inopportune exit

from this earth triggered MCL 700.2114(4), which severs the intestate inheritance rights of parents who have refused to financially support and openly acknowledge a child. In other words, MCL 700.2114(4) punishes parents who desert and ignore their progeny by denying those parents the right to inherit from their dead child's estate. According to the maternal relatives, Carl Cedrick Umble was such a parent.

The probate court rejected this argument, finding that applying MCL 700.2114(4) in this situation would render "meaningless" other sections of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., that afford inheritance rights to posthumously born children. Further, the court declared, the maternal relatives had not met their summary disposition burden, as they presented no evidence that Carl Cedrick Umble had rejected his in utero child. We agree with the probate court and affirm.

I

The deceased, Kenneth Koehler, left no will. He had no spouse, no children, and no siblings. His parents predeceased him, as did his grandparents. Under EPIC, half of Kenneth's intestate estate passes to the descendants of his paternal grandparents, and half to his maternal relatives. MCL 700.2103(d).

Kenneth Koehler's paternal pedigree is the focal point of this case. We begin with the details gleaned largely from various public and historical records.

Kenneth's father was a man named Carl Koehler. Carl Koehler was raised by a single mother, Florence Koehler. Florence never married Carl Koehler's father, Carl Cedrick Umble. The tragic and somewhat lurid story (even by today's standards) of Florence Koehler

and Carl Cedrick Umble has been pieced together through old Colorado newspaper articles and legal documents.

It appears that Carl Cedrick Umble led a short but passionate life punctuated by the conception of two illegitimate children (Carl Koehler and Ernest Umble), a vicious street fight over a woman (Florence Koehler), and death by stabbing at age 20, three months before Carl Koehler's 1931 birth. The first of Carl Cedrick Umble's love children was Ernest Umble, who was conceived during Carl Cedrick Umble's youthful liaison with Lyndall Adeline Hackett (Lydia). Carl Cedrick and Lydia married a year after Ernest's 1929 birth, rendering Ernest a marital child under current Colorado law. See Colo Rev Stat 19-4-105(1)(c).

Carl Cedrick Umble and Lydia Hackett Umble later separated, and Carl Cedrick began courting Florence Koehler. According to a newspaper account, Florence and Carl Cedrick quarreled. Although he "failed to revive the girl's affection for him," Carl Cedrick reportedly "threatened violence" to anyone who dated Florence. One Clyde Shadwick ignored this warning. When Carl Cedrick attempted to kiss Florence, Shadwick approached the pair and was "knocked down by a blow of Umble's fist[.]" Shadwick then stabbed Carl Cedrick Umble, allegedly in self-defense.

Carl Cedrick Umble's second son, Carl Koehler, was born three months later. In probate parlance, Carl Koehler was a "posthumous child." A posthumous child is "[a] child born after a parent's death." *Black's Law Dictionary* (10th ed), p 291.[1]

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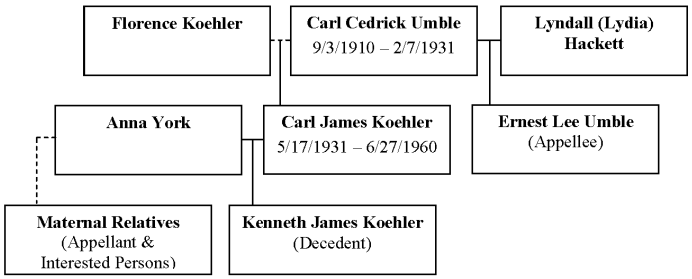
[1] The dissent uses the term "afterborn child." Technically, the terms "posthumous child" and "afterborn child" have different meanings. *Black's Law Dictionary* (10th ed), p 290, defines an "afterborn child" as "[a] child born after execution of a will or after the time in which a class

Florence never had any other children. When she died in 1946, Carl was only 15 years old. Four years later, Carl married Anna York. The marriage produced Kenneth Koehler and no other children. Carl died when Kenneth was eight years old. Kenneth died at the age of 59, and left no will distributing his $500,000 estate. For those readers who find themselves lost in Kenneth's patrilineal tree, we include this visual aid:



Sherry Bierkle is Kenneth's first cousin on his mother's side. She successfully petitioned the probate court to be named the personal representative of Kenneth's estate. Approximately 17 months later, Bierkle filed a final accounting and a proposed settlement distributing the estate among Kenneth's maternal relatives. Ernest Umble intervened. Ernest contended that as Kenneth's uncle and sole surviving paternal relative, half of Kenneth's estate belongs to him. The maternal relatives challenged Ernest's claim of kinship, focusing on the paternity of Carl Koehler, Kenneth's father.

Ernest asserted that Kenneth's grandfather was his own father, Carl Cedrick Umble. Bierkle took issue

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gift closes." Historically, Michigan caselaw used the term "afterborn child" in that manner. See, e.g., *Hankey v French*, 281 Mich 454; 275 NW 206 (1937). EPIC uses the term "[a]fterborn heirs" to refer to children "in gestation at a particular time," which encompasses both common-law concepts. MCL 700.2108.

with Ernest Umble's claim and filed a motion for summary disposition under MCR 2.116(C)(8). She insisted that Ernest was barred from inheriting by MCL 700.2114(4), which precludes a natural parent from inheritance from or through a child when the natural parent fails to "openly treat[] the child as his or hers," and "has . . . refused to support the child."

The probate court conducted an evidentiary hearing. Assembling the biological strands of Kenneth Koehler's paternal line presented a challenge worthy of an expert archivist. Ernest presented Carl Koehler's Colorado birth certificate and a Denver, Colorado, newspaper article describing the circumstances of Carl Cedrick Umble's demise. The parties also submitted various marriage, birth, and death certificates for the involved individuals, including Ernest's certificate of live birth indicating that his father was Carl Umble.

The probate court determined that Carl Koehler's father was Carl Cedrick Umble. This finding means that Ernest Umble and Carl Koehler were half-brothers, and that Ernest Umble was the uncle of our deceased, Kenneth Koehler. As Ernest Umble was the only surviving relative on Kenneth's paternal side, the court ruled that he would take half of the estate. The probate court rejected Bierkle's assertion that MCL 700.2114(4) barred Ernest's claim. The court also rebuffed Bierkle's legal argument that Carl Koehler's paternity was not properly established under Michigan law.

Bierkle appeals.

II

Bierkle asserts that the probate court clearly erred when it found that Carl Cedrick Umble was the natural father of Carl Koehler. We review the probate

court's factual findings for clear error. *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (quotation marks and citation omitted). We consider issues of statutory interpretation de novo. *Id*.

Whether Carl Cedrick Umble was Carl Koehler's father for purposes of EPIC is important, because establishing a parent-child relationship is the first step toward determining whether Ernest Umble can inherit as a paternal descendant. If Carl Cedrick Umble was entitled to inherit from his child, Carl Koehler, Ernest Umble inherits as the only surviving descendant of Koehler's paternal grandparents. Otherwise, Bierkle and the other maternal descendants inherit Kenneth's entire estate.

Article II, part 1 of EPIC governs rights to intestate inheritance. *In re Certified Question*, 493 Mich 70, 76-77; 825 NW2d 566 (2012). EPIC helpfully supplies the basic definitions needed to understand its pertinent provisions. The term "descendant" is used "in relation to an individual," and includes "all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this act." MCL 700.1103(k). EPIC defines a "parent" as "an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question." MCL 700.1106(i).

If a decedent dies intestate and has no surviving spouse, EPIC provides the order in which the decedent's estate passes to his or her surviving relatives.

MCL 700.2103. First, the estate passes to the decedent's descendants. MCL 700.2103(a). If the decedent has no descendants, the estate passes to the decedent's surviving parent or parents. MCL 700.2103(b). If the decedent has neither descendants nor surviving parents, the estate passes to the descendants of the decedent's parents (the decedent's siblings, nieces, and nephews). MCL 700.2103(c).

If the decedent has no surviving descendants, parents, or descendants of parents, EPIC instructs the probate court to determine whether there are any descendants of the decedent's grandparents. MCL 700.2103(d). Half the decedent's estate passes to the decedent's paternal grandparents or their descendants, and the other half passes to the decedent's maternal grandparents or their descendants. *Id*. Finally, "[i]f there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the 1/2." *Id*.

Accordingly, if Carl Cedrick Umble was entitled to inherit as Carl Koehler's parent, Ernest Umble is entitled to inherit half of Koehler's estate because he is the sole surviving descendant of Koehler's paternal grandparents. But if inheritance could not pass up to Carl Cedrick Umble through his relationship with Carl Koehler, it cannot pass back down to Ernest Umble, and he is not entitled to a portion of the estate.

Resolution of this case would be easy if we could simply stop here by concluding that Ernest Umble is a paternal descendant entitled to inherit under MCL 700.2103(d), which provides that half of Kenneth's intestate estate passes to the descendants of his pater-

nal grandparents. The evidence substantiates that Ernest is a descendant of Kenneth's paternal grandfather, Carl Cedrick Umble. As such, Ernest inherits. Case closed. Alas, Carl Koehler's nonmarital, posthumous birth complicates this case.

III

EPIC provides that, generally, a child is the child of his or her natural parents even if they were not married:

> Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. [MCL 700.2114(1).]

And a child is a child of his or her natural father even if the father dies before the child's birth. See *Black's Law Dictionary*, p 291 (defining the term "posthumous child"). Posthumous children enjoy a right to intestate inheritance in Michigan if they were "in gestation" at the time of the father's death and lived for 120 hours or more after birth. MCL 700.2108. The parentage of a posthumous child can be established by the probate court. MCL 700.2114(1)(b)(*v*). We find no fault with the manner in which the probate court determined that Carl Koehler fulfilled the statutory requirements for intestate succession as an out-of-wedlock, posthumous child, particularly given what the court had to work with.

MCL 700.2114(1)(b) sets forth circumstances in which a man is considered to be the natural parent of a child when that child is conceived out of wedlock for purposes of EPIC. In this case, the probate court proceeded under MCL 700.2114(b)(*v*), which provides:

> Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, . . . MCL 722.711 to 722.730.

Michigan's Paternity Act "was created as a procedural vehicle for determining the paternity of children born out of wedlock." *In re MKK*, 286 Mich App 546, 557; 781 NW2d 132 (2009) (quotation marks and citations omitted). The Paternity Act provides four ways by which a court may establish paternity by an order of filiation:

> (a) *The finding of the court or the verdict determines that the man is the father.*
>
> (b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.
>
> (c) The defendant is served with summons and a default judgment is entered against him or her.
>
> (d) Genetic testing . . . determines that the man is the father. [MCL 722.717(1) (emphasis added).]

The party seeking to prove paternity must establish by a preponderance of the evidence that the man is the child's father. *Bowerman v MacDonald*, 431 Mich 1, 14; 427 NW2d 477 (1988).

Under MCL 722.717(1)(a), the probate court had the authority to review the totality of the evidence and to determine that Carl Cedrick Umble was Carl Koehler's father. The court observed that Carl Cedrick Umble was listed as the father on Carl Koehler's birth certificate. Moreover, the probate court specifically noted that: Carl Cedrick Umble was killed in a knife fight over Florence Koehler, Carl Koehler's mother; a newspaper article and death certificate indicated that Carl

Cedrick Umble's mother was Grace Umble, and Carl Koehler's obituary listed his grandmother as Grace Roberts of Denver, Colorado; and Carl Koehler's marriage certificate listed his father as "Carl Sedric [sic] Umble." Taken together, this evidence preponderates in favor of Carl Cedrick Umble and Carl Koehler's father-child relationship. Accordingly, we find this portion of the probate court's ruling well-supported, both factually and legally.

IV

According to Bierkle, MCL 700.2114(4) forecloses Ernest Umble's inheritance rights, even assuming that Carl Cedrick Umble fathered Carl Koehler. As we have mentioned, the statute denies intestate inheritance to parents who fail to nurture a child in two critically important ways: by financially abandoning the child and by denying parenthood. See *In re Turpening Estate*, 258 Mich App 464; 671 NW2d 567 (2003). The dead child in this case was Carl Koehler, through whom Ernest Umble seeks to inherit as a paternal relative. Bierkle contends that Carl Cedrick Umble neglected Carl Koehler in the manner described in Subsection 2114(4).

Our analysis must begin with an overview of the statute as a whole, as we "do[] not construe the meaning of statutory terms in a vacuum." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (quotation marks and citation omitted). MCL 700.2114 states in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. . . .
>
> * * *

(2) An adopted individual is the child of his or her adoptive parent or parents and not of his or her natural parents, but adoption of a child by the spouse of either natural parent has no effect on either the relationship between the child and that natural parent or the right of the child or a descendant of the child to inherit from or through the other natural parent. An individual is considered to be adopted for purposes of this subsection when a court of competent jurisdiction enters an interlocutory decree of adoption that is not vacated or reversed.

(3) The permanent termination of parental rights of a minor child by an order of a court of competent jurisdiction; by a release for purposes of adoption given by the parent, but not a guardian, to the family independence agency or a licensed child placement agency, or before a probate or juvenile court; or by any other process recognized by the law governing the parent-child status at the time of termination, excepting termination by emancipation or death, ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child.

(4) Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child.

(5) Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

Subsection (1) sets forth the general rule that "an individual is the child of his or her natural parents, regardless of their marital status." Notably, Subsection (1)(b)(*v*) allows a court to find a parent-child relationship "[r]egardless of . . . whether or not the alleged father has died . . . ." The Reporter for the EPIC draft-

ing committee of the State Bar of Michigan has noted, "It is important to read and understand that subsection (1) expresses the operative rule of this entire section." Martin & Harder, Estates and Protected Individuals Code With Reporters' Commentary (ICLE, Feb 2015 update), p 65.[2] Subsection (1) dictates that a parent-child relationship existed between Carl Cedrick Umble and Carl Koehler, despite that Carl Koehler was a posthumous, nonmarital child.

Subsections (2), (3), and (4) describe three situations in which a proven parent-child relationship can be overcome, defeating intestate inheritance despite a demonstrated parent and child relationship. Subsection (2) provides that an adopted child "is the child of his or her adoptive parents," and not of his or her natural parents. Subsection (3) states that "[t]he permanent termination of parental rights" severs the parent-child relationship for the purposes of intestate succession. And Subsection (4) declares that "[i]nheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child." These three subsections "are the exceptions to the operative rule." Martin & Harder, p 65.[3]

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[2] The Reporter highlighted that Subsection (1)(b)(*v*) "offers an additional avenue for establishing paternity when mutual acknowledgment under Subsection (1)(b)(*iii*) is unavailable. *This could be important if the child is born after the death of the father* or is an infant when the father dies." Martin & Harder, p 65 (emphasis added).

[3] One of the exceptions reinforces that for the purpose of intestate succession, posthumous children must be treated in the same manner as children born during the lifetimes of their parents. Subsection (3) indicates that while the permanent termination of parental rights and other court-recognized releases of parental rights operate to "end[] kinship," "termination by emancipation or death" does not. MCL 700.2114(3).

Because Subsection (4) is an exception to the "operative rule" of intestate succession, it is akin to an affirmative defense. An affirmative defense "is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993), citing 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 192. In the context of MCL 700.2114, once the parent-child relationship is proven in a manner consistent with Subsection (1), the gateway to intestate inheritance is open; alternatively stated, the prima facie case for inheritance is established. An heir may challenge an individual's right to inherit based on a demonstrated parent-child relationship by invoking one of the exceptions. As with any affirmative defense, the party asserting that the exception controls the outcome bears the burden of presenting evidence to support his or her claim. See *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664-665; 741 NW2d 857 (2007). We agree with the probate court that Bierkle shirked this burden.

The plain language of the exception at issue here requires proof of two facts: that the natural parent failed to "openly treat[] the child as his," *and* that the natural parent "refused to support the child." MCL 700.2114(4) (emphasis added). Thus, in crafting Subsection (4), the Legislature decreed that two separate and distinct conditions must be fulfilled before a court may foreclose a parent's right to intestate inheritance from a child. The Legislature's use of the word "and" demonstrates that proof of *both* conditions is required. "Plainly, the use of the conjunctive term 'and' reflects

that *both* requirements must be met . . . ." *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007), overruled in part on other grounds *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010). "[T]he words ['and' and 'or'] are not interchangeable and their strict meaning should be followed when their accurate reading does not render the sense dubious and there is no clear legislative intent to have the words or clauses read in the conjunctive." *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997) (quotation marks and citation omitted). The Legislature intended a dual showing of parental malfeasance before an intestate inheritance may be precluded: both economic *and* emotional malevolence. *Turpening* supports this view: "[T]he statute's meaning is clear that a natural parent is barred from inheriting except if the natural parent 'openly treated the child as his' *and* 'has not refused to support the child.' " *Turpening*, 258 Mich App at 468 (citation omitted).

No evidence suggests that Carl Cedrick Umble "refused" to support Carl Koehler. As this Court noted in *Turpening*, 258 Mich App at 467, a "refusal" reflects "an act of the will." (Quotation marks and citation omitted.) Carl Cedrick Umble died before Carl Koehler was born. He could hardly have "refused" to support a child he never met. That Carl Cedrick Umble never *actually* "supported" Carl Koehler is simply irrelevant; were that the test, Subsection (4) would jeopardize inheritance rights flowing from most posthumous children.[4] The statute requires that Carl Cedrick Umble

[4] The dissent asserts that to be entitled to inherit through the estate of a deceased child, a parent must always affirmatively prove that he or she acknowledged the child and did not fail to support the child before the child's death. We do not read the statute in this fashion. We further observe that in the case of a posthumous child, such proofs are likely

"refused" to support his child. And Bierkle bore the burden of establishing such a refusal, as she moved for summary disposition under MCR 2.116(C)(8) on this issue.[5]

V

More fundamentally, we agree with the probate court that the Legislature never intended that Subsection (4) would apply to a posthumous child.

MCL 700.2114(4) is based on the 1990 version of the Uniform Probate Code (UPC), § 2-114(c). The prior UPC's language was almost identical to EPIC's:

> Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child. [Brackets in original.][6]

The comment to this section of the UPC stated, "The phrase 'has not refused to support the child' refers to the time period during which the parent has a legal obligation to support the child." UPC § 2-114(c), Comment (1990). Obviously, Carl Cedrick Umble never had a "legal obligation" to support Carl Koehler. The UPC aside, we reach the same conclusion based on the language and structure of EPIC.

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impossible. Counsel in this case conceded at oral argument that they presented all the evidence that was available. A remand, advocated by the dissent, would be a meaningless exercise.

[5] "In a contested proceeding, pretrial motions are governed by the rules that are applicable in civil actions in circuit court." MCR 5.142. As a matter of procedure, Bierkle had to come forward with proof, as she was the moving party, that the predeceased natural father failed to acknowledge and refused to provide support for the unborn child at the time of the father's death.

[6] When the UPC was amended in 2008, the drafters omitted Subsection (c).

A central purpose of MCL 700.2114 is to abrogate the common-law rule that denied nonmarital children any right to inherit from their biological fathers. The first sentence of § 2114(1) provides that with three exceptions, "for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, *regardless of their marital status*." (Emphasis added.) This subsection of EPIC proclaims that nonmarital children may inherit through intestacy, assuming parentage has been satisfactorily established.

At the outset of EPIC's provisions regarding intestate succession, posthumous children are included as potential heirs. MCL 700.2114(1)(a) provides that a child "conceived" during a marriage is presumed to be the child of both natural parents. And since marital and nonmarital children are treated alike, the rule that the parent-child relationship controls intestate inheritance applies equally to both posthumous and nonmarital children. EPIC also recognizes the rights of posthumous children in MCL 700.2108 ("An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."). And that Ernest Umble was Carl Koehler's half-brother is of no moment, as "[a] relative of the half blood inherits the same share he or she would inherit if he or she were of the whole blood." MCL 700.2107.

In determining whether MCL 700.2114(4) applies to posthumous children, our job is "to construe statutes, not isolated provisions." *Graham Co Soil & Water Conservation Dist v United States ex rel Wilson*, 559 US 280, 290; 130 S Ct 1396; 176 L Ed 2d 225 (2010) (quotation marks and citation omitted). "[T]o discern 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." *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

EPIC provides a discrete mechanism for a nonmarital child born after his father's death to obtain a judicial determination of paternity for inheritance purposes. Given this right to *establish* paternity despite a father's untimely demise, it makes little sense to construe EPIC as creating a virtually impenetrable barrier to the flip side—inheritance by the paternal family through the posthumous child. A father who dies before his child is born is incapable of "treating the child as his." Despite a father's death, the father's family may nevertheless have treated the child as "theirs," serving as an important emotional and financial support system for the child and mother. Evidence of a deceased parent's attitude toward an unborn child is unlikely to exist when the child's birth occurred many years before the emergence of the heirship dispute, or when the parent died in the early stages of a pregnancy. Lengthy investigations of long-forgotten parental intent contravene another central purpose of EPIC: "[t]o promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c).[7]

[7] Although they are interesting, the two cases cited by the dissent lack any relevance here. *In re Estate of Poole*, 328 Ill App 3d 964; 767 NE2d 855 (2002), involved the construction of an intestacy scheme markedly different from EPIC. Under 755 Ill Comp Stat 5/2-2, the application of other Illinois statutes governing intestate succession from or through a child born out of wedlock depends on whether "both parents are eligible parents." 755 Ill Comp Stat 5/2-2 defines an "eligible parent" as "a parent of the decedent who, during the decedent's lifetime, acknowledged the decedent as the parent's child, established a parental relationship with the decedent, and supported the decedent as the parent's child." By defining an "eligible parent" in this fashion, Illinois specifically preconditions a parent's ability to inherit on parental support and acknowledgment.

That posthumous children may inherit under Michigan's law of intestate succession reflects our Legislature's belief that consanguinity—biology—generally dictates inheritance rights. The exceptions to this principle are narrowly drawn to exclude parents who have lost their parental rights through adoption or other court order, or parents who *could* have lost their parental rights because they ignored and economically neglected their child. Bierkle's construction of MCL 700.2114(4) would defeat the purposes of MCL 700.2114 by forcing the descendants of a posthumous child to prove that the parent would have acknowledged and supported the child had the parent survived. The policy underlying Subsection (4) is to prevent undeserving parents from inheriting, see *Turpening*, 258 Mich App 464, not to erect evidentiary burdens and barriers constraining intestate succession when a relative of a parent seeks to inherit through a dead child's estate.

Applying Subsection (4) to a nonmarital, posthumous child contradicts the central thrust of other intestacy provisions of EPIC. Accordingly, the probate court properly refused to subvert clearly declared legislative purposes by refusing to apply MCL 700.2114(4) to the facts of this case.

We affirm.

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

The Mississippi statute at issue in *Williams v Farmer*, 876 So 2d 300 (Miss, 2004), similarly differs from EPIC. In Mississippi, "the natural father of an illegitimate and his kindred shall not inherit . . . [f]rom or through the child unless the father has openly treated the child as his, and has not refused or neglected to support the child, and are precluded from inheriting wealth through the child's natural mother. Miss Code Ann § 91-1-15(2)." Unlike EPIC, both the Mississippi and Illinois statutes specifically declare that the acknowledgment and support obligations are prerequisites to a parental claimant's prima facie proofs.

O'CONNELL, J. (*dissenting*). I respectfully dissent. Because MCL 700.3407(1)(a) places the burden on the petitioner to prove heirship, and appellee Ernest Lee Umble is attempting to establish heirship, he has the burden to prove his status as an heir. Accordingly, I would place the burden to establish heirship on Umble, and I believe the proper analysis of this case is as follows:

In 1931, Carl Cedrick Umble, the paternal grandfather of decedent, Kenneth James Koehler, died in a knife fight that began after Clyde Shadwick approached Carl Umble as he and Florence Koehler, who was then pregnant with Carl Umble's child, were kissing. At that time, Carl Umble was married to Lyndall Hackett, with whom he had a legitimate child. He could not have known that his decisions would seriously complicate the administration of his grandson's estate.

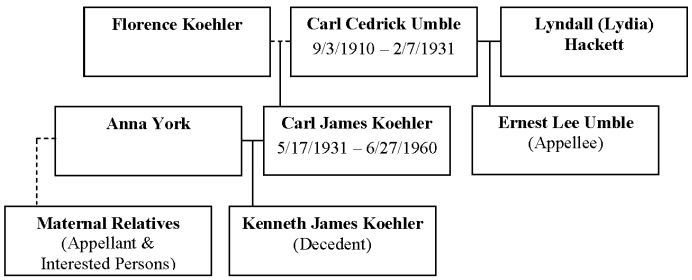
Appellant, Sherry Bierkle, appeals by delayed leave granted the probate court's order granting summary disposition in favor of appellee, Ernest Lee Umble. Bierkle raises two issues on appeal. First, the probate court ruled that Umble is a paternal heir to Kenneth Koehler under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Bierkle contends that the trial court erred. I disagree and conclude that the trial court correctly found that Umble is a paternal relative under EPIC.

Second, Bierkle contends that the trial court incorrectly decided that MCL 700.2114(4), which precludes a natural parent from inheriting from a child whom the parent failed to acknowledge or refused to support, cannot apply to a case in which a parent predeceased the child. I agree and conclude that MCL 700.2114(4) can apply, and I further conclude that unresolved

factual issues exist regarding whether Carl Umble acknowledged or refused to support Carl Koehler. I would reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In February 2012, Kenneth Koehler died intestate with a distributable estate of about $500,000. Kenneth Koehler had no children or siblings, and his parents predeceased him. On July 8, 2013, Sherry Bierkle, Kenneth Koehler's maternal cousin, filed a final accounting and a proposed settlement of Kenneth Koehler's estate among his maternal relatives. On July 23, 2013, Ernest Umble objected to Bierkle's proposed settlement. Ernest Umble asserted that he was Kenneth Koehler's paternal uncle. The family tree is as follows:



A news article from February 8, 1931, provides the context for Carl Umble's death. Carl Umble had been "separated for several months from his wife, Mrs. Lydia Hackett Umble . . . ." Florence Koehler and Carl Umble quarreled and he "failed to revive the girl's affection for him," but he was "reported to have threatened violence to anyone who went out with [Koehler] . . . ." Clyde Shadwick, who admitted to stabbing

Carl Umble, stated that he was "knocked down by a blow of Umble's fist" after he approached Umble and Florence Koehler as Umble "started to kiss her . . . ." Carl Koehler was born about three months later, and his Colorado birth certificate listed Carl Umble as his father.

Bierkle filed a proposed settlement of Kenneth Koehler's estate among his maternal relatives. Shortly afterward, Ernest Umble filed objections, asserting that Kenneth Koehler's paternal relatives[1] were entitled to half of the estate. Bierkle filed for summary disposition, asserting that even if Carl Umble was Carl Koehler's natural father, Ernest Umble could not be an heir to Kenneth Koehler's estate at law. According to Bierkle, Carl Umble was barred from inheriting as a matter of law because MCL 700.2114(4) provides that a parent may not inherit through a child whom the parent did not acknowledge or failed to support. According to Bierkle, it is impossible for a predeceased parent to establish that he or she acknowledged or supported an afterborn child.

Ernest Umble responded that the probate court should grant summary disposition in his favor under MCR 2.116(I)(2) because MCL 700.2114(4) does not apply if the parent predeceased the birth of the child. According to Ernest Umble, this subsection conflicts with other provisions of EPIC. Following a hearing, the probate court granted summary disposition in favor of Ernest Umble. It reasoned that applying MCL 700.2114(4) to cases in which a child predeceased the parent would conflict with other sections of EPIC.

The probate court held a bench trial to determine whether Carl Umble was the natural father of Carl

[1] Ernest Umble is the only surviving paternal relative.

Koehler. Following proofs by both parties, the probate court found that Carl Umble was Carl Koehler's father and was entitled to inherit through him. As a result, it sustained Ernest Umble's objections to the proposed settlement of Kenneth Koehler's estate and ruled that Kenneth Koehler's paternal relatives should inherit half of the estate.

Bierkle now appeals. The questions this Court must answer to resolve the issues presented are (1) whether Carl Umble was the father of Carl Koehler for the purposes of EPIC, and (2) whether MCL 700.2114(4) applies to cases involving afterborn children.

II. STANDARDS OF REVIEW

This Court reviews for clear error the probate court's factual findings. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Its findings are clearly erroneous if this Court is definitely and firmly convinced that the probate court made a mistake. *Id*.

We review de novo issues of statutory interpretation. *In re Casey Estate*, 306 Mich App 252, 256; 856 NW2d 556 (2014). If the plain and ordinary meaning of a statute's language is clear, we will enforce the statute as written. *Id*. We must consider the statute as a whole and in context, giving every word meaning and avoiding constructions that render parts of the statute surplusage. *Id*. at 257. We should not write into a statute provisions that the Legislature did not include. *Id*.

We review de novo the probate court's decision on a motion for summary disposition. *Id*. at 256. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim as pleaded . . . ." *Id*. The probate court properly grants summary disposition if the moving party is entitled to judgment as a matter of law.

MCR 2.116(C)(8). The probate court may grant summary disposition to the nonmoving party under MCR 2.116(I)(2) if "the opposing party, rather than the moving party, is entitled to judgment . . . ."

III. BACKGROUND LAW

Bierkle asserts that the probate court clearly erred when it found that Carl Umble was the natural father of Carl Koehler. Whether Carl Umble was Carl Koehler's father for purposes of EPIC is important in this case because it determines whether Ernest Umble can inherit as a paternal descendant. If Carl Umble was entitled to inherit from his child, Carl Koehler, Ernest Umble is the only surviving descendant of Kenneth Koehler's paternal grandparents, and he is entitled to inherit half of Kenneth Koehler's estate. Otherwise, Bierkle and the other descendants of Kenneth Koehler's maternal grandparents will inherit the entire estate.

Article II, part 1 of EPIC governs the rights to an intestate inheritance. *In re Certified Question*, 493 Mich 70, 76-77; 825 NW2d 566 (2012). Some basic definitions are necessary to understand the order of inheritance. EPIC defines "descendant" as "in relation to an individual, all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this act." MCL 700.1103(k). EPIC defines a "parent" as "an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question." MCL 700.1106(i).

If a decedent dies intestate and has no surviving spouse, EPIC provides the order in which the decedent's estate will pass to his or her surviving relatives.

MCL 700.2103. First, the estate will pass to the decedent's descendants. MCL 700.2103(a). If the decedent has no descendants, the estate will pass to the decedent's surviving parent or parents. MCL 700.2103(b). If the decedent has neither descendants nor surviving parents, the estate will pass to the descendants of the decedent's parents (the decedent's siblings, nieces, and nephews). MCL 700.2103(c).

If the decedent has no surviving descendants, parents, or descendants of parents, EPIC instructs the probate court to determine whether there are any descendants of the decedent's grandparents. MCL 700.2103(d). Half of the decedent's estate passes to the decedent's paternal grandparents or their descendants, and half of the decedent's estate passes to the decedent's maternal grandparents or their descendants. MCL 700.2103(d). Finally, "[i]f there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the ½." *Id*. The burden of establishing heirship is on the petitioner. MCL 700.3407(1)(a).[2]

Accordingly, if Carl Umble was entitled to inherit as Carl Koehler's parent, Ernest Umble is entitled to inherit half of Kenneth Koehler's estate because he is the sole surviving descendant of Kenneth Koehler's paternal grandparents. But if inheritance could not pass up to Carl Umble through his relationship with Carl Koehler, it cannot pass back down to Ernest Umble, and he is not entitled to a portion of the estate.

[2] Pre-EPIC caselaw required the child-petitioner to show that he or she and his or her parent mutually acknowledged their relationship. See *In re Scharenbroch Estate*, 191 Mich App 215, 216; 477 NW2d 436 (1991); *In re Jones Estate*, 207 Mich App 544, 548; 525 NW2d 493 (1994).

IV. ERNEST UMBLE'S RELATIONSHIP TO KENNETH KOEHLER

EPIC provides that, generally, a child is the child of his or her natural parents even if they were not married at the time of the child's birth:

> Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. [MCL 700.2114(1).]

MCL 700.2114(1)(b) sets forth circumstances in which a man is considered to be the natural parent of a child when that child is conceived out of wedlock. In this case, the probate court proceeded under MCL 700.2114(1)(b)(*v*). This subparagraph provides that:

> [r]egardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, . . . MCL 722.711 to 722.730.

Michigan's Paternity Act "was created as a procedural vehicle for determining the paternity of children born out of wedlock . . . ." *In re MKK*, 286 Mich App 546, 557; 781 NW2d 132 (2009) (quotation marks and citations omitted). The Paternity Act provides four ways by which a court may establish paternity and issue an order of filiation:

> (a) The finding of the court or the verdict determines that the man is the father.
>
> (b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.
>
> (c) The defendant is served with summons and a default judgment is entered against him or her.

> (d) Genetic testing . . . determines that the man is the father. [MCL 722.717(1).]

The party seeking to prove paternity must establish by a preponderance of the evidence that the man is the child's father. *Bowerman v MacDonald*, 431 Mich 1, 14; 427 NW2d 477 (1988).

This case did not involve a written acknowledgment of paternity, a default judgment, or genetic testing. Instead, the probate court relied on the documentary evidence that the parties presented at the bench trial. Bierkle specifically challenges the probate court's reliance on Carl Koehler's birth certificate, which listed Carl Umble as his father.

I agree with Bierkle that this birth certificate does not definitively establish that Carl Umble was Carl Koehler's father. But the statement on which Bierkle relies from the probate court's opinion is taken out of context. A full review of the probate court's opinion reveals that the probate court did not solely rely on the birth certificate. It was only part of the evidence the court considered.

In its findings, the probate court specifically noted that Carl Umble was killed in a knife fight over the affections of Florence Koehler, Carl Koehler's mother; a newspaper article and death certificate indicated that Carl Umble's mother was Grace Umble, and Carl Koehler's obituary listed his grandmother as Grace Roberts of Denver, Colorado; and Carl Koehler's marriage certificate listed his father as "Carl Sedric [sic] Umble." Given the body of evidence and the lack of evidence that Carl Koehler's father was someone else, I am not definitely and firmly convinced that the probate court made a mistake when it found that a preponderance of the evidence supported its finding that Carl Umble was Carl Koehler's father.

V. ACKNOWLEDGMENT AND SUPPORT

That Carl Umble was Carl Koehler's natural father does not automatically mean that he is entitled to inherit through Carl Koehler. Bierkle contends that the probate court erred when it determined that MCL 700.2114(4) cannot apply in circumstances where the parent dies before the child is born. Bierkle also contends that MCL 700.2114(4) bars Ernest Umble from inheriting as a matter of law because it is impossible for a natural parent to acknowledge or support an afterborn child. I agree in part. I conclude that the probate court erred when it concluded that MCL 700.2114(4) can only apply in cases involving living parents, but I conclude that it does not bar Ernest Umble from inheriting as a matter of law.

A. STATUTORY LANGUAGE

The probate court denied Bierkle's motion for summary disposition because it accepted Ernest Umble's argument that the exception in MCL 700.2114(4) could not apply in this case.

As previously noted, EPIC also provides "[*e*]*xcept as provided in subsections (2), (3), and (4)*, for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status." MCL 700.2114(1) (emphasis added). Subsection 4 provides:

> Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child. [MCL 700.2114(4).]

To accept Ernest Umble's argument that MCL 700.2114(4) cannot apply in this case is to essentially

write an additional condition into MCL 700.2114(4), a clause that would read "unless the child is an afterborn child." This Court does not read clauses into unambiguous statutory language. *Casey Estate*, 306 Mich App at 257. However, the probate court accepted Ernest Umble's argument, concluding that MCL 700.2114(4) did not apply in such cases because it would be impossible for the predeceased parent to comply and other statutory sections allow for inheritance through predeceased parents. I conclude that the probate court erred when it decided that MCL 700.2114(4) does not apply to cases involving afterborn children.

If the language of the statute is unambiguous, we must enforce the statute as written. *Casey Estate*, 306 Mich App at 257. We should not read language into an unambiguous statute. *McCormick v Carrier*, 487 Mich 180, 209; 795 NW2d 517 (2010). A statute "is ambiguous only if it irreconcilably conflicts with another provision, . . . or when it is *equally* susceptible to more than a single meaning." *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (quotation marks and citation omitted).

The probate court implicitly found that MCL 700.2114(4) is ambiguous when it reasoned that applying this subsection to cases involving afterborn children would conflict with other sections of EPIC. Specifically, the probate court cited MCL 700.2114(3), MCL 700.2104, MCL 700.2107, and MCL 700.2108 as conflicting provisions. I will analyze each of these statutory provisions in turn.

MCL 700.2114(3) provides that termination of parental rights precludes a parent from inheriting:

> The permanent termination of parental rights of a minor child by an order of a court of competent jurisdic-

> tion; . . . or by any other process recognized by the law governing the parent-child status at the time of termination, excepting termination by emancipation or death, ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child.

By its plain language, MCL 700.2114(3) applies to actions terminating parental rights. While MCL 700.2114(3) recognizes that death does not terminate a parental relationship, this has no bearing on the operation of MCL 700.2114(4). MCL 700.2114(4) does not terminate the parental relationship by death; it precludes inheritance if the parent did not acknowledge or refused to support the child. Not only does this case not involve termination of parental rights or any law governing parent-child status *at the time of termination*, but even in a case that did, I am unable to determine any ways in which these sections irreconcilably conflict. I conclude that MCL 700.2114(3) does not conflict with MCL 700.2114(4).

MCL 700.2104 provides that "[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession . . . ." This section concerns the death of the child, not the parent, and it does not touch on the parent-child relationship at all. This section would not irreconcilably conflict with MCL 700.2114(4) even if both the decedent and unborn child died within 120 hours of each other. I conclude that MCL 700.2104 and MCL 700.2114(4) do not conflict.

MCL 700.2107 provides that "[a] relative of the half blood inherits the same share he or she would inherit if he or she were of the whole blood." Nothing in MCL 700.2114(4) contradicts this section. MCL 700.2114(4) is only concerned with whether a natural father has acknowledged and has not refused to support a child.

That child's blood relationship to other children is not at issue. MCL 700.2107 and MCL 700.2114(4) do not conflict.

MCL 700.2108 provides that "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." Rather than conflicting, this actually supports the application of MCL 700.2114(4) in cases in which the natural parent predeceases the child. It instructs the probate court to treat an afterborn child as though the child was a living child at the time of the parent's death. This section does not conflict with MCL 700.2114(4), which does not, by its language, exclude afterborn children from consideration. I conclude that MCL 700.2108 and MCL 700.2114(4) do not conflict.

I conclude that the probate court erred by reading language into MCL 700.2114(4) that excludes afterborn children. This subsection is not ambiguous because it does not conflict with other provisions of EPIC. I recognize that applying MCL 700.2114(4) in cases involving afterborn children may be difficult. But that the statute appears to be inconvenient is not a reason for this Court to avoid applying plain statutory language. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012). Accordingly, I conclude that MCL 700.2114(4) applies in all cases of intestate succession from a child to a natural parent, not exclusive of afterborn children.

However, this does not mean that Bierkle is correct that Ernest Umble's claim is barred as a matter of law. Bierkle's argument is premised on the presumption that a natural father cannot acknowledge or support an afterborn child. I reject this presumption and conclude that the probate court did not err by denying Bierkle's motion for summary disposition.

As previously discussed, under MCL 700.2108, the probate court should consider a child who was in gestation at the time of a parent's death as a living child throughout the period of gestation if the child lives 120 hours or more after birth. I therefore conclude that under MCL 700.2114(4), the probate court must determine whether the predeceased natural father failed to acknowledge or refused to provide support to the unborn child at the time of the father's death. Accordingly, this issue cannot be resolved as a matter of law.

B. PERSUASIVE AUTHORITY

Additionally, because this is an issue of first impression in Michigan, this Court may consider cases from other jurisdictions as persuasive. See *In re Turpening Estate*, 258 Mich App 464, 466; 671 NW2d 567 (2003). Other jurisdictions hold that a natural father can acknowledge and provide support for a child even if the child dies before its birth. While this factual scenario is not directly analogous to a case involving an afterborn child, the crux of the argument—that it is impossible for the natural parent to acknowledge and support the child—is the same in both factual scenarios.

In *In re Estate of Poole*, 328 Ill App 3d 964; 263 Ill Dec 129; 767 NE2d 855 (2002), the Appellate Court of Illinois considered whether the acknowledged biological father of a fetus that was stillborn could inherit through the child. In that case, the Appellate Court of Illinois for the Third District considered whether statutory language providing that a father could not inherit through an illegitimate child unless the father, during the child's lifetime, acknowledged the child, established a parental relationship with the child, and supported the child. *Id*. at 969. The maternal relatives

in *Poole* argued that the father was not eligible to inherit because the child did not have a lifetime and so the father could not acknowledge her, support her, or establish a relationship with her. *Id*. The court determined that the father could qualify as an eligible parent because he resided with the child's mother throughout the pregnancy, he provided financial and emotional support to the mother and through her to the unborn child, and he held himself out as the child's father. *Id*. at 970.

Similarly, in *Williams v Farmer*, 876 So 2d 300; 2002 CA 02094 SCT (Miss, 2004), the Mississippi Supreme Court considered a statute providing that a father could not inherit through an illegitimate child unless the father openly treated the child as his own and had not refused or neglected to support the child. The father in *Williams* argued that this statute did not apply when his unborn child died in a car accident because it was impossible for him to comply with the statutory requirements. *Id*. at 302-303; 304-305. The court found that the statute did apply because the father could have acknowledged the fetus and provided support for it during the pregnancy. *Id*. at 305. The court barred the father from inheritance because he had no contact with the child's mother while she was pregnant, and "did not contribute any support, financial or otherwise" to the mother during or after the pregnancy. *Id*. at 306.

I find these cases persuasive. They establish that, in other states with similar statutes, courts have found that it is not *impossible* for a natural father to acknowledge and support an unborn child.

C. APPLICATION

In this case, the proofs are complicated by the passage of time. Carl Umble died in 1931. However,

circumstantial evidence and inferences from the evidence may support the probate court's findings. See *Kupkowski v Avis Ford, Inc*, 395 Mich 155, 166; 235 NW2d 324 (1975) (holding that circumstantial evidence and reasonable inferences may be sufficient to establish a fact).

Considering acknowledgment, the present state of the law in Colorado is that a father must consent to be named a father on a child's birth certificate. See Colo Rev Stat 19-4-105(1)(c)(II). There is no evidence regarding the state of the law in Colorado at the time of Carl Koehler's birth, but if similar laws existed, the fact that Carl Umble is listed on Carl Koehler's birth certificate might provide evidence of acknowledgment. If the child was acknowledged in Carl Umble's obituary, that too may be additional evidence.

I also note that there are many ways in which a father can support a child. See *Turpening Estate*, 258 Mich App at 468. The language of MCL 700.2114(4) states that the subsection applies if the parent *refused* to support the child. There must be some evidence that a natural parent refused to support his or her child. For instance, if another relative asked the natural father to support the child's mother but the father denied that the child was his, this may be evidence of refusing to support the child. See *Turpening Estate*, 258 Mich App at 468. Similarly, a natural father's lack of involvement in a pregnancy of which he was aware could provide circumstantial evidence to support an inference that the father refused to support the child. In contrast, if a natural father supported the unborn child by supporting its mother through the pregnancy or made provisions for familial support, this may be evidence that the predeceased father did in fact support the child. I note that a newspaper article provides

evidence that Carl Umble was involved in an ongoing relationship with Florence Koehler until his death, to the point of striking a man who approached them during a kiss and getting into a fatal knife fight. I do not decide whether the evidence is sufficient to support an inference or finding on this point—I simply note that evidence may exist.

Because the probate court determined that MCL 700.2114(4) did not apply in this case, it did not receive evidence on either of these requirements. I would remand for additional proceedings.

VI. CONCLUSION

It may be difficult for the predeceased natural father of a child born out of wedlock to comply with MCL 700.2114(4), but the statute is not ambiguous, and the proofs are not impossible. MCL 700.2114(4) applies in cases involving the predeceased natural fathers of afterborn children. In such cases, the probate court must determine (1) whether the man was the child's natural father, (2) whether the father acknowledged the unborn child, and (3) whether the father refused to support the unborn child.

I would reverse the probate court's determination that MCL 700.2114(4) did not apply in this case and remand for further proceedings.

PEOPLE v THOMPSON

Docket No. 318128. Submitted June 10, 2015, at Lansing. Decided March 29, 2016, at 9:00 a.m.

Jackie Thompson pleaded no contest in the Clinton Circuit Court to one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*). Defendant was charged after his stepdaughter accused him of sexually abusing her over a period of approximately two years. In pleading no contest, defendant agreed that the court, Michelle M. Rick, J., could use the police report to establish a factual basis for the plea. Defendant pleaded no contest specifically with regard to a sexual assault that occurred on February 24, 2013. At defendant's sentencing, the parties disputed whether defendant should be assessed 50 points for Offense Variable (OV) 7, MCL 777.37, which concerns aggravated physical abuse. The court determined that a score of 50 points for OV 7 was appropriate because defendant had engaged in sadism. In support of that conclusion, the court cited the victim's allegations in the police report indicating that at various points in time during the two years of abuse, defendant had engaged in conduct including putting a BB gun to her head, threatening her life, and spanking her with a belt that left marks. The court sentenced defendant within the guidelines to a term of imprisonment of 15 to 40 years. The Court of Appeals denied defendant's delayed application for leave to appeal, but the Supreme Court remanded the case to the Court of Appeals for consideration, as on leave granted, of whether defendant's conduct with the victim before the commission of the sentencing offense could be considered when scoring OV 7. 497 Mich 945 (2014).

The Court of Appeals *held*:

Offense variables are properly scored by giving consideration to the sentencing offense alone except when the statutory language of a particular offense variable specifically provides otherwise. The language of OV 7 requires the assessment of 50 points when 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. OV 7 does not specifically provide that a sentencing court may look outside the

sentencing offense to past criminal conduct. Therefore, when scoring OV 7, a sentencing court may only consider conduct that occurred during the sentencing offense. In this case, the trial court assessed 50 points for OV 7 in light of conduct engaged in by defendant throughout the two-year course of the sexual abuse instead of confining its examination to conduct occurring during the sexual assault on February 24, 2013. Defendant's conduct before the sexual assault on February 24, 2013, regardless of its deplorability, did not relate forward to the sentencing offense; the prosecution, in negotiating the plea bargain, had chosen to dismiss charges related to the alleged numerous criminal offenses of sexual assault occurring before February 24, 2013. The record was such that it was impossible to discern whether one or more, or none, of the horrific acts relied on by the trial court in scoring OV 7 took place on February 24, 2013. Accordingly, a preponderance of the evidence did not support the trial court's assessment of 50 points under OV 7.

Reversed and remanded for resentencing.

RONAYNE KRAUSE, P.J., dissenting, would have affirmed, concluding that the majority read the controlling caselaw too narrowly. Conduct that occurs at a different time from the sentencing offense may be considered when scoring an offense variable as long as that conduct pertains to the sentencing offense. Conduct may relate to multiple offenses and need not chronologically overlap the sentencing offense in order to determine an OV score. In situations involving serial sexual or physical abuse, the perpetrators often control their victims through threats and manipulations intended to affect the victim's future behavior. It does not make sense to treat one interaction as separate from and irrelevant to subsequent interactions. Acts of extraordinary brutality or terror during any particular act of abuse inherently pertain to future acts of abuse perpetrated against the same victim. Defendant unquestionably engaged in conduct designed to increase the victim's fear and anxiety during the sentencing offense, and the trial court properly assessed 50 points under OV 7.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — SCORING OFFENSE VARIABLE 7.

Under the sentencing guidelines, offense variables are properly scored by giving consideration to the conduct underlying the sentencing offense alone unless the statutory language of a particular offense variable specifically provides otherwise; the language of Offense Variable (OV) 7 requires the assessment of 50

> points when 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; when scoring OV 7, a sentencing court may only consider conduct that occurred during the offense for which the defendant is being sentenced (MCL 777.37).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Charles D. Sherman*, Prosecuting Attorney, and *Brian A. Ameche*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

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

MURPHY, J. Defendant pleaded no contest to one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*) (sexual penetration and victim at least 13 but less than 16 years of age and related to the defendant). He was sentenced to a prison term of 15 to 40 years. Defendant appeals his sentence, challenging the scoring of Offense Variable (OV) 7, MCL 777.37. We reverse and remand for resentencing.

Defendant pleaded no contest to an act of digital-vaginal penetration involving his stepdaughter. At defendant's plea hearing, the court indicated that it would rely on the police report in support of the factual basis for the no-contest plea. The police report reflected that the victim was 13 years old at the time the report was prepared and that, according to the victim, defendant had been sexually abusing her at least twice a week for approximately two years. The police report further provided that the victim had described multiple instances of digital-vaginal penetration, anal in-

tercourse, and various acts of sexual contact.[1] In the police report, and in an attached written statement by the victim, reference was made to an incident in which defendant put a BB gun to the victim's head and threatened to kill her if she did not perform a sexual act. The police report also alluded to instances in which defendant pulled the victim's hair, struck her buttocks, threatened her life if she said anything about the sexual abuse, and hit her with a belt buckle, resulting in bruises on numerous occasions. In the victim's statement, she asserted that defendant had threatened her life "many times." Medical documents attached to the police report indicated that defendant once bit the victim on one of her breasts, leaving a scar. The police report noted that the last incident of sexual abuse occurred on February 24, 2013. Defendant pleaded no contest specifically with respect to the sexual assault that occurred on February 24, 2013, and not in regard to any of the prior sexual abuse.[2]

At defendant's sentencing, the prosecutor argued that defendant should be assessed 50 points for OV 7, which is the proper score when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety

[1] The police report included a section regarding defendant's interview by police. The report stated, "Then in further talking to [defendant] and getting further signs of deception," defendant "did admit that he did touch [the victim's] vaginal area and that his right hand middle finger did go inside her vagina . . . ."

[2] We note that the victim was 13 years old on February 24, 2013, having turned 13 in December 2012. During most of the period in which the sexual abuse allegedly occurred, she was under the age of 13, and had defendant been convicted of CSC-I in relation to an act of penetration taking place when the victim was less than 13 years old, defendant would have faced a mandatory minimum sentence of 25 years' imprisonment. See MCL 750.520b(2)(b).

a victim suffered during the offense[.]"[3] MCL 777.37(1)(a). The only other potential score for OV 7 is zero points. MCL 777.37(1)(b). Defendant argued that a score of zero points was proper, claiming that his conduct did not rise to the level that would justify a score of 50 points. The trial court, which now had the benefit of the presentence investigation report (PSIR), which essentially echoed the police report and reiterated the facts previously discussed in this opinion, assessed 50 points for OV 7, ruling:

> [T]he Court takes note that the victim chronicled for the Clinton County Sheriff's Office the duration of the sexual abuse that . . . she suffered at the hands of the Defendant, which does include the scar to her breast, as well as anal intercourse, putting a B-B gun to her head, pulling her hair, threatening her life if she said anything, and that he had spanked her with a belt that left marks on her in the past. Those items the Court is satisfied constitute sadism as defined in the instructions to O-V 7 . . . .

The parties also argued over the scoring of other OVs that are not relevant to this appeal, including OV 13, MCL 777.43 (continuing pattern of criminal behavior). The minimum guidelines range for defendant's sentence was ultimately set at 108 to 180 months. See MCL 777.62. The trial court imposed a minimum sentence at the very top end of the guidelines range, 180 months (15 years), with the maximum sentence being set at 40 years' imprisonment. Defendant filed a delayed application for leave to appeal, challenging the scoring of OV 7 and OV 13. Defendant argued that OV 7 was improperly scored at 50 points, given that the trial court considered con-

[3] "Sadism" is statutorily defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

duct related to past sexual abuse, instead of limiting its examination to conduct directly pertaining to the sexual assault on February 24, 2013, which was the sentencing offense. This Court denied the application, *People v Thompson*, unpublished order of the Court of Appeals, entered December 3, 2013 (Docket No. 318128), and defendant then filed an application for leave to appeal in the Michigan Supreme Court. Our Supreme Court denied the application with respect to defendant's arguments concerning OV 13, but in regard to OV 7, the Court ruled:

> Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the conduct of the defendant with the victim prior to the commission of the sentencing offense may be considered when scoring Offense Variable 7, and if so, what evidence may support that scoring. MCL 777.37; *People v McGraw*, 484 Mich 120[; 771 NW2d 655] (2009). [*People v Thompson*, 497 Mich 945 (2014).]

Under the sentencing guidelines, a trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *People v Rhodes (On Remand)*, 305 Mich App 85, 88; 849 NW2d 417 (2014). " 'Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.' " *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012) (citation omitted). This Court reviews de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438; see also *Rhodes*, 305 Mich App at 88. When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a

PSIR. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012).[4]

In the remand order, the Supreme Court directed our attention to its decision in *McGraw*, 484 Mich 120, wherein the Court stated and held:

> This case involves further analysis of the issue presented in *People v Sargent*[, 481 Mich 346; 750 NW2d 161 (2008)]. There we held that offense variable (OV) 9 [number of victims] in the sentencing guidelines cannot be

[4] We note that if the appropriate score for OV 7 is zero points, the guidelines range for defendant's minimum sentence would be 81 to 135 months. MCL 777.62. Defendant was given a minimum sentence of 180 months. When a defendant properly preserves a claim that a scoring error was made and the guidelines range is altered in any way because the scoring error was actually made by the sentencing court, remand for resentencing is ordinarily required, even when the minimum sentence imposed falls within the altered guidelines range. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). In this case, while defendant challenged the trial court's scoring of OV 7, he did not challenge the assessment of 50 points on the ground that he now raises on appeal for the first time, so his current argument was not properly preserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, because, as held and explained later in this opinion, the appropriate guidelines range is indeed 81 to 135 months, and because the 180-month minimum sentence actually imposed falls entirely outside of that range, defendant is permitted to seek appellate relief despite the lack of preservation. *Id*. at 312 ("Because defendant's sentence is outside the appropriate guidelines sentence range, his sentence is appealable under [MCL 769.34(10)], even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand."). The *Kimble* Court explained that the plain-error test still had to be applied, but it easily found plain error that prejudiced the defendant and seriously affected the fairness, integrity, and public reputation of the judicial proceedings. *Id*. at 312-313. The Court stated that "[i]t is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law." *Id*. at 313. Considering that defendant's 180-month minimum sentence is nearly four years longer than the top end of the appropriate guidelines range, i.e., the sentencing period authorized by law, the plain-error test is satisfied.

> scored using uncharged acts that did not occur during the same criminal transaction as the sentencing offense. Today we decide whether the offense variables should be scored solely on the basis of conduct occurring during the sentencing offense or also using conduct occurring afterward.
>
> We hold that a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise. Therefore, in this case, defendant's flight from the police after breaking and entering a building was not a permissible basis for scoring OV 9. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for resentencing. [*McGraw*, 484 Mich at 121-122 (citation omitted).]

In *McGraw*, the defendant had pleaded guilty to multiple counts of breaking and entering a building in exchange for the dismissal of other charges, including fleeing and eluding police officers. *Id*. at 122-123. As part of the Court's reasoning in support of its holding, it observed:

> We conclude that the Court of Appeals erred by considering the entire criminal transaction and using defendant's conduct after the crime was completed as the basis for scoring OV 9. Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable. OV 9 does not provide for consideration of conduct after completion of the sentencing offense. Therefore, it must be scored in this case solely on the basis of defendant's conduct during the breaking and entering. If the prosecution had wanted defendant to be punished for fleeing and eluding, it should not have dismissed the fleeing and eluding charge. It would be fundamentally unfair to allow the prosecution to drop the fleeing and eluding charge while brokering a plea bargain, then resurrect it at sentencing in another form. [*Id*. at 133-134.]

At the conclusion of its opinion, the *McGraw* Court reiterated that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id*. at 135.

Once again, MCL 777.37(1)(a) calls for the assessment of 50 points when "[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*[.]" (Emphasis added.) Defendant seizes on the language "during the offense" in arguing that a court can only take into consideration conduct occurring during the sentencing offense for purposes of scoring OV 7. It does appear that the "during the offense" language found in OV 7 modifies all the preceding language in MCL 777.37(1)(a), thereby requiring us to focus solely on conduct occurring during the CSC-I offense. Regardless, even if OV 7 did not contain language that expressly limits the judge's consideration to conduct that occurred during the sentencing offense, OV 7 certainly does not specifically provide that a sentencing court may look outside the sentencing offense to past criminal conduct in scoring OV 7. Therefore, under *McGraw* and *Sargent*, the trial court here was only permitted to consider conduct that occurred during the criminal offense on February 24, 2013, for purposes of scoring OV 7.

It is clear that the trial court assessed 50 points for OV 7 in light of conduct engaged in by defendant throughout the two-year course of the sexual abuse, instead of confining its examination to conduct occurring during the sexual assault on February 24, 2013, which was the only criminal offense to which defendant pleaded no contest. Defendant's conduct that

allegedly took place before the sexual assault on February 24, 2013, regardless of its deplorability, did not relate forward to the sentencing offense; the prosecution, in negotiating the plea bargain, had chosen to dismiss charges related to the alleged numerous criminal offenses of sexual assault occurring before February 24, 2013. The record is such that it is impossible to discern whether one or more, or none, of the horrific acts relied on by the trial court in scoring OV 7 took place on February 24, 2013. Therefore, we cannot conclude that a preponderance of the evidence supported the 50-point score.[5]

We find it necessary to respond to some of the criticisms expressed by the dissent. The central theme of the dissent is that the Supreme Court in *McGraw* and *Sargent* rejected a narrow approach that would only allow contemplation of conduct occurring during the sentencing offense in the scoring of a variable,

[5] We note that the trial court assessed 50 points for OV 7 solely on the basis of sadistic behavior, not on the basis of torture or that defendant's conduct was designed to substantially increase the victim's fear and anxiety. It would not be appropriate for this Court to consider whether defendant's conduct was designed to substantially increase the victim's fear and anxiety. See *Anspaugh v Imlay Twp*, 480 Mich 964 (2007) (vacating this Court's judgment because the panel "engaged in appellate fact-finding"). "A *trial court* determines the sentencing variables by reference to the record," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (emphasis added), not this Court. See *People v Burns*, 494 Mich 104, 109 n 10; 832 NW2d 738 (2013) (recognizing that fact-finding authority is vested in the trial courts and that the Court of Appeals may not invade that authority). Although we acknowledge the "right result—wrong reason" doctrine cited by our dissenting colleague, which would seemingly indicate a conclusion that sadism was an improper or wrong reason to assess OV 7 at 50 points, we do not believe that the doctrine can be employed to allow impermissible appellate fact-finding. Regardless, the record is equally lacking in evidence that defendant's conduct solely in relation to the offense that occurred on February 24, 2013, to which defendant pleaded guilty, was designed to substantially increase the victim's fear and anxiety.

instead opting in favor of a broader approach allowing consideration of conduct simply "relating" or "pertaining" to the sentencing offense, which would not necessarily preclude, despite chronological distinctions, examining prior conduct or offenses. In *McGraw*, 484 Mich at 124, the Court noted that the defendant was arguing for an approach in which "only conduct occurring during the offense of which the defendant was convicted may be considered." On the other hand, the prosecution argued that a transactional approach should be used, examining "a continuum of the defendant's conduct . . . , which can extend far beyond the acts that satisfy the elements of the sentencing offense." *Id*. The *McGraw* Court then observed that in *Sargent*, "[w]e stated that usually 'only conduct relating to the offense may be taken into consideration when scoring the offense variables.' " *McGraw*, 484 Mich at 124, quoting *Sargent*, 481 Mich at 349 (quotation marks omitted). The dissent in this case emphasizes this language, treating it as a rejection of the *McGraw* defendant's argument that only conduct occurring during the sentencing offense may be considered. The fact is, however, that the Court was agreeing with the defendant's position and rejecting the prosecution's transactional-approach argument. It is abundantly clear that, when read in context, the Supreme Court's reference to conduct "relating" to the sentencing offense meant that consideration was limited to conduct occurring during the sentencing offense. The dissent improperly construes the use of the term "relating" as opening the door to contemplation of prior and subsequent conduct going beyond the sentencing offense.

The *Sargent* Court stated, "That the general rule is that the relevant factors are those relating to the offense being scored is further supported by the fact

that the statutes for some offense variables specifically provide otherwise." *Sargent*, 481 Mich at 349. In applying this rule, the Court held:

> [W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered.
>
> In the instant case, the jury convicted defendant only of sexually abusing the 13-year-old complainant. It did not convict him of sexually abusing the complainant's sister. Furthermore, the abuse of the complainant's sister did not arise out of the same transaction as the abuse of the complainant. For these reasons, zero points should have been assessed for OV 9. [*Id*. at 350-351.]

Accordingly, the Court was clearly limiting its consideration to conduct and events occurring during the sentencing offense. Indeed, that is how the *McGraw* Court interpreted *Sargent*, stating that in *Sargent* "we held that offense variable (OV) 9 in the sentencing guidelines cannot be scored using uncharged acts that *did not occur during the same criminal transaction as the sentencing offense*." *McGraw*, 484 Mich at 121-122 (emphasis added; citation omitted). Speaking of *Sargent* later in its opinion, the *McGraw* Court noted that "it was clear that the defendant's conduct [in *Sargent*] did not occur during the same criminal transaction." *Id*. at 126 n 17.

Accordingly, while *Sargent* held that the Legislature intended that the scoring of the offense variables be offense-specific, the Court in *McGraw* went one step further, characterizing its ruling as "decid[ing] whether the offense variables should be scored solely on the basis of conduct occurring during the sentencing offense or also using conduct occurring afterward." *Id*. at 122. As quoted earlier, the *McGraw* Court specifically held that "a defendant's conduct after an offense

is completed *does not relate back* to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. (emphasis added). Contrary to the principle established in this plain language, the dissent in this case concludes that prior conduct can relate forward to the sentencing offense. The *McGraw* Court rejected the argument "that the Legislature intended sentencing courts to consider a defendant's entire criminal transaction when scoring the variables." *Id*. at 128. And it concluded "that the Court of Appeals erred by considering the entire criminal transaction and using defendant's conduct after the crime was completed as the basis for scoring OV 9." *Id*. at 133. The Court emphasized that the sentencing variable at issue "must be scored . . . solely on the basis of defendant's conduct *during* the [sentencing offense]." *Id*. at 134 (emphasis added). In the case at bar, the dissent is effectively arguing in favor of a transactional or multitransactional approach, examining the full history of sexually assaultive conduct committed by defendant against the victim in previous criminal transactions, even though that conduct did not occur during the sentencing offense. *McGraw* and *Sargent* do not allow for that approach. Furthermore, outside the framework of *McGraw* and *Sargent*, MCL 777.37(1)(a) expressly limits the sentencing court to consideration of whether a victim was treated with sadism "during the offense[.]"

The dissent, citing *McGraw*, 484 Mich at 129, states that "[t]he holding in *McGraw* was not that conduct that occurred at a different time from the sentencing offense could *never* be considered when scoring guidelines for that offense, but rather that any such conduct must *pertain to* the sentencing offense unless the offense variable specifies otherwise." We have closely reviewed page 129 of the *McGraw* opinion and find no

support whatsoever for this proposition, and we stand by the quoted materials from *McGraw* referred to earlier in this opinion and our interpretation thereof. In *McGraw*, 484 Mich at 129, the Court did observe:

> This does not mean that transactional conduct may never influence a defendant's sentence. Such a result would frustrate the Legislature's intention of having the guidelines promote uniformity in sentencing. Nothing precludes the sentencing court from considering transactional conduct when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation.

We are not holding that defendant's conduct occurring before the sentencing offense was committed cannot be considered in a sentencing departure or in imposing defendant's minimum sentence within the guidelines range. Indeed, the trial court may have sentenced defendant at the very top end of the guidelines range precisely because of the history of sexual abuse. This passage from *McGraw* simply does not suggest that a court may consider preoffense conduct that merely "pertains" to the sentencing offense in scoring a variable, such as OV 7, that is limited to contemplation of conduct occurring during the sentencing offense.[6]

The dissent suggests that *McGraw* is distinguishable because it dealt with postoffense conduct and not preoffense conduct. It is clear to us, however, that the analytical framework constructed by our Supreme Court in *McGraw* applies regardless of whether a court

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[6] The *McGraw* Court would not even allow consideration of conduct amounting to fleeing and eluding that occurred directly following the completion of the sentencing offense. *McGraw*, 484 Mich at 131-135. We therefore find it plain that taking into consideration conduct occurring on different days over a two-year period does not survive scrutiny under *McGraw*.

is addressing conduct occurring before or after the sentencing offense; the touchstone is that the conduct to be considered in scoring the variable must have occurred during the commission of the sentencing offense unless the offense variable statute expressly says otherwise.

Finally, the dissent, relying on research and data concerning ongoing sexual abuse of children, makes an impassioned plea regarding the necessary interrelationship or interconnection between the sentencing offense and the prior acts of sexual abuse, precluding examination of the sentencing offense in a vacuum. We do not disagree with the dissent's information regarding the victims of child sexual abuse and their abusers, nor do we reject the dissent's general theory about abusive relationships; rather, we merely disagree that such matters are relevant under *McGraw* and *Sargent* for purposes of scoring OV 7 in this case. We note that despite the fact that OV 7 does not allow consideration of the full history of acts of sexual abuse, OV 13 was assessed at 50 points, the highest score possible, because the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). OV 13 requires consideration of "all crimes within a 5-year period, including the sentencing offense, . . . regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Thus, defendant's past alleged sexual abuse of the victim is relevant and has a bearing on his sentence.

We have pondered the proposition that assessing 50 points under MCL 777.37(1)(a) was perhaps proper on the basis that the act of digital-vaginal penetration occurring on February 24, 2013, had to be examined in context by taking into account the entire history of

abuse, i.e., the sexual penetration, in and of itself, was a sadistic act given everything else defendant had allegedly done to the victim. However, that analysis would necessitate consideration of preoffense conduct for which defendant did not plead guilty or no contest and that simply is not permissible under MCL 777.37(1)(a), *Sargent*, and *McGraw*.

Reversed and remanded for resentencing. We do not retain jurisdiction.

SERVITTO, J., concurred with MURPHY, J.

RONAYNE KRAUSE, P.J. (*dissenting*). I respectfully dissent. I do not read the applicable statutory or caselaw as narrowly as does the majority, and I further conclude that even if the majority correctly reads that law, the majority misunderstands the facts. Either way, I would affirm.

As the majority explains, defendant pleaded no contest to digitally penetrating his then 13-year-old stepdaughter in exchange for a sentence within the sentencing guidelines. Defendant was, notably, *not* charged with any of the prior sexual, physical, and emotional abuse he inflicted on his stepdaughter over a period of approximately two years. The instant appeal specifically concerns the trial court's assessment of 50 points under Offense Variable (OV) 7. Fifty points should be assessed under OV 7 if "[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). At issue is solely whether defendant's egregious conduct may be used to assess points under OV 7 in light of the record evidence and our Supreme Court's statement that "[o]ffense vari-

ables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).[1]

Factually, the trial court relied in significant part on a police report. The police officer's summary of the victim's interview states that the victim was 13 years old at the time of the specific assault of which defendant was convicted and that defendant had sexually abused her at least twice a week for the prior "couple of years." The last sexual assault occurred on February 24, 2013; defendant pleaded no contest specifically to that last assault. In the police report, and in an attached written statement by the victim, reference was made to an incident in which defendant put a BB gun to the victim's head and threatened to kill her if she did not perform a sexual act. The police report also alluded to instances in which defendant pulled the victim's hair, struck her buttocks, threatened her life if she said anything about the sexual abuse, and hit her with a belt buckle, resulting in bruises on numerous occasions. In the victim's statement, it is clear that defendant had threatened her life "many times" and that to the extent to which she subsequently did not resist, she acted out of fear. Medical documents attached to the police report indicated that defendant once bit the victim on one of her breasts, leaving a scar. The trial court also considered defendant's presentence investigation report, which essentially echoed the police report information.

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[1] *McGraw* dealt with OV 9, which simply states, "Offense variable 9 is number of victims." MCL 777.39(1). It also dealt with conduct that occurred after the date of the offense of which the defendant was convicted. *McGraw*, 484 Mich at 122.

When reviewing a challenge to a sentencing guidelines score, we review for clear error whether the trial court's factual findings are supported by a preponderance of the evidence, and we review de novo as a question of law whether those factual findings properly justify the guidelines scores at issue. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). We defer to the trial court's superior ability to observe and assess the credibility of the persons who, in contrast to the operation of this Court, actually appeared before it. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). When calculating a defendant's minimum-sentence range under the sentencing guidelines, a court may consider all record evidence, including the contents of a presentence investigation report. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012).

"Sadism" is statutorily defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). As our Supreme Court has explained, the terms "torture," "excessive brutality," and "conduct designed to substantially increase the fear and anxiety a victim suffered" are to be given their ordinarily understood meanings, and 50 points should be assessed if *any* such conduct occurred. *Hardy*, 494 Mich at 439-444. I believe that any conceivable argument to the effect that defendant inflicted anything less on the victim would be utterly illogical. Further, it would not take into account the particular dynamics of ongoing, serial abuse, either as a general matter or the specific abuse that occurred in this case.

In my opinion, the majority reads more into *McGraw* than our Supreme Court wrote. The holding in *McGraw* was not that conduct that occurred at a different time from the sentencing offense could *never* be considered when scoring guidelines for that offense, but rather that any such conduct must *pertain to* the sentencing offense unless the offense variable specifies otherwise. See *McGraw*, 484 Mich at 129. Indeed, our Supreme Court was urged to pronounce an approach restricting consideration to "only conduct occurring during the offense," but instead explained that consideration must be given to "conduct '*relating to* the offense . . . .' " *Id*. at 124, quoting *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008). While perhaps a subtle distinction, I think it a highly significant one. Furthermore, strictly speaking, *McGraw* was concerned with conduct that occurred *after the completion of the sentencing offense*. *McGraw*, 484 Mich at 122, 132-135. There is no possibility of any subsequent conduct being used to score OV 7 in the instant matter.

The majority points out that our Supreme Court explicitly held that sentencing courts could consider "transactional conduct when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation." *McGraw*, 484 Mich at 129. The majority then goes on to discuss *conduct unrelated to the sentencing offense*, which entirely misses the point. Again, our Supreme Court explicitly *rejected* a "conduct occurring during the offense" approach in favor of a "conduct relating to the offense" one. Furthermore, our Supreme Court clearly regarded transactional conduct as something else entirely, which makes perfect sense in the context of a defendant who committed a series of offenses as part of a single transaction, in which case it

would be unsurprising that conduct relating to only one of those offenses could not be used to compute the OV score for a different offense. What the majority overlooks is that there is absolutely no reason why conduct cannot relate to multiple offenses and that our Supreme Court expressly rejected the notion that such related conduct must chronologically overlap the sentencing offense if it is to be used to determine an OV score.

Our Supreme Court has explained that the proper delineation between conduct that may be considered and that which may not be considered is not strictly chronological. Rather, the delineation is whether the conduct in question pertains to the sentencing offense, which is an inherently fact-specific inquiry. I believe that the majority finds in our Supreme Court's opinion a neat, simple, and easy-to-apply bright-line rule that was never articulated nor intended and that, in this case, is neither proper nor just. Our Supreme Court could easily have stated that conduct that occurs at a different time from the sentencing offense may not serve as a basis for assessing OV points unless a statute provides otherwise, but did not.

That being said, scorable conduct may well usually overlap chronologically with the sentencing offense. An observed trend, however, is not a rule, and statistics reveal nothing about specific cases. As applied to OV 7, I conclude that in light of our Supreme Court's analysis in *McGraw* and the plain language of MCL 777.37, whether points may be assessed depends not necessarily on when the conduct at issue occurred, but on the extent to which that conduct *pertains to the sentencing offense*. Nothing in *McGraw* dictates that such conduct must occur at the same time as the sentencing offense or must pertain to *only* the sentencing offense.

Importantly, this case does not involve simple facts and a straightforward timeline of discrete events. It has long been recognized that "there is general agreement among experts that reactions of a victim of sexual assault vary quite significantly from those of a victim of the 'average' crime." *People v Beckley*, 434 Mich 691, 715-716; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.). As a general matter, in situations involving serial sexual or physical abuse, the perpetrators inherently need to maintain control over their victims, often through some manner of threat or manipulation *intended to affect the victim's future behavior*.[2] In any kind of ongoing interpersonal relationship, it simply makes no sense to pretend that one interaction is irrelevant to subsequent interactions, and this is *especially* so in familial relationships or any other relationship involving authority, control, or influence over another person.[3] Situations involving serial acts of

[2] See, e.g., National Center for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse*, *Third Edition* (Thousand Oaks: 2004), pp 13-15; Hamby & Grych, *The Complex Dynamics of Victimization: Understanding Differential Vulnerability Without Blaming the Victim*, to appear in Cuevas & Rennison, eds, *The Wiley Handbook on the Psychology of Violence* (West Sussex: John Wiley & Sons, Ltd, 2016), pp 66-81; 1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014), p 124.

[3] For example, intimate partner violence is overwhelmingly chronic. See, generally, Rand & Saltzman, *The Nature and Extent of Recurring Intimate Partner Violence Against Women in the United States*, 34(1) J Comp Fam Stud 137 (2003). Controlling behaviors are, unsurprisingly, associated with the infliction of physical or sexual violence within relationships. Catallozzi et al, *Understanding Control in Adolescent and Young Adult Relationships*, 165(4) Archives of Pediatrics & Adolescent Med 313 (2011). Furthermore, experiencing violence physically alters young brains to become more sensitive to further threats and more prone to future psychological problems, much like soldiers exposed to combat stresses. McCrory et al, *Heightened Neural Reactivity to Threat in Child Victims of Family Violence*, 21(23) Current Biology R947 (2011). It should be obvious that *any* hostile environment from which a person

abuse over time are not mere transactions, but are deeply and fundamentally interconnected. To regard the individual acts as discrete and separable ignores both the research and common sense. Acts of extraordinary brutality or terror during any particular act of abuse inherently pertain to future acts of abuse perpetrated against the same victim.

Nowhere has the Legislature explicitly stated that scorable conduct must have occurred during the offense. Rather, the statute requires that 50 points be assessed if the defendant engaged in sadism, torture, excessive brutality, or other conduct designed to increase fear and anxiety during the offense. Furthermore, nowhere has the Legislature required that such conduct pertain to *only* the sentencing offense, to the exclusion of others. Defendant unquestionably engaged in conduct designed to increase the victim's fear and anxiety during the sentencing offense.[4] Because that conduct pertained to the sentencing offense and met the statutory requirements for assessing points

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cannot escape is, for all practical purposes, little more than a form of torture, with the net effect of causing a progressive depletion of that person's ability to cope. Involvement, as either a victim or a perpetrator, in any individual offense within the context of such ongoing abuse is intrinsically and qualitatively different from involvement in a criminal act that actually can be severed from other criminal acts. I am concerned by the majority's dismissal of these facts as some kind of emotional plea.

[4] In my view, defendant engaged in conduct for the purpose of increasing the fear and anxiety the victim suffered during the offense beyond what such a victim might ordinarily be expected to suffer during that offense. See *Hardy*, 494 Mich at 439-443. This, of course, may be inferred from circumstantial evidence. *Id*. at 440 n 26. While the majority asserts that it is not appropriate to consider whether defendant's conduct was designed to substantially increase the victim's fear and anxiety, appellate courts generally do not reverse when the trial court reached the right result for a wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998). Accordingly, I would affirm defendant's sentence.

under OV 7, I conclude that the trial court properly scored OV 7 at 50 points.[5] I would, therefore, affirm the trial court.

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[5] I appreciate that in light of our Supreme Court's recent decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), facts that increase a defendant's minimum sentence range under the guidelines must be admitted by the defendant or found by a jury. The instant case features a situation seemingly unaddressed by *Lockridge*, in which defendant did not, strictly speaking, personally admit facts directly to the sentencing court. However, defendant expressly agreed to the trial court's reliance on the police report for the no-contest plea-taking procedure and has not made any contention that the trial court's *factual* findings were incorrect or improper. I would consider his acceptance of this procedure as an admission, and I perceive no constitutional infirmity under *Lockridge*.

HUDSONVILLE CREAMERY & ICE CREAM COMPANY, LLC v DEPARTMENT OF TREASURY

Docket No. 322968. Submitted November 10, 2015, at Lansing. Decided March 29, 2016, at 9:05 a.m.

Hudsonville Creamery & Ice Cream Company, LLC, filed a petition in the Tax Tribunal against the Department of Treasury, alleging that the department improperly calculated the tax liability it owed under the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., for the tax year 2008. To offset its tax liability for that year, Hudsonville Creamery had sought a refund under MCL 208.1437(18) of the BTA through the carryforward of brownfield redevelopment tax credits issued to it under the former Michigan Single Business Tax Act (SBTA), MCL 208.1 *et seq*., which the department denied. The tribunal granted summary disposition in favor of the department, drawing a distinction between the treatment of credits and the carryforward of credits for purposes of a refund under MCL 208.1437(18). It concluded that while MCL 208.1437(18) allowed credits to be refunded to offset tax liability under the BTA, the subsection did not allow a refund for the carryforward of the credits Hudsonville Creamery had earned under the SBTA. Hudsonville Creamery appealed.

The Court of Appeals *held*:

1. As initially enacted, the BTA did not allow qualified taxpayers or assignees to seek a refund of credits or unused carryforward credits allowed under MCL 208.1437. Instead, MCL 208.1437(18) provided that if the credit allowed under MCL 208.1437 for the tax year and any unused carryforward of the credit allowed under MCL 208.1437 exceeded the qualified taxpayer's or assignee's tax liability for the tax year, those credits and unused carryforward credits could be carried forward to offset tax liability in subsequent tax years for 10 years, or until used up, whichever occurred first. However, 2008 PA 89 amended MCL 208.1437(18), which then provided that after a certain date, if the credit allowed under MCL 208.1437 for the tax year exceeded the qualified taxpayer's tax liability for the tax year, the qualified taxpayer could elect to have the excess refunded at a rate of 85% of that portion of the credit that exceeded the tax liability of the

qualified taxpayer for the tax year in exchange for forgoing the remaining 15% of the credit and any carryforward.

2. The BTA does not define the word credit. MCL 208.1103 of the BTA directs that an undefined term in the BTA has the same meaning as when used in comparable context in federal income tax laws. Under the Internal Revenue Code, 26 USC 38(1) in part defines general business credits as the business credit carryforwards carried to that year. The tribunal erred by concluding that Hudsonville Creamery could not claim a refund under MCL 208.1437(18) for the brownfield redevelopment tax credit carryforwards it was issued under the SBTA. Relying on the Internal Revenue Code for guidance, the term tax credit is a broad concept that unequivocally includes a credit carryforward. Therefore, for purposes of determining whether a refund was available under MCL 208.1437(18), the phrase "if the credit allowed under this section for the tax year exceeds the qualified taxpayer's tax liability for the tax year" included Hudsonville Creamery's credit carryforwards that originated under the SBTA.

3. This Court's decision in *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1 (2015), supports the inclusion of credit carryforwards in the definition of those credits that were eligible for a refund under MCL 208.1437(18) because, in the context of sequencing credits under a different section of the BTA, this Court previously concluded in part that the word credit encompassed a carryforward of a credit earned under the SBTA. The plain language of the fifth sentence of MCL 208.1437(18), which allows credit carryforwards to be claimed against the tax imposed under the BTA, also supports the conclusion that Hudsonville Creamery's carryforward of the brownfield redevelopment credits issued under the SBTA were credits for purposes of MCL 208.1437(18) and as such qualified for a refund under that section, regardless of the fact that the credits were carried forward from another tax year. The omission of the word "carryforward" from the sixth sentence of MCL 208.1437(18), which allows for a refund if the credit allowed under MCL 208.1437(8) exceeded the qualified taxpayer's liability for the tax year, does not compel a different result because tax credits in a given year were commonly understood under the BTA to include carryforwards like the one in this case. In addition, had the Legislature intended to exclude credit carryforwards from refunds under MCL 208.1437(18), it could have expressed that intention when it amended the BTA but chose not to do so.

Reversed and remanded.

METER, P.J., dissenting, disagreed with the majority's analysis of MCL 208.1437(18). The first sentence of the subsection allows certain credits and the carryforward of credits to be carried forward in subsequent years but not refunded, but the sixth sentence of the subsection only allows for a refund if the credit allowed under MCL 208.1437(18) exceeded the taxpayer's tax liability for the tax year. While the first sentence contains language allowing qualified taxpayers to carry forward both credits allowed under that subsection and any unused carryforward of the credits under that subsection, the sixth sentence only contains language allowing qualified taxpayers to elect to have excess credits allowed under MCL 208.1437(18) refunded. The Legislature's omission of the words "unused carryforward of credits" in the sixth sentence was intentional. The language of the sixth sentence—the credit allowed under this section for the next year—would be rendered nugatory if it were interpreted to include credits carried over from other years. The majority's reliance on *Ashley Capital* was unpersuasive because that case did not address the interpretation of the sixth sentence of MCL 208.1437(18). Judge METER found no merit in the other issue raised by Hudsonville Creamery involving former MCL 208.38g(34)(c) and would have affirmed the tribunal's decision.

TAXATION — BUSINESS TAXES — TAX CREDITS — REFUNDS — CARRYFORWARD OF CREDITS.

Under MCL 208.1437(18) of the Michigan Business Tax Act, MCL 208.1101 *et seq*., if the credits allowed under MCL 208.1437 for the tax year exceed the qualified taxpayer's tax liability for that year, the qualified taxpayer may seek a refund of the excess; for purposes of calculating whether the credits allowed under MCL 208.1437 exceed a qualified taxpayer's tax liability for that year, MCL 208.1437(18) provides that the credits allowed for the tax year include the carryforward of brownfield redevelopment credits issued in prior years under the former Michigan Single Business Tax Act, MCL 208.1 *et seq*.

Warner Norcross & Judd LLP (by *Matthew T. Nelson*, *Christian E. Meyer*, and *Thomas M. Amon*) for petitioner.

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

Legal Counsel, and *Emily C. Zillgitt*, Assistant Attorney General, for respondent.

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

BECKERING, J. Petitioner, Hudsonville Creamery & Ice Cream Company, LLC, appeals as of right the decision of the Michigan Tax Tribunal (MTT), which granted summary disposition to respondent, Department of Treasury, and denied petitioner's motion for the same. At issue in this case is whether certain brownfield tax credits issued to petitioner under the former Michigan Single Business Tax Act (SBTA), MCL 208.1 *et seq*., are eligible for a refund under MCL 208.1437(18) of the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*.[1] Because the common understanding of the term "credit" as it is used in MCL 208.1437(18) encompasses a carryforward, and because that statute permits an 85% refund for credits, without limitation, we hold that petitioner was entitled to a refund of 85% of its brownfield credits in the 2008 tax year. Accordingly, we reverse and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2005, petitioner invested over $8 million in an approved brownfield redevelopment project under MCL 208.38g(2). Respondent issued petitioner a certificate of completion, indicating that petitioner, a "qualified taxpayer" under the SBTA, was eligible to

[1] Although the MBTA was repealed for most business tax filers on January 1, 2012, some businesses were permitted to continue filing MBTA returns in order to claim refundable tax credits. 2011 PA 39. The MBTA will be fully repealed when the last of those credits are claimed. See 2011 PA 39, enacting § 1 (stating that the MBTA "is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certification credit or any carryforward from that certificated credit has been claimed").

claim a brownfield redevelopment credit under MCL 208.38g. Accordingly, petitioner received $800,000[2] in brownfield redevelopment credits under the now-repealed SBTA.

Petitioner did not have any tax liability on its 2005, 2006, or 2007 SBTA returns, and as a result it did not have tax liability against which to apply its brownfield redevelopment credits. Having no SBTA tax liability for 2005-2007, petitioner carried forward its SBTA credits as allowed by former MCL 208.38g(15).[3] Thereafter, the Legislature repealed the SBTA and implemented the MBTA for tax years beginning after December 31, 2007. See 2006 PA 325.[4]

This case involves MCL 208.1437(18) of the MBTA. As originally enacted, the statute permitted a qualified taxpayer to carry forward brownfield redevelopment credits earned under the SBTA, but did not permit a refund of those credits. However, the Legislature subsequently amended the act, 2008 PA 89, and allowed for a refund in certain situations. MCL 208.1437(18) provides:

> Except as otherwise provided under this subsection, if the credit allowed under this section for the tax year and any unused carryforward of the credit allowed under this section exceed the qualified taxpayer's or assignee's tax liability for the tax year, that portion that exceeds the tax

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[2] Of the $800,000, $562,685 was issued to petitioner and the remaining $237,315 was issued to Landmark Center, LLC. Although the relationship between petitioner and Landmark LLC is unclear from the record, it appears undisputed that petitioner has standing to pursue litigation with regard to the total amount of credits.

[3] Although MCL 208.38g(15) allowed unused credits to be carried forward, it did not permit a refund of those unused credits.

[4] In 2011 PA 39, the Legislature enacted legislation to repeal the MBTA and replace the act with the corporate income tax act, MCL 206.601 *et seq*.

> liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first. Except as otherwise provided in this subsection, the maximum time allowed under the carryforward provisions under this subsection begins with the tax year in which the certificate of completion is issued to the qualified taxpayer. If the qualified taxpayer assigns all or any portion of its credit approved under this section, the maximum time allowed under the carryforward provisions for an assignee begins to run with the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. The maximum time allowed under the carryforward provisions for an annual credit amount for a credit allowed under subsection (4) begins to run in the tax year for which the annual credit amount is designated on the certificate of completion issued under this section. A credit carryforward available under section 38g of former 1975 PA 228 that is unused at the end of the last tax year may be claimed against the tax imposed under this act for the years the carryforward would have been available under former 1975 PA 228. *Beginning on and after April 8, 2008, if the credit allowed under this section for the tax year exceeds the qualified taxpayer's tax liability for the tax year, the qualified taxpayer may elect to have the excess refunded at a rate equal to 85% of that portion of the credit that exceeds the tax liability of the qualified taxpayer for the tax year and forgo the remaining 15% of the credit and any carryforward*. [Emphasis added.][5]

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[5] The emphasized refund provision was added by 2008 PA 89, which enacted the version of the statute that was in effect at the time petitioner filed its 2008 MBTA tax return. The Legislature has since made minor modifications to the statute in 2008 PA 578—adding the date of the amendatory act—and in 2009 PA 241—fixing an apparent typographical error. For ease of reference, and because the most recent version of the statute does not contain any substantive differences from the version that was in effect at the time petitioner filed its 2008 tax return, this opinion will refer to the most recent version of the statute unless otherwise noted.

When petitioner filed its 2008 MBTA tax return, it claimed a credit of $71,306 against its MBTA liability and, pursuant to MCL 208.1437(18), elected a refund of 85% of its remaining SBTA credits. At the time, petitioner sought a refund of $619,390[6] on its 2008 MBTA tax return for its brownfield redevelopment credits.[7]

In December 2011, respondent denied petitioner's request for the $619,390 refund. Respondent took the position that the credit was nonrefundable and could only be carried forward. According to respondent, a qualified taxpayer could only elect a refund for the tax year in which a certificate of completion of the brownfield redevelopment was received. On petition to the MTT, the MTT drew a distinction between credits and credit carryforwards under MCL 208.1437(18), concluding that refunds are only available for credits and not for the carryforward of a credit that was earned under the SBTA. On this basis, the MTT granted respondent's motion for summary disposition and denied petitioner's motion for summary disposition. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

The critical issue in this case is whether a carryforward of a credit earned under the SBTA is refundable as a "credit" under MCL 208.1437(18) of the MBTA.

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[6] This amount represents the total carryforward credit of $800,000, minus the claimed credit of $71,306, for a remaining carryforward credit of $728,694. Eighty-five percent of $728,694 is $619,390.

[7] Subsequently, and with the idea that its refund request might not be granted, petitioner made what it termed "protective elections" in the amount of $125,698 on its MBTA returns for the 2009–2011 tax years, seeking to use its SBTA credit carryforwards to offset its MBTA liability for those years.

"Where fraud is not claimed, we review the [MTT's] decision for misapplication of the law or adoption of a wrong principle." *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 568; 861 NW2d 347 (2014) (citation and quotation marks omitted). When statutory interpretation is involved, as it is in the instant case, our review is de novo. *Id*. at 569. See also *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Id*. at 76. The first step in the analysis is to examine the plain language of the statute at issue. *Id*. "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *Mid-American Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) (citations and quotation marks omitted; alteration in original). In addition, this Court should avoid a construction that would render any part of the statute surplusage or nugatory. *Id*. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. at 369-370.

B. MCL 208.1437(18)

At issue in this case is the interpretation of MCL 208.1437(18), which provides:

> Except as otherwise provided under this subsection, if the credit allowed under this section for the tax year and any unused carryforward of the credit allowed under this section exceed the qualified taxpayer's or assignee's tax liability for the tax year, that portion that exceeds the tax

> liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first. Except as otherwise provided in this subsection, the maximum time allowed under the carryforward provisions under this subsection begins with the tax year in which the certificate of completion is issued to the qualified taxpayer. If the qualified taxpayer assigns all or any portion of its credit approved under this section, the maximum time allowed under the carryforward provisions for an assignee begins to run with the tax year in which the assignment is made and the assignee first claims a credit, which shall be the same tax year. The maximum time allowed under the carryforward provisions for an annual credit amount for a credit allowed under subsection (4) begins to run in the tax year for which the annual credit amount is designated on the certificate of completion issued under this section. A credit carryforward available under section 38g of former 1975 PA 228 that is unused at the end of the last tax year may be claimed against the tax imposed under this act for the years the carryforward would have been available under former 1975 PA 228. *Beginning on and after April 8, 2008, if the credit allowed under this section for the tax year exceeds the qualified taxpayer's tax liability for the tax year, the qualified taxpayer may elect to have the excess refunded at a rate equal to 85% of that portion of the credit that exceeds the tax liability of the qualified taxpayer for the tax year and forgo the remaining 15% of the credit and any carryforward*. [Emphasis added.]

The refund provision at issue appears in the last sentence of MCL 208.1437(18). That sentence provides that in the event "the credit allowed under this section for the tax year exceeds the qualified taxpayer's tax liability for the tax year," that qualified taxpayer "may elect to have the excess *refunded* . . ." at a rate of 85%, in exchange for forgoing the remaining percentage of the credit and any carryforward. The pertinent inquiry in determining whether a refund can be obtained is

whether that which is sought to be refunded—a carryforward of credit that originated under the SBTA—qualifies as a "credit allowed under this section."

C. WHAT CONSTITUTES A "CREDIT ALLOWED UNDER THIS SECTION"?

To determine what constitutes a "credit allowed under this section"—and whether that includes a credit carryforward—the meaning of the words "credit" and "carryforward" are of critical importance. Neither word is defined by the MBTA. MCL 208.1103 provides that when a term is not defined in the MBTA, that term "shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required." Turning to the Internal Revenue Code, 26 USC 38 describes what constitutes a "general business credit"; business credits are at issue in this case. Notably, 26 USC 38(a) provides that:

> There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of—
>
> (1) *the business credit carryforwards carried to such taxable year*,
>
> (2) the amount of the current year business credit, plus
>
> (3) the business credit carrybacks carried to such taxable year. [Emphasis added.]

Thus, under the Internal Revenue Code, a tax credit for a given tax year is designed to be a broad concept that includes certain defined components. One of those components is unequivocally a credit carryforward. See 26 USC 38(a)(1). This understanding borrowed from the Internal Revenue Code demonstrates that the

"credit allowed under [MCL 208.1437(18)]" includes credit that has been carried forward from a prior year to the taxable year. Consequently, the common and ordinary understanding of "credit" and "carryforward" supports the idea that a carryforward is considered a credit for a given tax year.

The idea that a credit—and thus, a "credit allowed under this act"—is an encompassing term that includes carryforwards of credits is buttressed by this Court's opinion in *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1; 884 NW2d 848 (2015). That case, which admittedly did not involve the precise statutes at issue in this case, dealt with the sequence in which credits are to be applied under the MBTA. The respondent in that case—the Department of Treasury—argued that "credits" under the MBTA did not include the "brownfield rehabilitation credits and *carryforward credits that originated under the SBTA*." *Id*. at 5 (emphasis added). In particular, the respondent argued that "the Legislature intended a textual distinction between a 'carryforward' from the SBTA and a 'credit' under the [M]BTA; that is, those credits carried forward from the SBTA cannot be considered 'credits' for purposes of the [M]BTA." *Id*. at 9. In other words, the respondent took a position very similar to the one it takes in this appeal: a carryforward of a brownfield redevelopment credit earned under the SBTA should not be considered a credit under the MBTA.

The panel in *Ashley Capital* rejected this argument, explaining:

> This argument from the Department draws a distinction without a difference. Under the [M]BTA, carryforward credits, brownfield rehabilitation credits, investment credits, and compensation credits *were all available to offset*

> *taxpayer liability under the* [*M*]*BTA. The mere fact that some credits were carried forward by the Legislature from the SBTA does not alter the clear fact that such carryforwards are nonetheless credits which, like other credits, may be used under the* [*M*]*BTA to offset liability arising under the* [*M*]*BTA*. Indeed, MCL 208.1403(1) referred broadly to "*any* other credit under this act" (emphasis added) and it made no distinction between those credits carried forward from the SBTA and those originating under the [M]BTA. We decline to read such language into the statute. [*Id*. at 9-10 (emphasis added).]

Thus, the panel in *Ashley Capital* expressly rejected the idea that a "carryforward" should not be encompassed within the term "credit." Although the case at bar involves a different section of the MBTA, the decision in *Ashley Capital* is nevertheless instructive because it touched on the heart of the dispute in this case. That is, it weighed in on the issue of whether a credit, as the term is commonly understood in the MBTA, encompasses a carryforward of a credit earned under the SBTA.

In addition to the idea that a carryforward is a credit, it is apparent from the plain language of MCL 208.1437(18) that the particular carryforward at issue in this case qualifies as a "credit allowed under this section." The fifth sentence of MCL 208.1437(18) addressed the type of carryforward at issue in this case, providing that "[a] credit carryforward available under section 38g of former 1975 PA 228[8] that is unused at the end of the last tax year *may be claimed against the tax imposed under this act* for the years the carryforward would have been available under former 1975 PA 228." (Emphasis added.) The key phrase in this sentence is that the credit carryforward "*may be claimed*

[8] This is a reference to MCL 208.38g of the former SBTA, under which the credits at issue in this case were earned.

against the tax imposed under this act." That the credit carryforward may be claimed against the tax imposed under the act, i.e., may be subtracted from one's tax liability, makes it apparent that the particular carryforward at issue in this case was intended to function as a credit against liability imposed under the MBTA. In other words, a credit earned under the SBTA and subsequently carried forward and claimed against MBTA liability is, according to the plain language of MCL 208.1437(18), a "credit allowed under this section."

Furthermore, it is apparent from the plain language of the statute that the carryforward at issue was a "credit allowed under this section *for the tax year* . . . ." MCL 208.1437(18) (emphasis added). As noted, 26 USC 38(a)(1) describes a carryforward as a credit for purposes of "the taxable year . . . ." And on the subject of what constitutes the "tax year," the MBTA in part defines "the term" to mean "the calendar year, or the fiscal year ending during the calendar year, upon the basis of which the tax base of a taxpayer is computed under this act." MCL 208.1117(4). A carryforward of a credit is available for use in a given tax year, meaning that it can appropriately be considered in calculating tax liability in "the tax year." Hence, the fact that something is a credit carried forward from another tax year does not negate the idea that it is nevertheless a credit "allowed under this section for the tax year." In this sense, we disagree with the dissent's conclusion that the phrase "for the tax year" is rendered nugatory if it is interpreted to include credits carried forward from other years.

D. PETITIONER WAS ENTITLED TO THE CLAIMED REFUND

In light of the conclusion that the common and ordinary understanding of the term "credit" includes a

carryforward of a credit from a prior year, and in light of the express language in MCL 208.1437(18) that describes the credit carryforward at issue in this case as a credit under the pertinent section, we conclude that petitioner was entitled to the refund it claimed. The last sentence of MCL 208.1437(18) provides a refund for a "credit allowed under this section for the tax year" if such credit "exceeds the qualified taxpayer's liability for the tax year." Put simply, a "credit" allowed under the act encompasses a credit that has been carried forward to the taxable year. Further, there can be no dispute that the credit carryforward at issue in this case was considered a "credit allowed under" the appropriate section. Consequently, we hold that petitioner was correct in its election of an 85% refund of its SBTA credit carryforwards and that it was entitled to a refund under the last sentence of MCL 208.1437(18).

In concluding that petitioner is not entitled to a refund under MCL 208.1437(18), the dissent juxtaposes the first and last sentences of the statute. In this regard, the dissent notes that the first sentence of the statute refers to both credits and carryforwards: "[I]f the *credit* allowed under this section for the tax year *and any unused carryforward* of the credit allowed under this section exceed the qualified taxpayer's or assignee's tax liability for the tax year . . . ." MCL 208.1437(18) (emphasis added). In contrast, the sixth sentence—the sentence providing a refund option—refers only to "*the credit* allowed under this section for the tax year . . ." and makes no mention of carryforwards. *Id*. (emphasis added). The dissent concludes that the omission of the word "carryforward" from the sixth sentence was intentional and signals the Legislature's intent not to permit refunds of credit in the form of carryforwards.

We do not find the use of the words "credit" and "carryforward" in the first sentence of MCL 208.1437(18) to be compelling when interpretating the word "credit" in the last sentence of that subsection. Again, tax credits in a given year are commonly understood to include carryforwards. Moreover, it is apparent that the particular credit at issue—one that is carried forward from the SBTA—is expressly treated as a "credit under this section." Therefore, it is also apparent that the carryforward sought to be refunded in this case is, without limitation, a credit. The dissent's interpretation essentially requires the conclusion that the carryforward is a credit for certain purposes but, at the same time, is not a credit for other purposes, simply because of a different sentence in the same statute. Such an interpretation is not supported by the plain language of the statute.

Furthermore, we find the history of the legislation at issue to be pertinent and instructive on this point. As originally enacted, MCL 208.1437(18) lacked a refund option. The subsection provided that:

> If the credit allowed under this section for the tax year and any unused carryforward of the credit allowed under this section exceed the qualified taxpayer's or assignee's tax liability for the tax year, that portion that exceeds the tax liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first. Except as otherwise provided in this subsection, the maximum time allowed under the carryforward provisions under this subsection begins with the tax year in which the certificate of completion is issued to the qualified taxpayer. If the qualified taxpayer assigns all or any portion of its credit approved under this section, the maximum time allowed under the carryforward provisions for an assignee begins to run with the tax year in which the assignment is made and the assignee first claims a

> credit, which shall be the same tax year. The maximum time allowed under the carryforward provisions for an annual credit amount for a credit allowed under subsection (4) begins to run in the tax year for which the annual credit amount is designated on the certificate of completion issued under this section. A credit carryforward available under section 38g of former 1975 PA 228 that is unused at the end of the last tax year may be claimed against the tax imposed under [sic] act for the years the carryforward would have been available under former 1975 PA 228. [2007 PA 36.]

Later, in 2008 PA 89, the Legislature added the refund provision at issue in this case, as well as the prefatory language of "[e]xcept as otherwise provided under this subsection . . . ." Therefore, the refund option, with its broad reference to "credit allowed under this section," is a later-enacted provision that allows the taxpayer to elect to liquidate the taxpayer's net excess credit (i.e., that which "exceeds the qualified taxpayer's tax liability for the year") and have 85% of the excess amount refunded in exchange for forgoing the remaining 15% and the option of any carryforward. The Legislature could have expressed an intent to prohibit the refund of credits from carryforwards when it adopted this new refund provision, but it did not. Instead, it used the broad and encompassing term of "credit" when providing an option to liquidate a taxpayer's "credit allowed under this section for the tax year . . . ." There is no discernable explanation from reading the plain language of the text why there would be any reason to differentiate and treat credits differently on the basis of when they were earned. The provision at issue expressly provides that it applies to "credit allowed under this section for the tax year"; it does not state that it applies to credit allowed under this section and *earned during* the tax year. So long as the credit in question qualifies as a "credit allowed under this section"—which the

carryforward of brownfield credits in the instant case does—the statute permits the election of an 85% refund option. We decline to read into the last sentence of MCL 208.1437(18) a prohibition on claiming a refund of credit from carryforwards when such prohibition is not apparent from the plain language of the statute.

III. CONCLUSION

In light of this analysis, we reverse the decision of the MTT and hold that petitioner was entitled to its elected refund for the 2008 tax year. Accordingly, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.[9]

BORRELLO, J., concurred with BECKERING, J.

METER, P.J. (*dissenting*). I respectfully dissent. In my opinion, the Michigan Tax Tribunal (MTT) properly applied the principles of statutory construction in interpreting MCL 208.1437(18).

As noted by the majority, petitioner claimed a refund for 85% of the remainder of its brownfield redevelopment credits pursuant to the following provision:

> [I]f the credit allowed under this section for the tax year exceeds the qualified taxpayer's tax liability for the tax year, the qualified taxpayer may elect to have the excess refunded at a rate equal to 85% of that portion of the credit that exceeds the tax liability of the qualified taxpayer for the tax year and forgo the remaining 15% of the credit and any carryforward. [MCL 208.1437(18).]

Respondent denied petitioner's claim for a refund under this provision because respondent construed the

[9] In light of our resolution of this issue, we find it unnecessary to address petitioner's remaining claims.

provision as excluding refunds for credits earned under the Michigan Single Business Tax Act, MCL 208.1 *et seq.*,[1] like those at issue in this case, and carried forward. The MTT agreed.

The primary goal of statutory construction is to determine the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). To determine the Legislature's intent, this Court examines the specific language of the statute. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 177; 617 NW2d 735 (2000). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011) (citations and quotation marks omitted).

An examination of the specific language of the statute at issue indicates that the Legislature did not intend to provide a refund for credit carryforwards. The first sentence of MCL 208.1437(18) states, "[I]f *the credit allowed under this section for the tax year and any unused carryforward of the credit allowed under this section* exceed the qualified taxpayer's or assignee's tax liability for the tax year, that portion that exceeds the tax liability for the tax year shall not be refunded but may be carried forward to offset tax liability in subsequent tax years for 10 years or until used up, whichever occurs first." (Emphasis added.) The word "and" means "in addition to[.]" *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 85; 817 NW2d 621 (2012). The sixth sentence of MCL 208.1437(18), which petitioner

[1] The Single Business Tax Act was repealed by 2006 PA 325, effective December 31, 2007.

relies on for a refund, states: "[I]f *the credit allowed under this section for the tax year* exceeds the qualified taxpayer's tax liability for the tax year, the qualified taxpayer may elect to have the excess refunded . . . ." (Emphasis added.) Importantly, the sixth sentence does *not* contain a reference to an *unused carryforward of the credit* allowed under the section. "The omission of a provision in one part of a statute that is included in another should be construed as intentional . . . ." *People v Barrera*, 278 Mich App 730, 741; 752 NW2d 485 (2008) (citations and quotation marks omitted).

The fact that the Legislature included the phrase "and any unused carryforward" in the first sentence of MCL 208.1437(18) but did not include that phrase in the sixth sentence of that subsection indicates that the Legislature intended the first portion of MCL 208.1437(18) to apply to both "credit allowed under this section for the tax year" and "unused carryforward of the credit allowed under this section" but intended the refund portion at issue to apply only to "the credit allowed under this section for the tax year . . . ."

I acknowledge that petitioner appears to be correct that a carryforward is a type of credit rather than something wholly distinct from a credit. However, this does not lead to the conclusion that when the statute distinctly refers to "the credit allowed under this section for the tax year," it also is referring to an unused carryforward of credit. As discussed, the inclusion of the term "carryforward" in the first sentence, when compared to the omission of that term in the sixth sentence, indicates that the omission was intentional. Importantly, if this Court were to interpret the refund portion of the statute as argued by petitioner and apply it to all credits, it would render some of the statutory language nugatory. The language used in the

sixth sentence of MCL 208.1437(18) is "the credit allowed under this section for the tax year . . . ." The phrase "for the tax year" would be rendered nugatory if it were ignored in order to include credits carried over from other years. Every phrase in a statute must be given effect so as not to render any part of the statute nugatory. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004). Had the Legislature intended to include carryforward credits in the provision allowing for refunds, i.e., the sixth sentence, it could have included language indicating that intent just as it did in the first sentence. See, generally, *Gray v Chrostowski*, 298 Mich App 769, 777; 828 NW2d 435 (2012).

There is no dispute that petitioner's credits were carryforward credits. Therefore, I conclude that there was no genuine question of material fact that petitioner could not receive a refund under the statute at issue and that the MTT properly granted respondent's motion for summary disposition. I find unpersuasive the nonbinding caselaw and inapposite statute cited by petitioner. I also find unpersuasive petitioner's reliance on *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1; 884 NW2d 848 (2015). In that case, while the Court discussed credits and carryforward credits, it simply did not address the issue we face today, i.e., the interpretation of the last sentence of MCL 208.1437(18). Finally, I have considered the additional issue, involving former MCL 208.38g(34)(c), that petitioner raised at an informal conference and have found it to provide no basis for reversal.

I would affirm.

LYMON v FREEDLAND

Docket No. 323926. Submitted January 13, 2016, at Lansing. Decided March 29, 2016, at 9:10 a.m. Leave to appeal sought.

Joyanna Lymon brought an action in the Washtenaw Circuit Court against Karen Freedland, Jim Freedland, and the Karen Freedland Trust for injuries sustained when she slipped and fell on defendants' driveway after arriving on a January evening to provide in-home healthcare services for Karen's mother, an elderly patient who required round-the-clock care. Defendants moved for summary disposition, arguing that the ice- and snow-covered driveway was an open-and-obvious danger, that the driveway did not contain special aspects that created an unreasonable risk of severe injury or death, and that the driveway was not effectively unavoidable because plaintiff could have taken an alternate route by walking on the snow-covered front yard next to the driveway. At the conclusion of a hearing held on June 5, 2014, the court, Archie C. Brown, J., denied defendants' motion, determining that a question of fact existed as to whether the alternate route was truly unobstructed—and therefore whether the driveway was effectively unavoidable—because a large bush was located in the front yard and because the yard itself presented slippery conditions. On June 26, 2014, defendants filed a motion for immediate consideration, an emergency application for leave to appeal, and a motion to stay trial pending appeal. The Court of Appeals, SHAPIRO, P.J., and MARKEY and BECKERING, JJ., granted the motion for immediate consideration, denied the application for leave to appeal for failure to persuade of the need for immediate review, and denied the motion to stay trial pending appeal in an unpublished order, issued September 19, 2014 (Docket No. 322440). The parties agreed to forgo trial and finalize the case to allow defendants to appeal the June 5, 2014 order as of right, agreeing that the total amount of plaintiff's damages, prejudgment interest, costs, and attorney fees was $330,000, payment contingent on the outcome of defendants' appeal. On September 25, 2014, the trial court entered judgment in favor of plaintiff conditioned on the premise that defendants preserved their right to appeal. Defendants appealed the judgment as of right.

The Court of Appeals *held*:

1. Michigan caselaw distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. Reading plaintiff's complaint as a whole, it was apparent that plaintiff's complaint sounded in premises liability because she alleged that her injury arose from a condition on the land—i.e., the icy driveway. The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his or her land. With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. In the context of ice and snow, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. However, the possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard. Whether a danger is open and obvious involves an objective inquiry to determine whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. Although ice is transparent and difficult to observe in many circumstances, wintry conditions, like any other condition on the premises, may be deemed open and obvious. As a matter of law, a snow-covered surface by its very nature presents an open-and-obvious danger because of the high probability that it may be slippery. Defendants' steep, ice-covered driveway was an open-and-obvious danger.

2. Even if a condition amounts to an open-and-obvious danger, liability may arise when special aspects of a condition make an open-and-obvious risk unreasonable. When special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that unreasonable risk of harm. Two instances that can constitute special aspects include when the danger is unreasonably dangerous or when the danger is effectively unavoidable because these conditions give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided. When a plaintiff demonstrates that a special aspect existed, tort recovery may be permitted if the defendant breached his or her duty of reasonable care.

3. Although slippery conditions coupled with the nature of the sloped driveway presented unsafe conditions, an extraordinarily

high bar exists for a condition to constitute an unreasonable risk of harm because the condition must present a substantial risk of death or severe injury. Based on this heightened standard, courts have repeatedly held that ice and snow generally do not meet this threshold. Defendants' ice- and snow-covered driveway did not contain special aspects that created a high likelihood of harm or severity of harm.

4. An effectively unavoidable condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. Because all routes to defendants' home were covered in ice and snow, plaintiff was faced with two open-and-obvious hazards that posed a danger to her safety. As an essential home healthcare aide, plaintiff did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease, leaving plaintiff compelled to traverse one of two equally hazardous pathways. Plaintiff did not confront the hazard merely because she desired to participate in a recreational activity; instead, a rational juror could conclude that she was compelled by extenuating circumstances and had no choice but to traverse the risk. While other individuals were able to successfully navigate the slippery yard to access the home, reasonable minds could differ as to whether traversing the yard provided a viable means by which plaintiff could have effectively avoided the slippery conditions. Accordingly, the trial court did not err by denying defendants' motion for summary disposition because there was a genuine issue of material fact with regard to whether the open-and-obvious hazard in this case contained special aspects such that defendants retained a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation on the driveway and exercise reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.

Affirmed.

Bredell and Bredell (by *John H. Bredell*) for Joyanna Lymon.

Hom, Killeen, Arene, Hoehn & Bachrach (by *Joseph K. Bachrach*) and *Mary T. Nemeth, PC* (by *Mary T. Nemeth*), for Karen Freedland, Jim Freedland, and the Karen Freedland Trust.

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

BORRELLO, J. In this premises liability action, on June 5, 2014, the trial court entered an order denying defendants' motion for summary disposition under MCR 2.116(C)(10). Subsequently, the parties entered into a stipulation, forgoing trial and finalizing the case to allow defendants to appeal the June 5, 2014 order as of right. The parties agreed that the total amount of plaintiff's damages, prejudgment interest, costs, and attorney fees was $330,000, payment contingent on the outcome of defendants' appeal. Pursuant to the stipulation, on September 25, 2014, the trial court entered judgment in favor of plaintiff conditioned on the premise that defendants preserved their right to appeal. Defendants now appeal the judgment as of right, arguing that the trial court erred by denying their motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS

In November 2012, Gloria Freedland moved from an assisted-living center into her daughter Karen Freedland's home in Ann Arbor (Freedland home). Gloria was 84 years old and suffered from dementia and Parkinson's disease. Karen contracted with Interim Health Care (Interim), a healthcare staffing agency owned by Don Ottomeyer, to have healthcare aides provide in-home care for Gloria. At the time, plaintiff and Nadia Hamad worked for Interim as certified nursing aides. From November 2012 to January 2013, plaintiff worked two to three days per week for 15 hours per day at the Freedland home providing round-the-clock care for Gloria. Because of her health condi-

tion, Gloria needed constant care and could not be left alone.

The Freedland home was located on a hill and had two levels. A steep asphalt driveway located to the right of the home led to a two-stall attached garage. The garage had a door that provided access to the home and the lower level of the home where Gloria stayed. The healthcare aides entered and exited the home through the garage.

On January 1, 2013, plaintiff worked at the Freedland home. Plaintiff parked her vehicle on the street because her vehicle had previously "bottomed out" when she had attempted to traverse the driveway at the home. Plaintiff worked overnight that day and recalled that there had been rain the previous few days as well as "slippery slush" on the driveway. Plaintiff mentioned the condition of the driveway to Karen, and Karen instructed plaintiff to drive all the way up the driveway to avoid the slippery conditions. However, plaintiff explained that her vehicle could not make it up the driveway. Plaintiff left the Freedland residence on the morning of January 2, 2013, and she had to do a "penguin waddle" down the driveway to get to her vehicle. Plaintiff informed Kristen Lavagnino, the office manager at Interim, that the Freedlands' driveway was "getting bad."

Plaintiff testified that it snowed from Tuesday, January 2, 2013, to Thursday, January 4, 2013. Plaintiff was scheduled to relieve Hamad for the overnight shift on January 4, 2013, and plaintiff learned that Karen was scheduled to be out of town for the weekend. Plaintiff arrived at the Freedland residence at about 6:00 p.m. on January 4, 2013. It was dark, but plaintiff observed that the driveway was "by far" in worse shape than it had been two days before. The driveway was

covered in snow with ice build-up underneath. Plaintiff testified that she could tell the driveway and the yard apart, but she could not walk on the yard because it was on an incline. Plaintiff stated that the only way the yard could be safely traversed was "with some ski sticks maybe." Plaintiff parked on the street and proceeded to walk up the driveway toward the home. About halfway up the driveway, plaintiff slipped and fell. Plaintiff felt "a numbing, tingling like sensation," but she proceeded to get up and walk to the house. Plaintiff entered and briefly spoke with Hamad, who then departed the premises. After Hamad left, plaintiff explained that she started feeling "excruciating pain," so she called Ottomeyer and informed him that she had an emergency. Ottomeyer told plaintiff that he would drive to the Freedland home, but he stated that it would take about 20 minutes. Plaintiff could not wait for Ottomeyer, so she called her boyfriend, Desmond Jones, and asked him to come help her. Plaintiff testified that she then went into the garage and eventually ended up outside the home on the flat part of the driveway with Jones. Upon his arrival, Jones attempted to move plaintiff down the driveway to his vehicle in a sled, but he failed. At some point, plaintiff called 911, and EMT arrived at the scene with two vehicles. Plaintiff suffered a severely fractured tibia and fibula that required surgery and months of rehabilitation. Plaintiff was unable to work, and at the time of her deposition, plaintiff needed to use a walker to ambulate.

Several witnesses testified about the condition of the driveway at the Freedland residence. Hamad testified that Karen never cleared or salted the driveway and that it was icy on numerous occasions; however, Hamad stated that the top landing part of the driveway where people walked to the garage was flat, and

sometimes it was shoveled. Hamad explained that on January 4, 2014, the driveway was "cleared a little," but "there were good sheets of ice" on the driveway. She further stated that it was not salted and that it was "very icy and slippery." Hamad testified that plaintiff relieved her that evening, but plaintiff did not mention that she fell. Shortly after Hamad left the residence, she received a call from Ottomeyer, who asked her to return for the overnight shift to cover for plaintiff. Hamad agreed, and when she returned to the home, she observed EMT vehicles; plaintiff was on a stretcher screaming in pain. Hamad slipped but did not fall on the driveway and explained that she walked "on the side where the snow [was] so I didn't fall." Hamad explained that it was possible to get to the home without walking on the driveway because "you can always walk up the sides where there's snow so that you don't slip on ice, which is mostly in the middle." However, Hamad agreed that at some point a person would have to walk on the top part of the driveway to get to the door. Hamad explained that the top part of the driveway was flat and had not been as icy as the remainder of the driveway. Hamad also agreed that there was a bush in the yard that was near the driveway so that there was a very narrow path between the bush and the driveway.

Jones and Ottomeyer also testified about the condition of the driveway. Jones testified that the driveway was covered in ice that was probably over 1-inch thick. Jones attempted to drive his vehicle up the driveway, but it slid back down. Therefore, Jones explained that he walked on the snow-covered grass next to the driveway to get to the home so that he could avoid walking on the driveway. Ottomeyer testified that he and his wife arrived at the Freedland home and

observed that the driveway was icy. Both Ottomeyer and his wife walked on the yard next to the driveway to get to the Freedland home because the snow-covered grass was "not as slick." Ottomeyer testified that the driveway was always icy and slippery and that he "had asked all . . . caregivers to walk on the side [of the driveway] on the grass because it's not as slick." Ottomeyer explained that plaintiff was instructed to walk on the grass to get to the Freedland home, and he testified that plaintiff stated that she should have walked up the side on the grass. However, Ottomeyer did not recall whether the bush near the driveway obstructed part of this route.

Lavagnino testified that she went to the Freedland residence for a home visit sometime before the accident and that the driveway was slippery on that occasion. Lavagnino also testified that plaintiff raised concerns about the driveway a few days before the accident. Additionally, Lavagnino testified that she informed Ottomeyer about the slippery driveway, but she stated that she did not call Karen because Karen was going out of town. Lavagnino testified that Karen had previously instructed Interim's healthcare workers to park at the top of the driveway to avoid the ice. Lavagnino testified that it was hazardous to walk up the driveway and explained that the eaves on the roof of the home ran water to the middle of the driveway where plaintiff fell. Lavagnino agreed that a person could walk on the snow next to the driveway to avoid the driveway, but she also agreed that one would probably have to walk on part of the driveway to get around foliage that abutted the driveway.

On April 29, 2013, plaintiff commenced this action alleging that defendants negligently maintained the driveway at their premises and that traversing the

driveway was effectively unavoidable for plaintiff in the course of her employment as a home health aide.

Following discovery, on May 9, 2014, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that plaintiff's claim failed because the danger posed by the driveway was open and obvious and because there were no special circumstances that applied. In particular, defendants argued that the driveway did not create an unreasonable risk of severe injury or death because snow and ice cannot constitute an unreasonable risk of severe injury or death. In addition, defendants argued that the danger was not effectively unavoidable because plaintiff could have taken a different route to the house by walking on the snow-covered yard.

Plaintiff responded, arguing that her claim was not barred by the open-and-obvious-danger doctrine because there were special aspects related to the danger. Specifically, plaintiff argued that the driveway presented an unreasonable risk of severe injury or death because the driveway was very steep and covered in ice. Additionally, plaintiff argued that the danger was effectively unavoidable: she argued that her employment compelled her to go into the house and that there was no safe path to the house because the snow-covered area adjacent to the driveway was dangerous and presented unreasonable risks. Plaintiff maintained that she was presented with two perilous paths to the house, and therefore the danger was unavoidable.

Following oral argument, the trial court denied defendants' motion for summary disposition, explaining as follows:

> Clearly for the Court the issue is . . . to determine whether or not what we have here is in fact um--a truly special aspect. Um--I think it's a close question, frankly . . . I mean, to be effectively unavoidable, is there

> an unreasonable risk of harm given the particular facts, circumstances in this case. Well, it's clear that there's no dispute as to at least the condition of the drive being in such a way that in fact it was ice covered in parts, if not over its entirety; that clearly it had a pitch to it. Ah--there's been . . . evidence cited by Counsel . . . regarding other people who were obviously able to go up the drive and didn't fall, whereas others came on the scene and did fall, including the ambulance.
>
> . . . [I]t's clear from the case law that in fact if there's an alternate route . . . one should take it . . . just reviewing the photographs that were recited and having read the pleadings, the question becomes is that truly . . . [an] unobstructed alternate route when in fact you've got, it's obvious, a--a snow-covered and perhaps ice-covered portion that um--requires while you can go in the yard in some way . . . in order to avoid that one huge bush that would require that . . . Ms. Lymon would have to walk, oh, I can't tell the foot distance, but a significant ways in from the driveway to get around, and then it's unclear whether or not it's clear all the way to the back entrance.
>
> . . . I'm gonna deny the motion for summary disposition, finding that in fact [the hazard] . . . was effectively unavoidable. That based on the specific language of [*Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012)] and the very narrow exceptions it is drawing, this case at least falls within the ambit of the determination as to a jury as to whether or not there's negligence and/or whether or not there--the actions taken by Ms. Lymon were in fact reasonable or not.

Thereafter, the parties agreed to forgo trial as noted earlier in this opinion, and the trial court entered judgment in favor of plaintiff pending the resolution of this appeal.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition to determine whether

the moving party is entitled to judgment as a matter of law." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). "In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

III. ANALYSIS

Defendants argue that the trial court erred by denying their motion for summary disposition because plaintiff's claim failed in that the icy driveway presented an open-and-obvious hazard that did not contain special aspects.

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Ordinary negligence claims are grounded on the underlying premise that a person has a duty to conform his or her conduct to an applicable standard of care when undertaking an activity. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005) (opinion by NEFF, J.). In contrast, "[i]n a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. Thus, "[w]hen an injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability." *Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008)

(opinion by TALBOT, J.),[1] citing *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

In this case, reading plaintiff's complaint as a whole, it is apparent that plaintiff's complaint sounded in premises liability because she alleged that her injury arose from a condition on the land—i.e., the icy driveway. See *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) (noting that "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim"). Accordingly, we proceed by applying the well-established framework that governs a premises liability claim.

"The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land." *Hoffner*, 492 Mich at 460. "With regard to invitees,[2] a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Id*. In the context of ice and snow,

> a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. [*Id*. at 464 (quotation marks and citation omitted).]

However, a landowner's duty does not generally encompass defects that are "open and obvious." *Id*. at 460. "The possessor of land owes no duty to protect or

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[1] Aff'd 486 Mich 228 (2010).

[2] Neither party disputes that plaintiff was a business invitee at the Freedland residence.

warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard . . . ." *Id*. at 460-461 (quotation marks and citation omitted). Whether a danger is open and obvious involves an objective inquiry to determine "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered [the danger] upon casual inspection." *Id*. at 461.

In this case, plaintiff slipped on a steep, ice-covered driveway. Although ice is transparent and difficult to observe in many circumstances, our Supreme Court has explained that "wintry conditions, like any other condition on the premises, may be deemed open and obvious." *Id*. at 464; see also *id*. at 473 (holding that an ice-covered entryway to a fitness center was an avoidable open-and-obvious hazard); *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002) (holding that frost and ice on a roof was an open-and-obvious hazard); *Cole v Henry Ford Health Sys*, 497 Mich 881 (2014) (noting in an order that "so-called 'black ice' " in a parking lot posed an open-and-obvious hazard). Indeed, this Court has held that "as a matter of law . . . , by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

Although the driveway amounted to an open-and-obvious hazard, this does not end our inquiry because "liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable." *Hoffner*, 492 Mich at 461. "When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm." *Id*. Two instances that can constitute "special

aspects" include "when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*" because these conditions "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id*. at 463 (quotation marks and citation omitted). "[W]hen a plaintiff demonstrates that a special aspect exists or that there is a genuine issue of material fact regarding whether a special aspect exists, tort recovery may be permitted if the defendant breaches his duty of reasonable care." *Id*.

Plaintiff contends that the icy driveway contained a special aspect because the driveway presented a risk of high severity of harm such that it amounted to an unreasonably dangerous condition.

In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001), our Supreme Court provided the following illustration of an unreasonably dangerous condition:

> [C]onsider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a *substantial risk of death or severe injury* to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [Emphasis added.]

Plaintiff contends that the driveway presented an unreasonable risk of harm because it was steep and covered in snow and ice. Plaintiff also notes that eaves directed water onto the driveway. Although the slippery conditions coupled with the nature of the sloped driveway presented unsafe conditions, our Supreme Court has set an extraordinarily high bar for a condition to constitute an unreasonable risk of harm because the condition must present a "substantial risk of

death or severe injury." *Id*. Based on this heightened standard, courts have repeatedly held that ice and snow generally do not meet this threshold. See, e.g., *Perkoviq*, 466 Mich at 19-20 (holding that "[t]he mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition"); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (holding that ice-covered steps did not present a high likelihood of harm or severity of harm); *Royce v Chatwell Club Apartments*, 276 Mich App 389, 395-396; 740 NW2d 547 (2007) (holding that "[t]he risk of slipping and falling on ice is not sufficiently similar to those special aspects discussed in *Lugo* to constitute a *uniquely high* likelihood or severity of harm and remove the condition from the open and obvious danger doctrine"). Similarly, in this case, the ice- and snow-covered driveway did not contain special aspects that created a high likelihood of harm or severity of harm as set forth in *Lugo*, 464 Mich at 518.

Plaintiff also argues that the hazardous driveway was effectively unavoidable. Our Supreme Court provided an example of an "effectively unavoidable" hazard as follows:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*.]

In *Hoffner*, our Supreme Court reiterated that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Hoffner*, 492 Mich at 456.

In *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), this Court addressed whether an icy walkway was effectively unavoidable. In that case, the plaintiff, Valary Joyce, was removing personal belongings from the home of one of the defendants during snowy weather when she slipped and fell on the sidewalk leading to the front door. *Id*. at 233. The plaintiff argued, in part, that the open-and-obvious condition was effectively unavoidable because the homeowner's wife had refused to provide an alternate route, refused to provide safety measures, and refused to provide a rug for traction. *Id*. at 241. In rejecting the plaintiff's argument, this Court explained that the plaintiff could have insisted on using an alternative route or removed her personal items on another day. *Id*. at 242. This Court explained as follows:

> [U]nlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out. Joyce specifically testified that, after she slipped twice on the sidewalk, she *walked around the regular pathway* to avoid the slippery condition. Therefore, though this is a close case, Joyce's own testimony established that she could have used an available, alternative route to avoid the snowy sidewalk. While . . . [the] alleged refusal [of the homeowner's wife] to place a rug on the sidewalk or allow access through the garage, if true, may have been inhospitable, no reasonable juror could conclude that the aspects of the condition were so unavoidable that Joyce was effectively forced to encounter the condition. [*Id*. at 242-243.]

This case is dissimilar to *Joyce*. Unlike the plaintiff in *Joyce*, plaintiff in this case was compelled to enter the premises because she was a home healthcare aide who could not abandon her patient. As an essential home healthcare aide, plaintiff did not have the option of failing to appear for work. Gloria was an elderly

patient with dementia and Parkinson's disease, and plaintiff was scheduled to care for her throughout the night. Hence, abandoning Gloria was not an option, leaving plaintiff compelled to traverse two equally hazardous pathways. On the one hand, plaintiff could traverse the steep, snowy, and icy driveway. On the other hand, plaintiff could have traversed the steep yard next to the driveway, but this route also contained slippery, hazardous conditions. Evidence showed that some individuals were able to successfully navigate this route to the home, supporting the argument that the hazards on the driveway may have been avoidable. However, other evidence left open a question of fact as to whether the yard provided a viable alternative route. Evidence showed that the yard was steep and covered in snow. As this Court has previously explained, "a snow-covered surface might always, by its very nature, present an open and obvious danger because it is likely to be slippery as a result of underlying ice or for some other reason." *Ververis*, 271 Mich App at 65. Additionally, unlike in *Joyce* in which there were alternate unobstructed routes to the house, in this case, there was foliage next to the driveway that obstructed the path to the house. Hamad and Lavagnino both agreed that, because of the foliage, the alternate route would probably still require someone to traverse part of the driveway. Furthermore, unlike the plaintiff in *Joyce*, plaintiff in this case believed that she needed ski poles to traverse the alternate route at the time she arrived at the home.

Defendants cite *Hoffner*, 492 Mich 450, to support their argument that the icy driveway was not effectively unavoidable. In *Hoffner*, the plaintiff had a paid membership to a fitness club that had a single entrance serviced by a sidewalk connecting the building to the parking lot. *Id*. at 456. On a January morning in

2006, the plaintiff drove to the fitness club and noticed that the entrance to the building was icy and that the roof was dripping. *Id*. at 457. Because the entrance provided the only means of access to the building, the plaintiff traversed the ice, and in doing so, she slipped and fell, injuring her back. *Id*. In reversing both the circuit court and this Court, our Supreme Court held that the ice-covered entryway was not effectively unavoidable. *Id*. at 455-456. Our Supreme Court held that, although the plaintiff had a contractual right to enter the premises and use her membership, she was not compelled to do so, explaining that

> an "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a "special aspect" characterized by its *unreasonable risk of harm*.
>
> . . . Plaintiff freely admits that she knew that the ice posed a danger, but that she saw the danger as surmountable and the risk apparently worth assuming in order to take part in a recreational activity. Plaintiff was not forced to confront the risk, as even she admits; she was not "trapped" in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk. In other words, *the danger was not unavoidable*, or even effectively so. [*Id*. at 472-473.]

Contrary to *Hoffner*, in this case, there was a question of fact as to whether plaintiff was compelled to confront the hazardous risk posed by the snowy and icy conditions at the Freedland home. A reasonable juror could conclude that, unlike the plaintiff in *Hoffner*, plaintiff in this case did not have a choice about whether to confront the icy conditions. As a home healthcare aide, plaintiff did not have the option of

abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease. Plaintiff did not confront the hazard merely because she desired to participate in a recreational activity; instead, a rational juror could conclude that she was "compelled by extenuating circumstances" and had "no choice but to traverse . . . [the] risk." *Id*. at 473.

In short, plaintiff arrived at a premises where she was surrounded by slippery winter conditions. Our review of the record leads us to conclude that all routes to the home were covered in ice and snow. Plaintiff was faced with two open-and-obvious hazards that posed a danger to her safety. While other individuals were able to successfully navigate the slippery yard to access the home, reasonable minds could differ regarding whether traversing the yard provided a viable means by which plaintiff could have effectively avoided the slippery conditions. Accordingly, the trial court did not err by denying defendants' motion for summary disposition because there was a genuine issue of material fact as to whether the open-and-obvious hazard in this case contained special aspects such that defendants retained "a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation" on the driveway and exercise "reasonable measures . . . within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Id*. at 464 (quotation marks and citation omitted).

Affirmed. Plaintiff, having prevailed, may tax costs. MCR 7.219(A).

SHAPIRO, P.J., and O'CONNELL, J., concurred with BORRELLO, J.

SHINN v MICHIGAN ASSIGNED CLAIMS FACILITY

Docket No. 324227. Submitted March 4, 2016, at Detroit. Decided March 29, 2016, at 9:15 a.m. Leave to appeal denied 500 Mich 892.

Kelli Shinn brought an action in the Wayne Circuit Court, seeking to recover personal protection insurance (PIP) benefits, MCL 500.3105, under the no-fault act, MCL 500.3101 *et seq*., for injuries she sustained in an automobile accident. Plaintiff owned a vehicle that she parked in the street in front of her house; she did not maintain insurance on the vehicle because it had recently been repaired, and she had not been operating it. Plaintiff was sitting in the passenger seat of the vehicle with part of her body also outside the vehicle when Robert Daniels hit the rear of her vehicle with the one he was driving, injuring plaintiff. The Michigan Assigned Claims Facility (MACF) assigned plaintiff's claim for benefits to Farmers Insurance Exchange. American Country Insurance Company (ACIC) insured Daniels's vehicle. The trial court, Brian R. Sullivan, J., granted summary disposition in favor of ACIC and Farmers, concluding that plaintiff was not entitled to PIP benefits because she did not have security for the vehicle when the accident occurred as required by MCL 500.3101(1) and MCL 500.3113(b). Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 500.3105(1) provides that under PIP an insurer is liable to pay benefits for accidental injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Under MCL 500.3106(1)(c), however, accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless the injury was sustained by a person while occupying, entering into, or alighting from the vehicle. In this case, the parked-car exclusion to eligibility for PIP benefits did not prohibit plaintiff's recovery of those benefits because the parties agreed that plaintiff occupied her vehicle for purposes of MCL 500.3106(1)(c) when the accident occurred.

2. To be eligible for the payment of PIP benefits, MCL 500.3101(1) requires the owner or registrant of a motor vehicle to maintain security for the payment of those benefits, but the

security must only be in effect during the period the motor vehicle is driven or moved upon a highway. For purposes of MCL 500.3101(1), the term "period" means the completion of a cycle, a series of events, or a single action. Under MCL 500.3113(b), a person is not entitled to PIP benefits for accidental bodily injury if, at the time of the accident, the person who was the owner or registrant of the motor vehicle in the accident did not have the security required by MCL 500.3101(1). The trial court erred by granting summary disposition in favor of ACIC and Farmers on the basis that plaintiff lacked security for the vehicle when the accident occurred. Under MCL 500.3101(1), plaintiff was not required to have security on the vehicle during the period the motor vehicle was not driven or moved upon the highway; security was not required because, at the time of the accident, the vehicle had not been driven or moved on a highway for several days after being repaired and returned to the street in front of her house.

3. In terms of the order of priority for claiming PIP benefits, MCL 500.3114(4) requires a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle to first claim PIP benefits from the insurer of the owner or registrant of the vehicle occupied and second from the insurer of the operator of the vehicle occupied. ACIC was entitled to summary disposition of plaintiff's PIP-benefits claim because it was not in the order of priority of responsible insurers under MCL 500.3114(4); ACIC was the insurer of the vehicle that hit plaintiff's vehicle—it was not the insurer of the vehicle plaintiff occupied during the accident, and there was no operator of the vehicle. Farmers was not entitled to summary disposition under MCL 500.3114(4) because it was the insurer of last priority as the insurer assigned the claim by the MACF.

Affirmed in part, reversed in part, and remanded.

INSURANCE — NO FAULT — PERSONAL PROTECTION INSURANCE — SECURITY.

To be eligible for the payment of personal protection insurance benefits for accidental bodily injury arising out of a motor vehicle accident, MCL 500.3101(1) and MCL 500.3113(b) of the no-fault act, MCL 500.3101 *et seq*., require that the owner or registrant of the motor vehicle maintain security on the motor vehicle; the security only needs to be in effect during the period the motor vehicle is driven or moved upon a highway.

Law Office of Carl L. Collins III (by *Carl L. Collins III*) for Kelli Shinn.

Liedel Law Group (by *William J. Liedel* and *Ryan C. Moloney*) for American Country Insurance Company.

McDonald Pierangeli MacFarlane, PLLC (by *David M. Pierangeli*), for Farmers Insurance Exchange.

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

RONAYNE KRAUSE, P.J. In this action brought under the no-fault act, MCL 500.3101 *et seq*., plaintiff, Kelli Shinn, appeals as of right the trial court's order granting summary disposition of her claim for personal protection insurance (PIP) benefits, MCL 500.3105, in favor of defendants American Country Insurance Company (ACIC) and Farmers Insurance Exchange.[1] We affirm in part, reverse in part, and remand.

The facts in this case are not, at least for purposes of the instant summary disposition motion, disputed. Plaintiff owned a vehicle that at the time of the accident was not insured or operating. The vehicle was parked on the street in front of her house. During a walk with her baby, plaintiff opened the door to the vehicle and sat in the passenger seat; she was partially inside and partially outside the vehicle. While plaintiff was seated and partially inside the vehicle, Robert Daniels drove another car into the rear of plaintiff's vehicle. For purposes of the instant motion, there is no dispute that plaintiff was injured.[2] Likewise, there is no dispute that plaintiff was "occupying" the vehicle within the meaning of MCL 500.3106(1)(c). At issue is

[1] Plaintiff and Farmers agreed to the dismissal of the Michigan Assigned Claims Facility as a party to the action after plaintiff filed her first amended complaint.

[2] Defendants note that they do challenge the extent of plaintiff's injuries but concede that dispute is not before us at this time.

whether she is entitled to PIP benefits from either defendant. Farmers is the insurer assigned to plaintiff's claim by the Michigan Assigned Claims Facility (MACF),[3] and ACIC is the insurer of Daniels's vehicle.

The trial court granted summary disposition pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013). We review de novo decisions on motions for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> In evaluating a motion for summary disposition brought under Subrule (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition is properly granted if the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014) (citations omitted).]

"Interpretation of a statute or court rule constitutes a question of law that is also reviewed de novo." *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013). "When a statute's language is clear and unambiguous, we must apply the terms of the statute to the circumstances of the particular case . . . and we will not read words into the plain language of the statute." *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 410-411; 809 NW2d 669 (2011).

We note initially that plaintiff has not provided this Court with a transcript of the summary disposition motion hearing, nor has a certificate been filed by the court reporter verifying that the transcript has even

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[3] The Michigan Assigned Claims Facility has been succeeded by the Michigan Automobile Insurance Placement Facility. See MCL 500.3171.

been ordered. Plaintiff is therefore in violation of MCR 7.210(B)(1)(a), which constitutes a waiver of the issue. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). Nevertheless, because of the importance and meritoriousness of the issue raised and because our review is de novo and therefore not dependent on the trial court's reasoning, we will not punish plaintiff for her counsel's neglect, and we choose to consider the matter. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). Defendants argued below, and the trial court presumably accepted, that pursuant to MCL 500.3113(b) and MCL 500.3101(1), because plaintiff was occupying an uninsured, parked vehicle, she was not entitled to PIP benefits; ACIC further argues that it was entitled to summary disposition because it was not an insurer listed in the order of priority under MCL 500.3114(4)(a).

The parties rely on authority involving parked cars, but critically the statutory provisions cited in those cases have since been amended. The pinnacle case is *Heard v State Farm Mut Auto Ins Co*, 414 Mich 139; 324 NW2d 1 (1982). In *Heard*, the plaintiff's uninsured vehicle was parked at a gas station and the plaintiff was outside that vehicle pumping his gas when another vehicle insured by State Farm struck him and pinned him against his vehicle. In analyzing whether the plaintiff could collect PIP benefits from State Farm, the threshold question was whether the uninsured vehicle was involved in the accident for purposes

of MCL 500.3113(b). At the time *Heard* was decided, MCL 500.3113, as added by 1972 PA 294, provided:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle which he had taken unlawfully, unless he reasonably believed that he was entitled to take and use the vehicle.
>
> (b) The person was the owner or registrant of a motor vehicle *involved in the accident* with respect to which the security required by subsections (3) and (4) of section 3101 was not in effect.
>
> (c) The person was not a resident of this state, was an occupant of a motor vehicle not registered in this state and was not insured by an insurer which has filed a certification in compliance with section 3163. [Emphasis added.]

At that time, MCL 500.3101(1), as amended by 1977 PA 54, provided, "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle."

The *Heard* Court, 414 Mich at 144-145, ruled that a parked car was only involved in an accident if one of the exceptions to the parked-vehicle provision in MCL 500.3106 applied. At that time, MCL 500.3106(1) as amended by 1981 PA 209, provided:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), the injury was a direct result of physical contact with the equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> (c) Except as provided in subsection (2) for an injury sustained in the course of employment while loading, unloading, or doing mechanical work on a vehicle, the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.[4]

The Court concluded that none of the exceptions applied, and therefore the uninsured vehicle was not involved in the accident for purposes of the exclusion in MCL 500.3113(b). *Heard*, 414 Mich at 144-145. It reasoned that when a parked vehicle was neither involved in the accident nor being used as a motor vehicle at the time of the accident—but was more like any other stationary object that could be hit by a car, such as a tree, sign post, or boulder—the owner of the uninsured vehicle was not precluded from benefits. *Id*. at 148. Without discussing whether any security was actually required under MCL 500.3101, our Supreme Court concluded that summary disposition under the exclusion in MCL 500.3113(b) was inappropriate.

The parties also rely on two more recent cases, which are more factually similar to the instant case because the plaintiffs in those cases were occupying the vehicle, and were not outside the vehicle as in

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[4] MCL 500.3106 is substantially similar today. However, Subsection (1)(c) no longer makes specific reference to injuries sustained in the course of employment, but rather only generally refers to Subsection (2): "Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle."

Heard. In *Childs v American Commercial Liability Ins Co*, 177 Mich App 589, 591; 443 NW2d 173 (1989),[5] the plaintiff was sitting on the bed of his parked truck, waiting for it to be repaired, when another vehicle driving on the street struck a vehicle parked behind the plaintiff's truck, which in turn hit the plaintiff's truck, resulting in injuries to the plaintiff. The plaintiff's truck was uninsured, but American Commercial insured another vehicle owned by the plaintiff. *Id*. This Court ruled that sitting on the back of a pickup truck was "identifiable with the use of the truck as a motor vehicle," and therefore the plaintiff was occupying it for purposes of MCL 500.3106. *Id*. Without discussing whether any security was actually required under MCL 500.3101,[6] the Court ruled that the plaintiff was therefore excluded from PIP benefits under MCL 500.3113(b). *Id*.

In *Adams v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2010 (Docket No. 290037), p 1,[7] the plaintiff

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[5] *Childs* is not binding on this Court because it was decided before November 1, 1990. MCR 7.215(J)(1).

[6] Even if *Childs* had discussed security requirements in relation to MCL 500.3101, it would have applied a version of the statute that no longer exists and therefore would have had no relevance to our analysis of the facts in this case. The accident in *Childs* occurred on September 26, 1986, at which time MCL 500.3101(1) provided in relevant part, "Security shall be in effect continuously during the period of registration of the motor vehicle." 1984 PA 84, effective April 19, 1984. Subsequently, that statutory provision was amended to provide in relevant part, "Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway." 1987 PA 168, effective November 9, 1987. In other words, *Childs* is not relevant authority regarding the requirement to maintain insurance under MCL 500.3101(1) because the critical portion of that statute was substantially amended after the relevant date in that case.

[7] *Adams* is an unpublished opinion and is not binding under the rule of stare decisis. MCR 7.215(C)(1). Additionally, consideration of unpub-

was injured when a vehicle driving on the road lost control and struck the uninsured vehicle of the plaintiff's mother; the plaintiff was sitting in the parked vehicle in their driveway when the accident occurred. The plaintiff filed a claim for PIP benefits with the MACF, and the claim was assigned to the defendant. *Id*. The trial court granted the defendant's motion for summary disposition. On appeal, the plaintiff's primary argument was that there was a question of fact regarding whether he was an "owner" under MCL 500.3113(b), which this Court rejected. *Id*. at 2-3. The plaintiff also asserted that he was not "involved in the accident" for purposes of MCL 500.3113(b), but this Court also rejected that argument. *Id*. at 3. Relying on *Heard* and *Childs*, this Court referred to MCL 500.3106(1)(c) to conclude that because the plaintiff was occupying the parked vehicle, he was "involved in the accident" as a matter of law. *Id*. at 3. Again, in *Adams* this Court did not cite or analyze MCL 500.3101 to determine whether any security was actually required.

In this case, the parties do not appear to dispute that plaintiff's uninsured vehicle was involved in the accident for purposes of MCL 500.3113(b) because they all agree that plaintiff was occupying it under MCL 500.3106(1)(c). Instead, plaintiff raises an argument that was not addressed in *Heard*, *Childs*, or *Adams*. Specifically, plaintiff argues that under MCL 500.3101 she was not required to maintain security for payment of PIP benefits because the vehicle was not being "driven or moved upon a highway." Neither defendant has specifically responded to this argument.

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lished cases is disfavored, but we consider *Adams* here because of the extensive reliance already placed on it by the parties and because of the dearth of other relevant caselaw, binding or not.

In *Heard*, our Supreme Court explained that the disqualification of an uninsured owner from entitlement to no-fault benefits is not absolute. *Heard*, 414 Mich at 145. MCL 500.3113(b) currently provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

After *Heard* was decided, the Legislature amended MCL 500.3101(1). 1987 PA 168. Previous versions of the statute provided, "Security shall be in effect continuously during the period of registration of the motor vehicle." MCL 500.3101(1), as added by 1972 PA 294. See also MCL 500.3101(1), as amended by 1984 PA 84. This language suggests that the security was required regardless of whether the vehicle was being driven or parked. Under 1987 PA 168 and the current version of the statute, continuous coverage is no longer required during the period of registration of the motor vehicle.[8] Rather, "[s]ecurity is only required to be in effect during the period the motor vehicle is driven or moved on a highway." MCL 500.3101(1), as amended by 1987 PA 168. See also MCL 500.3101(1), as amended by 1988 PA 126, 1988 PA 241, and 2014 PA 492.

Plaintiff argues that she was not driving her vehicle at the time of the accident because it had just been repaired and was uninsured. She therefore argues that

[8] See note 6 of this opinion.

she was not required to maintain the security under the current version of MCL 500.3101(1). The term "period" is defined as "the completion of a cycle, a series of events, or a single action." *Merriam-Webster's Collegiate Dictionary* (11th ed). Because any driving or movement on a highway was completed several days before the accident when plaintiff's vehicle was moved from the repair shop to 4th Street where it was parked at the time of the accident, we agree with plaintiff's argument that security was not required at that time.[9] Therefore, PIP benefits should not have been excluded under MCL 500.3113(b) and MCL 500.3101(1).

However, we agree with ACIC's argument that it was nevertheless entitled to summary disposition on the basis of MCL 500.3114, which governs the priority of insurer responsibility for PIP benefits. MCL 500.3114(4) provides:

> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.

Again, the parties agree that plaintiff was an occupant of her vehicle when the accident occurred. ACIC was the insurer of the vehicle that struck plaintiff's vehicle, not the insurer of the owner or registrant of plaintiff's vehicle. MCL 500.3114(4)(a). Because there was no operator of plaintiff's vehicle, ACIC was not the insurer

[9] Under the present procedural posture of the case, we presume the facts are as stated by plaintiff and certainly nothing in defendants' briefs suggests otherwise. However, we do not make any decision to that effect at this time.

under MCL 500.3114(4)(b), and ACIC was entitled to summary disposition. See *Allstate Ins Co v Dep't of Mgt & Budget*, 259 Mich App 705, 715; 675 NW2d 857 (2003) (stating that when an insurer is neither the insurer of the owner or registrant nor the insurer of the operator as set forth in MCL 500.3114, summary disposition should be granted), superseded in part on other grounds by 2008 PA 241, which amended MCL 500.3101. Farmers, in contrast, as the insurer assigned by the MACF, is the insurer of last priority and was not entitled to summary disposition under MCL 500.3114. See *Hunt v Citizens Ins Co*, 183 Mich App 660, 666; 455 NW2d 384 (1990).

We therefore affirm the grant of summary disposition in favor of ACIC, but we reverse the grant of summary disposition in favor of Farmers and remand for further proceedings consistent with this opinion. In view of plaintiff's unexcused failure to file the mandatory transcript with this Court, we direct that both defendants may nevertheless tax costs. MCR 7.219(A). We do not retain jurisdiction.

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

In re SKIDMORE ESTATE

Docket No. 323757. Submitted January 12, 2016, at Lansing. Decided January 19, 2016, at 9:05 a.m. Reconsideration granted and opinion vacated by Court of Appeals order entered May 24, 2016. Opinion reinstated and clarified 500 Mich 967.

Ralph Skidmore, Jr., individually and as personal representative of the estate of Catherine D. Skidmore, deceased, brought an action in the Calhoun Circuit Court against Consumers Energy Company, alleging that Consumers failed to exercise its duty to reasonably inspect and maintain its power lines in a residential area and that Consumers' negligence was a proximate cause of Catherine's death. On the evening of July 19, 2011, Ralph and Catherine Skidmore looked through the window of their home; they saw sparks and fire coming from their neighbor's van across the street. Catherine ran outside to warn the neighbor, approaching the house from the corner opposite the van. Ralph could see that a power line had fallen on top of the van. Several other neighbors yelled for Catherine to stop, but it was unknown whether Catherine heard the shouting over the loud crackling of the electricity. While running across the neighbor's yard, Catherine came into contact with a downed power line. She was electrocuted and died from her injuries. Consumers moved for summary disposition, alleging that it was not reasonably foreseeable that Catherine would run to the house where the power line had fallen and that Consumers therefore owed her no duty. The court, James C. Kingsley, J., granted Consumers' motion for summary disposition, concluding that Catherine's actions were not reasonable and, therefore, that Consumers did not owe her a duty. The estate appealed.

The Court of Appeals *held*:

To prove negligence, a plaintiff must show that a defendant owed the plaintiff a duty of care, the defendant breached that duty, the plaintiff was injured, and the defendant's breach caused the plaintiff's injury. An electric utility company has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy defects. This duty includes an obligation to reasonably inspect for fraying power lines; however,

this duty does not include guarding or warning against every possible contact with elevated power lines. The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. In this case, the area surrounding the downed power line was residential, and it was foreseeable that people would be using the surrounding streets and yards and would be at risk if the power line fell. Accordingly, it was reasonably foreseeable that an injury could follow from failing to inspect and maintain a power line in a residential area. Additionally, it was reasonably foreseeable that persons in a residential area would act in response to an emergency to aid a neighbor. However, the rescuer must act reasonably, and whether the rescuer acted reasonably is a question of fact. In this case, there was an issue of material fact regarding whether Catherine acted reasonably: she approached the neighbor's home from the corner opposite the van, away from the sparks and fire, but she ran across a darkened yard with the knowledge that there was a downed power line nearby while people yelled for her to stop. The trial court erred by granting summary disposition on the basis that Consumers did not owe Catherine a duty.

Reversed and remanded.

1. NEGLIGENCE — ELECTRIC UTILITIES — DUTY TO INSPECT AND REPAIR — RESIDENTIAL AREAS.

An electric utility company has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy defects; the test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which an injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure; it is reasonably foreseeable that an injury could result from an electric utility company's failure to inspect and maintain a power line in a residential area.

2. NEGLIGENCE — COMPARATIVE NEGLIGENCE — RESCUERS.

Rescuers, as a class, are foreseeable; rescuers must act reasonably; whether a rescuer acted reasonably is a question of fact.

Mark Granzotto, PC (by *Mark Granzotto*), and *Kline & Specter, PC* (by *Shanin Specter* and *Charles L. Becker*), for Ralph Skidmore, Jr.

Smith Haughey Rice & Roegge (by *John R. Oostema*, *E. Thomas McCarthy, Jr.*, and *D. Adam Tountas*) and *Jacobs and Diemer, PC* (by *John P. Jacobs* and *Timothy A. Diemer*), for Consumers Energy Company.

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

O'CONNELL, J. A live power line on the ground is far more hazardous than a live power line in the air. In this wrongful death action, plaintiff Ralph Skidmore, Jr., individually and as the personal representative of the estate of Catherine Dawn Skidmore (collectively, the estate), appeals of right the trial court's order granting summary disposition in favor of defendant, Consumers Energy Company (Consumers), under MCR 2.116(C)(10). The trial court concluded that Consumers did not owe Catherine a duty because it was not foreseeable that she would run across her neighbor's darkened yard to warn him of a fire that resulted from a downed power line. We reverse and remand.

I. FACTUAL BACKGROUND

According to Ralph, the evening of July 19, 2011, was warm and clear. As Ralph was getting into bed that evening, the lights flickered and Catherine began screaming that a neighbor's van was on fire. Ralph looked out a window and saw sparks and fire coming from the van across the street. He could see that a power line had fallen on top of the van, and he explained that he could only see movement and light because it had fallen on the opposite side of the van.

Ralph testified that Catherine thought that the van might explode and was frantic with concern for the man who lived in the house across the street. Cath-

erine "bolted out of the house" to warn the neighbor, Roddy Cooper. Ralph testified that Catherine ran for the window where the neighbor Cooper was standing. Ralph heard people yell for her to stop, but he opined that she likely did not hear them over the loud crackling of the electricity.

According to Cooper, the power line that broke runs above the southeastern corner of his house. Cooper heard a loud boom, followed by a brilliant flash and a buzzing sound. He looked outside and saw flashing sparks in a bush, so he called 911. The line was sliding "like it was pulling itself through the bush." Cooper saw Catherine on the porch on the northwestern corner of his home. She yelled to him that there was a fire, and he shouted back that he heard. As he was traveling to the other end of his house, he heard a sharp crack and a lot of yelling.

Cooper, Don Stutzman, and James Beam testified that Cooper's yard was dark. Stutzman and Beam testified that they could not see where the line was in the yard. They yelled at Catherine to stop but could not tell if she heard them. Ralph saw a wire twist around Catherine's legs. Catherine began shaking and then caught on fire. Despite efforts to put Catherine out with a fire extinguisher, she repeatedly lit on fire and died.

According to Ralph, the power lines in the neighborhood had been a problem for about 25 years, and the power would go off two or three times each summer. Stutzman and Beam also testified about frequent power outages and electrical problems. Ralph testified that following a windstorm in May 2011, Consumers worked on the lines, but neighbors complained about the power lines being too tight, including the line that broke on the night of the accident. Beam testified that

the power line that broke was a short pole anchored to a pole that had been broken.

Ralph testified that a power line had also fallen one year before the accident, and Cooper testified that the incident in 2011 was the second consecutive summer that a high-voltage line had fallen in his yard. Cooper testified that he had told the workers that the trees needed to be trimmed and that neighbors had complained about the trees causing arcing and sparking during wind and rain. James Leahy, a journeyman line worker, testified that if a tree touches a line and causes a repeated arc, the power line may fall. However, other deponents testified that there are many reasons why a power line could fall, including the activities of weather and animals.

Dr. Campbell Laird, one of the estate's experts, opined that Consumers lacked a "systematic inspection system" for the maintenance of vegetation surrounding power lines. Laird averred that a properly maintained power line should not fall absent some trauma to the line. Richard L. Buchanan, a public-utility expert, opined that Catherine's death was caused by poor vegetation management. Buchanan asserted that the 2010 incident with the power line should have warned Consumers about the power lines in Catherine's neighborhood. Buchanan concluded that Consumers violated industry standards by failing to conduct preventative vegetation trimming.

The estate filed suit in May 2012. The estate asserted claims of negligence and negligent infliction of emotional distress, based, in pertinent part, on Consumers' duty to reasonably inspect and maintain its power lines. In July 2014, Consumers filed a motion for summary disposition, asserting that it was not reasonably foreseeable that Catherine would run into the

downed power line. Following a hearing on the motion, the trial court concluded that Catherine's actions were not reasonable and, therefore, that Consumers did not owe Catherine a duty. It granted summary disposition. The estate now appeals.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a party moves for summary disposition under MCR 2.116(C)(8) and (10), and the trial court considered documents outside the pleadings when deciding the motion, we review the trial court's decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013). Whether a defendant owed a plaintiff a duty is a question of law that this Court reviews de novo. *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

III. DUTY

The estate contends that the trial court improperly conflated questions concerning whether Consumers owed Catherine a duty, a question of law, with com-

parative negligence, which is a question of fact for a jury to decide. We disagree, but we conclude that a question of fact precludes summary disposition.

To prove negligence, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the plaintiff's injury. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). But if it is not foreseeable that the defendant's conduct could pose a risk of injury to a person with whom the defendant has a relationship, then there is no duty not to engage in that conduct. *Certified Question*, 479 Mich at 508.

The extent of duty that an electric utility company owes the public has been a topic of this state's jurisprudence for over a century. See, e.g., *Huber v Twin City Gen Electric Co*, 168 Mich 531, 535; 134 NW 980 (1912). More recently, the Michigan Supreme Court has applied modern tort principles to explain an electrical utility company's duty to the general public. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).

In *Schultz*, the plaintiff's decedent was electrocuted while helping a friend paint his house. *Id*. at 447. While moving a 27-foot aluminum extension ladder, the defendant's medium-voltage electrical wires electrocuted the decedent. *Id*. at 447-448. The plaintiff alleged that a fray in the wire allowed the electrical current to arc to the nearby ladder. *Id*. at 448-449.

The Court held that "a power company has an obligation to reasonably inspect and repair wires and

other instrumentalities in order to discover and remedy hazards and defects." *Id*. at 451. This duty "involve[s] more than merely remedying defective conditions actually brought to its attention." *Id*. at 454. The Court reasoned that "it is well settled that electricity possesses inherently dangerous properties requiring expertise in dealing with its phenomena." *Id*. at 451.

However, this duty does not include guarding against every possible contact with the power lines. In Chief Justice BRICKLEY's lead opinion resolving the consolidated cases in *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996),[1] the Michigan Supreme Court rejected several claims involving accidental contacts with overhead wires. The Court explicitly recognized that the cases did not involve allegations of poorly maintained wires. *Id*. at 657, 660. Rather, in the specific circumstances of the cases, the defendant had no reason to foresee that equipment would come into contact with its reasonably placed power lines. *Id*. at 657, 660. And in *Valcaniant*, the Michigan Supreme Court rejected a case in which a dump truck's driver was shocked after accidentally severing overhead power lines. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 84-85; 679 NW2d 689 (2004). Again, the Court explicitly noted that the lines' state of repair was not pertinent to its holding, and the holding did not implicate the defendant's duty to inspect its lines. *Id*. at 86.

Consumers contends that it had no more duty in this case than the defendants had in *Groncki* and *Valcaniant*. We disagree.

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[1] The *Groncki* Court was fractured regarding its rationale. See *Valcaniant v Detroit Edison Co*, 470 Mich 82, 87 n 7; 679 NW2d 689 (2004) (providing an overview of the Justices' positions in *Groncki*).

First, each of these cases is distinguishable because the Court specifically noted that the state of repair of the lines was not at issue. In this case, the state of repair of Consumers' lines is directly at issue. Second, Consumers fails to comprehend that the risks of accidental contact with a live power line suspended in the air and accidental contact with a live power line on the ground are fundamentally different. As stated by Chief Judge Cardozo of the New York Court of Appeals in an axiom familiar to any first-year torts student, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v Long Island R Co*, 248 NY 339, 344; 162 NE 99 (1928). If nothing else, people are more likely to be in close proximity to a power line on the ground than they are likely to be if the power line is suspended in the air.

The question is whether it is reasonably foreseeable that failing to reasonably inspect and maintain power lines would result in a dangerous situation to a person on the ground. *Schultz* answers this question in the positive, providing that "a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Schultz*, 443 Mich at 451. It is not a leap to conclude that this duty includes an obligation to reasonably inspect for fraying lines because a frayed line was responsible for the injury in *Schultz*. An injury due to a live power line on the ground is far more foreseeable than an injury due to a power line in the air.

Consumers contends that it could not have expected that Catherine would run toward, rather than away from, the power line. However, that argument focuses too closely on the particular act that resulted in injury.

The *Schultz* Court explained that the foreseeability of an injury depends, in part, on the expected uses of an area:

> Those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. *The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted*, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. [*Id*. at 452 (emphasis added).]

The area surrounding the power line was residential. It is foreseeable that people would be using the surrounding streets and yards and would be at risk if the power line fell. We conclude that it was reasonably foreseeable that an injury could follow from failing to inspect and maintain a power line in a residential area.

Additionally, it is reasonably foreseeable that those persons in the residential area would act in response to the emergency. "[R]escuers, as a class, are foreseeable . . . ." *Solomon v Shuell*, 435 Mich 104, 135; 457 NW2d 669 (1990) (opinion by ARCHER, J.); *id*. at 151 (opinion by BOYLE, J.). Rescuers must act reasonably. *Id*. at 135 (opinion by ARCHER, J.). But whether the rescuer acted reasonably is a question of fact, not a question of law. *Id*. at 136.[2]

We conclude that there is an issue of material fact regarding whether Catherine acted reasonably. Ralph testified that he and Catherine both were aware that a power line had fallen. However, Ralph also testified

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[2] That the reasonableness of a rescue is a question of fact holds true to the general principle that the fact that a plaintiff was also negligent does not alter the nature of the defendant's initial duty. *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 98; 485 NW2d 676 (1992).

that Catherine was frantic, concerned for her neighbor, and went to his home to warn him of the danger. Cooper testified that Catherine approached his southwestern door, away from obvious sparks and fire around the van at the house's southeastern corner. On the other hand, with the knowledge that there was a downed power line nearby, Catherine also ran across a darkened yard while people were yelling for her to stop. Even the trial court stated that whether Catherine's actions were reasonable constituted a close question. We conclude that reasonable minds could differ on this issue. Accordingly, the trial court erred when it granted summary disposition on the estate's claims on the basis that Consumers did not owe Catherine a duty.[3]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, the estate may tax costs. MCR 7.219.

SHAPIRO, P.J., and BORRELLO, J., concurred with O'CONNELL, J.

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[3] To the extent that Consumers raises causation issues on appeal, Consumers did not raise these issues in the trial court. An appellee need not file a cross-appeal to argue alternative reasons to affirm, but the appellee must have presented the reasons to the trial court. *Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). We decline to address these unpreserved issues because they do not concern issues of law, they are not necessary to the resolution of the remaining issues, and our failure to rule on them will not work a manifest injustice. See *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered February 12, 2016:

PEOPLE v PERKINS; PEOPLE v WILLIAMS; PEOPLE v HYATT, Docket Nos. 323454, 323876, and 325741. The Court orders that a special panel shall be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015) (Docket No. 317892).

The Court further orders that part IV, section C, of the opinion in this case, released on January 19, 2016, is vacated in its entirety. MCR 7.215(J)(5).

Appellant Hyatt may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellee may file a supplemental brief within 21 days of the service of appellant's brief.

Order Entered March 14, 2016:

GARY STEVEN GARRETT v DARITA CAMILLE WASHINGTON, Docket No. 323705. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve a conflict between this case and *Cynthia Adam v Susan Letrice Bell*, 311 Mich App 528 (Docket No. 319778, issued August 11, 2015).
