MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

June 5, 2015, through August 18, 2015

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOLUME 311
FIRST EDITION

THOMSON REUTERS™

2016

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PEOPLE v PACE

Docket No. 322808. Submitted March 11, 2015, at Lansing. Decided June 4, 2015, at 9:00 a.m. Leave to appeal denied 498 Mich 957.

Joshua Matthew Pace was charged in the 15th District Court with the misdemeanor offense of committing a moving violation causing serious impairment of a body function to another person, MCL 257.601d(2). The court, Christopher S. Easthope, J., granted defendant's request for a jury instruction that would require the prosecution to prove that defendant was negligent in the operation of his vehicle. The Washtenaw Circuit Court, Carol Anne Kuhnke, J., denied the prosecution's application for leave to appeal the district court's order. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The district court erred by granting defendant's motion to have the court deliver a jury instruction that would require the prosecution to prove that defendant was negligent at the time of the collision that caused serious impairment of a body function to another person. MCL 257.601d(2) requires only that the prosecution prove that (1) defendant committed a moving violation, and (2) another person suffered serious impairment of a body function. In addition, the moving violation must have been the factual and proximate cause of the injury. The plain language of the applicable statute indicates that negligent conduct is not an element of MCL 257.601d(2); rather, MCL 257.601d is a strict liability offense. Conviction of committing a moving violation causing serious impairment of a body function does not require any proof of criminal intent or negligence.

2. MCL 257.601d, the statute penalizing a motorist who commits a moving violation that causes serious impairment of a body function to another person, is constitutional. The Legislature is authorized to enact strict liability laws—like those regulating traffic—that impose criminal penalties on an offender for specified conduct without regard to the offender's intent and without any proof of negligence.

Reversed and remanded.

MOTOR VEHICLES — MOVING VIOLATIONS CAUSING SERIOUS IMPAIRMENT OF A BODY FUNCTION — STRICT LIABILITY.

Commission of a moving violation causing serious impairment of a body function to another person, MCL 257.601d(2), is a strict liability offense that requires no proof of a motorist's intent or negligence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

John A. Shea and *Uwe Dauss* for defendant.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM. In this interlocutory appeal, the prosecution appeals by leave granted an order entered by the Washtenaw Circuit Court denying plaintiff's application for leave to appeal a district court order which granted defendant's motion for a specific jury instruction. We reverse and remand.

The basic facts of this case are not in dispute. On June 5, 2013, as Michael John Bly used a pedestrian crosswalk to walk across Church Street in Ann Arbor, defendant made a left-hand turn onto Church Street and struck Bly with his vehicle. As a result of the collision, Bly suffered head trauma that left him permanently disabled. Defendant was charged under MCL 257.601d(2) with the misdemeanor offense of committing a moving violation causing serious impairment of a body function to another person.

Before trial, defendant moved the district court for a jury instruction requiring the prosecution to prove, as an element of the charged offense, that defendant was negligent in the operation of his vehicle. The prosecution argued, in contrast, that to prove the charge of

committing a moving violation causing serious impairment of a body function, the applicable jury instruction, M Crim JI 15.19, required the prosecution to prove only that (1) defendant committed a moving violation, and (2) defendant's operation of the vehicle caused serious impairment of a body function to another person. According to the prosecution, M Crim JI 15.19 accurately stated the law and there was no requirement that the prosecution also prove that defendant was negligent in his actions. The district court granted defendant's motion, citing *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005), and reasoning that the Legislature did not expressly indicate an intention to dispense with negligence as an element of the offense.

The Washtenaw Circuit Court denied the prosecution's application for leave to appeal the district court's order. We granted the prosecution's application for leave to appeal the Washtenaw Circuit Court's denial of its application. In addition to the issue whether negligence is an element of the offense of committing a moving violation causing serious impairment of a body function, this Court directed the parties to address two issues: "(1) if negligence is not an element of committing a moving violation causing serious impairment of a body function, MCL 257.601d(2), then what, if any, mens rea is required for conviction of this offense; and (2) if no mens rea is required, is the statute constitutional?" *People v Pace*, unpublished order of the Court of Appeals, entered October 7, 2014 (Docket No. 322808).

On appeal, the prosecution contends that MCL 257.601d encompasses a preexisting negligence component such that the district court's requirement of proof of negligence as a separate, distinct element was superfluous and contrary to legislative intent. Alterna-

tively, the prosecution contends that the statute is a constitutional, strict liability offense. We conclude that the Legislature's intention to make MCL 257.601d a strict liability offense is implicit.

Matters of statutory construction are questions of law, which this Court reviews de novo. *People v Williams*, 491 Mich 164, 169; 814 NW2d 270 (2012). Determining the elements of a crime is also a question of law that we review de novo. *People v Holtschlag*, 471 Mich 1, 4-5; 684 NW2d 730 (2004).

MCL 257.601d(2) provides:

> A person who commits a moving violation that causes serious impairment of a body function to another person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

MCL 257.601d(4) states:

> As used in this section, "moving violation" means an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that involves the operation of a motor vehicle, and for which a fine may be assessed.

Thus, MCL 257.601d(2) clearly requires the prosecutor to prove that (1) a moving violation was committed, (2) another person suffered serious impairment of a body function, and (3) there was a causal link between the injury and the moving violation, i.e., factual and proximate causation. See M Crim JI 15.19. The statutory provision is silent with regard to fault or intent. However, "the failure to include a fault element in the statute does not end our inquiry. Where the statute does not include language expressly requiring fault as an element, this Court must focus on whether the Legislature nevertheless intended to require fault as a predi-

cate to guilt." *People v Adams*, 262 Mich App 89, 93; 683 NW2d 729 (2004).

In *Tombs*, 472 Mich at 453, our Supreme Court noted that the United States Supreme Court begins its analysis of "whether a criminal intent element should be read into a statute . . . with the proposition that criminal offenses that do not require a criminal intent are disfavored." See *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). "The Court will infer the presence of the element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it. Moreover, the Court has expressly held that the presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime." *Id*. at 454-455, citing *Morissette* and its progeny. The *Tombs* Court expressly applied the precedent in *Morissette* and its progeny to the case before it. *Id*. at 456. According to *Tombs*, if there were no *mens rea* element in a criminal offense, "[a] statute could punish otherwise innocent conduct." *Id*. at 458.

However, as Chief Justice COOLEY early observed in *People v Roby*, 52 Mich 577, 579; 18 NW 365 (1884):

> I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations . . . impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.

Our Supreme Court still recognizes that there are circumstances where the lack of criminal intent does

not preclude a criminal prosecution. In *Holtschlag*, 471 Mich at 17, our Supreme Court noted that a conviction of involuntary manslaughter "requires that the defendant acted with a mens rea of culpable negligence" when the homicide occurs during the commission of a lawful act. Citing *People v Townsend*, 214 Mich 267, 273-274; 183 NW 177 (1921), and its discussion regarding the proofs necessary to demonstrate the "unlawful-act" and "lawful-act" theories of involuntary manslaughter, the *Holtschlag* Court noted:

> [I]f the defendant committed an *unlawful* act that resulted in death, it is sufficient to allege the commission of the unlawful act and the resulting death; whereas, if the defendant committed a lawful act resulting in death, the prosecutor must specifically allege the manner in which the defendant's actions were grossly or culpably negligent. That is, under *Townsend*, lawful-act manslaughter requires that the defendant acted with a mens rea of culpable negligence; whereas unlawful-act manslaughter does not require that the defendant acted with a specific mens rea—all that is required is that the defendant committed the unlawful act. [*Holtschlag*, 471 Mich at 17.]

Thus, as observed in *Holtschlag*, under some circumstances, the fact that a defendant committed an unlawful act is sufficient to form the basis of a criminal charge, even where a specific *mens rea* is absent.

This Court also noted in *People v Janes*, 302 Mich App 34, 42; 836 NW2d 883 (2013), "that the Legislature can constitutionally enact offenses that impose criminal liability without regard to fault" and that "whether the Legislature intended to enact [such an] offense is generally a matter of statutory interpretation." These offenses, called strict liability offenses, are ones "in which the prosecution need only prove beyond a reasonable doubt that the defendant committed the prohibited act, regardless of the defendant's intent and

regardless of what the defendant actually knew or did not know." *Id*. at 41-42 (quotation marks omitted). "[T]he distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it." *People v Lardie*, 452 Mich 231, 241; 551 NW2d 656 (1996), overruled in part on other grounds by *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005).

In *Morissette*, 342 US 246, the United States Supreme Court discussed the origin of criminal offense charges that disregard any intent. Citing the industrial revolution, increased traffic, the congestion of cities, and the wide distribution of goods, the *Morissette* Court noted that as dangers increased so did duties and regulations and that lawmakers sought to make the duties and regulations more effective by imposing criminal sanctions in some cases. *Id*. at 252-255. These "public welfare offenses" do not necessarily "result in [a] direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." *Morissette*, 342 US at 255-256.

> [W]hatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an

> offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. [*Id*. at 256.]

The purpose of imposing criminal penalties for conduct not involving any criminal intent is "to require a degree of diligence for the protection of the public which shall render violation impossible." *Id*. at 257 (quotation marks and citation omitted). Examples of strict liability offenses include narcotics laws, traffic laws, adulterated food or drug laws, criminal nuisances, and liquor control laws. *People v Nasir*, 255 Mich App 38, 42; 662 NW2d 29 (2003).

"Courts in this country have almost universally held that traffic violations are strict liability offenses, in which the motorist's negligence or lack of intent to commit the infraction is irrelevant." *People v Jones*, 132 Mich App 368, 370; 347 NW2d 235 (1984). For example, in *Stanley v Turner*, 6 F3d 399 (CA 6, 1993), the United States Court of Appeals for the Sixth Circuit addressed an Ohio statute defining involuntary manslaughter as causing death during the commission of a misdemeanor driving offense, without a separate mens rea requirement. The Sixth Circuit noted that:

> [W]here a criminal statute prohibits and punishes conduct not innocent or innocuous in itself, the criminal intent element may be dispensed with if the criminal statute is designed for the protection of the public health and safety and if it has no common law background that included a particular criminal intent. Because citizens are presumed to know the ordinary traffic safety laws and that violating them is dangerous and wrong, Ohio's involuntary manslaughter statute, as applied in this case, is based on the obviously wrongful and blameworthy conduct of violating traffic safety laws. [*Id*. at 404.]

As the Court in *Stanley* recognized, public welfare statutes, such as those regulating traffic, that dispense with the requirement of *mens rea* on the basis that citizens are presumed to know the ordinary traffic safety laws and that violating them is dangerous, do not offend due process. *Id*. at 404-405.

Based on the above reasoning and the Legislature's use of the term "moving violation" without any reference to *mens rea*, we can infer that the Legislature intended to dispense with the criminal intent element of committing a moving violation causing serious impairment of a body function, and that it intended to make such a violation a strict liability offense. "[T]he Legislature is presumed to know of and legislate in harmony with existing laws." *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) (quotation marks and citation omitted). MCL 257.601d is a public welfare statute—it imposes criminal penalties on a person who endangers the public, regardless of intent, by committing a moving violation causing serious impairment of a body function to another person. "[I]t is the motorist's duty in the use and operation of his automobile to exercise ordinary and reasonable care and caution, that is, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). The commission of a moving violation indicates that the motorist failed to exercise the requisite care and caution, regardless of intent, and as previously indicated, the violation of a traffic law is typically a strict liability offense. *Nasir*, 255 Mich App at 42. Thus, MCL 257.601d is a strict liability offense.[1]

---

[1] This conclusion is also supported by the legislative history. We recognize "that legislative [bill] analyses are 'generally unpersuasive

Because the Legislature implicitly intended to make MCL 257.601d a strict liability offense, the prosecution is required to prove only that (1) defendant committed a moving violation, (2) another person suffered serious impairment of a body function, and (3) there exists a

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tool[s] of statutory construction' " and "do not necessarily represent the views of any individual legislator." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007) (citation omitted; second alteration in original). However, the analyses "do have probative value in certain, limited circumstances." *Id*.

MCL 257.601d was added to the Michigan Vehicle Code by 2008 PA 463, effective October 31, 2010. At the same time MCL 257.601d was added, the offenses of negligent homicide, MCL 750.325, and felonious driving, MCL 257.626c, were repealed. The legislative bill analyses, attached to the prosecution's brief, suggest that the changes were made in response to concerns by legislators that

> [t]he current standard for determining whether a person is guilty of negligent homicide or felonious driving is ambiguous, based on whether the person operated the vehicle in a careless, reckless or negligent manner. The language prescribing those offenses is antiquated and based on common law notions of negligence. Applying those concepts to criminal law creates some uncertainty about what constitutes a violation, leading to inconsistent enforcement of the law. For example, a driver who loses control of a car on an icy overpass and is involved in a fatal accident could have foreseen the possibility that the bridge might be icy, and therefore could be charged with negligent homicide, although most people would not consider that to be appropriate in such a case. The bill would remove that ambiguity, and instead enact prohibitions under which a person would not be guilty of a criminal offense unless a moving violation had occurred. This would reduce inconsistencies in the application of the law and clarify proscribed conduct. [Senate Legislative Analysis, SB 104, August 5, 2008, available at <http://www.legislature.mi.gov/documents/2007-2008/billanalysis/Senate/pdf/2007-SFA-0104-B.pdf> (accessed March 26, 2015) [http://perma.cc/9M4M-JY5T].]

By enacting MCL 257.601d and repealing the felonious driving and negligent homicide statutes, the Legislature sought to erase uncertainty about what conduct was punishable by focusing solely on whether a motorist committed a moving violation, instead of determining whether the motorist's conduct was careless, reckless, or negligent.

causal link between the injury and the moving violation, i.e., factual and proximate causation. The prosecution is not required to prove that defendant operated his vehicle in a negligent manner, and the trial court erred by so concluding.

After reaching the conclusion that the prosecution is not required to prove negligence, we next consider whether MCL 257.601d is constitutional. Constitutional questions are reviewed de novo by this Court. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

"[T]he United States Supreme Court has recognized as a general matter that the constitution does not preclude the enactment of even strict liability criminal statutes." *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992), citing *Lambert v California*, 355 US 225; 78 S Ct 240; 2 L Ed 2d 228 (1957). See also *Janes*, 302 Mich App at 42, citing *Quinn*, 440 Mich at 188 ("Our Supreme Court has recognized that the Legislature can constitutionally enact offenses that impose criminal liability without regard to fault."). This is especially the case with public welfare regulations. There does not appear to be a well-settled test for determining when a strict liability crime offends due process. However, this Court has previously acknowledged that " '[t]he elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) [the] conviction does not gravely besmirch.' " *People v Olson*, 181 Mich App 348, 352; 448 NW2d 845 (1989), quoting *United States v Wulff*, 758 F 2d 1121, 1125 (CA 6, 1985). See also *Lardie*, 452 Mich at 255 (noting that "the penalties for public-welfare strict-liability crimes generally are relatively small and do no grave damage to an offender's reputation") (quotation marks and citations omitted).

There is no question that the Legislature had the constitutional authority to enact MCL 257.601d as a strict liability offense concerning public welfare. *Lambert*, 355 US at 228; *Quinn*, 440 Mich at 188; *Janes*, 302 Mich App at 42. We are satisfied that imposing strict liability for the offense of committing a moving violation causing serious impairment of a body function does not offend due process. First, the offense is a misdemeanor; that is, despite the severe harm that such an offense inflicts on the victim, it is punishable only by imprisonment for not more than 93 days, or a fine of not more than $500, or both. The penalty is thus relatively small. See *People v Adams*, 262 Mich App 89, 98-99; 683 NW2d 729 (2004) (upholding the strict liability crime of failing to pay child support despite a potential four-year term of imprisonment). Second, because the crime is a misdemeanor only, it is far less likely to "besmirch" the defendant. Cf. *Wulff*, 758 F 2d at 1125 ("[A] felony conviction irreparably damages one's reputation . . . ."). Thus, we conclude that it does not offend due process to hold individuals strictly liable for committing moving violations that cause serious impairment of a body function to another individual.

In sum, MCL 257.601d imposes strict liability on a motorist who commits a moving violation causing serious impairment of a body function to another person, when the moving violation is the factual and proximate cause of the injury, and MCL 257.601d is constitutional. The prosecution is not required to prove that defendant operated his vehicle in a negligent manner, and the trial court erred by so concluding.

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

WILDER, P.J., and SERVITTO and STEPHENS, JJ., concurred.

PEOPLE v ACKAH-ESSIEN

Docket No. 317411. Submitted January 6, 2015, at Grand Rapids. Decided June 4, 2015, at 9:05 a.m. Leave to appeal denied 498 Mich 921.

Dylin Ackah-Essien was convicted following a jury trial in the Cass Circuit Court of conspiracy to commit armed robbery, armed robbery, unlawful imprisonment, larceny from a motor vehicle, carrying a weapon with unlawful intent, unlawfully driving away an automobile, larceny in a building, and receiving and concealing stolen property worth $200 or more but less than $1,000. A previous trial on the same charges had ended in a mistrial because of a deadlocked jury. The charges stemmed from the robbery of a pizza delivery driver. Defendant and three other young men had conspired to commit the crime and lured the driver to an abandoned house. Defendant pointed a BB gun at the victim during the robbery. After the robbery, defendant and his accomplices fled in the victim's car. The court, Michael E. Dodge, J., sentenced defendant to concurrent prison terms of 8 to 20 years for the conspiracy and armed robbery convictions, 4 to 15 years for the unlawful imprisonment conviction, and time already served for the remaining convictions. Defendant appealed.

The Court of Appeals *held*:

1. At the time of defendant's crime, MCL 750.226 stated that any person who, with the intent to use the same unlawfully against the person of another, went armed with a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade more than three inches in length, or any other dangerous or deadly weapon or instrument, was guilty of a felony. Defendant argued that a BB gun did not qualify as a firearm or any other dangerous or deadly weapon under the statute. The weapons specifically enumerated in the statute are dangerous per se. Under the rule of *ejusdem generis*, the meaning of the general words, "other dangerous or deadly weapon or instrument," had to be limited to the same general kind or class of weapons and instruments as those specifically listed, i.e., those that are dangerous per se. Because the Legislature excluded—through both MCL 750.222(d) (defining the word "firearm" for purposes of the firearms chapter of the Michigan Penal Code) and MCL 8.3t

(defining the word "firearm" as used in other statutes)—smoothbore BB guns that propel BBs not exceeding .177 caliber from the meaning of "firearm" as used MCL 750.226, it was reasonable to infer that the Legislature did not intend to include BB guns of this type within the catchall phrase "or any other dangerous or deadly weapon or instrument" under MCL 750.226. Accordingly, that type of BB gun was excluded from the meaning of "any other dangerous or deadly weapon or instrument" in MCL 750.226. The evidence presented at trial did not support a conclusion that the BB gun at issue was dangerous per se. There was no evidence presented at trial that the handgun-style BB gun defendant used in the robbery was anything other than a smooth bore handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BBs not exceeding .177 caliber, and that type of BB gun does not come within meaning of "any other dangerous or deadly weapon or instrument" under MCL 750.226. Consequently, the evidence was insufficient to prove all the elements of MCL 750.226, and defendant's conviction of that offense could not be sustained.

2. The Michigan and United States Constitutions preclude the prosecution from making repeated attempts to convict a defendant for the same offense. If a trial is concluded prematurely after jeopardy has attached, a retrial for the same offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of manifest necessity. The decision to declare a mistrial after a finding of manifest necessity because of a deadlocked jury is entrusted to the sound discretion of the trial court. In this case, there was nothing in the record to suggest that the trial court abused its broad discretion by determining that manifest necessity required the declaration of a mistrial because the first jury was unable to reach a unanimous verdict in the case. After learning that the jury was having difficulty reaching agreement, the trial court read the "deadlocked jury" instruction and required the jury to continue deliberations. After further deliberations, the jury again indicated that it was unable to reach a verdict. Under the circumstances, with no objection by either party, the trial court's declaration of a mistrial in defendant's first trial was a proper exercise of judicial discretion. Defendant's retrial, therefore, did not constitute a constitutionally impermissible successive prosecution.

3. Offense Variable (OV) 10, MCL 777.40, concerns exploitation of vulnerable victims. Defendant was assessed 15 points under OV 10 for predatory conduct. The record contained ample evidence to support the trial court's scoring of OV 10 at 15 points.

> The record showed that defendant engaged in predatory conduct by planning and implementing the crime at the abandoned house and by lying in wait at the isolated, dark location to victimize the pizza delivery person.
>
> 4. OV 14, MCL 777.44, concerns the offender's role in the crime. Defendant was assessed 10 points under OV 14 for being a leader in a multiple-offender situation. There was evidence that it was defendant's idea to commit the robbery, and that he selected the target, and held the BB gun during the robbery. Given that evidence, the trial court did not clearly err by assessing 10 points for OV 14. Because defendant's sentences were within the recommended range of appropriately scored sentencing guidelines, they had to be affirmed.
>
> Defendant's conviction and sentence for carrying a dangerous weapon with unlawful intent vacated; all other convictions and sentences affirmed; case remanded for entry of an amended judgment of sentence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Victor A. Fitz*, Prosecuting Attorney, and *Elizabeth M. Rivard*, Assistant Attorney General, for the people.

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

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

MARKEY, J. Defendant appeals by right his convictions, following a jury trial, of conspiracy to commit armed robbery, MCL 750.529, armed robbery, MCL 750.529, unlawful imprisonment, MCL 750.349b, larceny from a motor vehicle, MCL 750.356a(1), carrying a weapon with unlawful intent, MCL 750.226, unlawfully driving away an automobile, MCL 750.413, larceny in a building, MCL 750.360, and receiving and concealing stolen property $200 or more but less than $1,000, MCL 750.535(4)(a). The trial court sentenced defendant to concurrent prison terms of 8 to 20 years

for the conspiracy and armed robbery convictions, 4 to 15 years for the unlawful imprisonment conviction, and time already served for the remaining convictions. We vacate defendant's conviction and sentence for carrying a dangerous weapon with unlawful intent, but affirm defendant's other convictions and sentences. The evidence established that defendant used a BB gun; however, a BB gun does not come within the meaning of "any other dangerous or deadly weapon or instrument" under MCL 750.226.

I. FACTUAL SUMMARY

Defendant's convictions arise out of the robbery of a 21-year-old pizza delivery driver. Four young men had conspired to commit the crime by having a female friend place an order for food to be delivered to an abandoned house. The trial resulting in defendant's convictions was his second; defendant's first trial resulted in the trial court declaring a mistrial when the jury was unable to reach a verdict.

The testimony at trial showed Michael Smith and Anteyon Russell were identified from their clothing as two of three or four black males that a citizen had observed near the scene of the crime. Russell pleaded guilty to conspiracy to commit armed robbery and several other crimes as part of an agreement for his truthful testimony against defendant in the instant case. Detective Dan Wiggins obtained the fingerprints of Smith and Martrell Jones from pizza boxes he located during the criminal investigation. Jones entered into a guilty plea on multiple charges for the armed robbery of the victim as part of a plea agreement for the dismissal of certain charged offenses in exchange for his truthful testimony against defendant in the instant case.

Martrell Jones testified that he lived in Chicago where he met Michael Smith and defendant through his high school football team. In early April 2012, Jones was on spring break and decided to go to Michigan for a basketball tournament at Smith's invitation. Defendant came with Jones and Smith on a train from Chicago to South Bend; all three are friends. Defendant paid Smith's travel expenses. Smith asked his uncle, Paul Williams, to pick him up at the South Bend Airport, where the train from Chicago also deposits passengers. When Williams arrived, Jones and defendant were also there, and Williams took the three of them to his home near Walter Ward Park in Dowagiac.

Anteyon Russell testified that after defendant, Smith, and Jones got to Dowagiac, defendant, an acquaintance of Anteyon, but not a friend, suggested the idea of committing an armed robbery. According to Anteyon, defendant said he had done "home delivery robberies" of pizza delivery men in Wisconsin. Rolandis Russell is the older brother of Anteyon. Anteyon had been in the company of Smith, Jones, and defendant a few days before the robbery. Rolandis heard defendant suggest a robbery, but Rolandis declined to participate.

Jones testified that defendant, Anteyon, and Smith smoked marijuana and played basketball the morning of the robbery. Defendant suggested they commit an armed robbery, as he had done the day before. Jones first declined, but defendant said that he needed money to get back to Chicago. Defendant specifically suggested robbing a delivery person. Smith testified for defendant, and claimed that sometime later, while he and the codefendants were playing inside Williams's house with a rifle-type BB or pellet gun, they shot out the glass on a stove with it. Williams asked them to leave his home as a consequence.

Anteyon testified that the four men met at Anteyon's grandmother's house before leaving to play basketball and again shoot a BB gun recreationally. Defendant again brought up the topic of a robbery, saying he knew who to call and "set it up." The codefendants found an empty house and determined it would be a suitable location for the planned crime. Anteyon suggested he had a gun that might work and went home to obtain a black BB gun pistol that was later used in the robbery of the victim. Anteyon gave the black BB gun to defendant. Anteyon also testified that once he was back at the unoccupied house, which had no electricity, defendant called a female friend to place an order with Pizza Hut. While the group waited inside the house for the pizza to arrive, they drank a pint of whiskey and planned "who was gonna do what."

Jones testified that Anteyon went to his grandmother's house to change his clothes and get a BB gun, which looked like a "[h]andgun." Someone suggested they call Pizza Hut, and defendant called his girlfriend to have her do so, instructing her to " 'get a lot of pizzas,' " and giving her an address for the delivery. The group then walked to the vacant house they had earlier selected to wait and plan "who was gonna do what . . . ." Defendant, who asked to be called "Pistol" according to Anteyon, elected to hold the gun to the victim's face, while Smith held the victim and Anteyon went through his pockets. Jones agreed to take the victim's car and be the driver.

Anteyon further testified that when car lights appeared from down the street, Jones went out the back sliding door; defendant and Smith went outside to the front, and Anteyon waited inside the house. Defendant was to initiate the robbery by signaling with the words, " 'Dad, the pizza man here [sic].' " Anteyon heard the

signal from defendant and once the crime was underway, went through the victim's pockets as planned. Anteyon took money, a cellular telephone, and a Nintendo DS game system from the victim. Jones testified that when the group saw the victim's car approaching, Jones went out the side door to position himself out front to steal the victim's car. After Smith "lured" the victim into the house, Jones jumped in the car and confirmed the keys were in it. Anteyon came out of the house with the victim's wallet but went back for the pizzas. Smith and defendant then came out, and the four drove off.

Anteyon testified that after the robbery, the four men got into the victim's car and drove off in it, with Jones driving as planned. They drove through a cornfield and stopped along the way near a railroad viaduct so Anteyon could throw the victim's cellular telephone out the car window, fearing its GPS tracking device. He also disposed of a Nintendo DS game. Defendant never gave Anteyon his gun back, which Anteyon last saw when defendant was brandishing it during the crime. According to Anteyon, defendant tried to remove the license plate from the victim's car because he wanted to take the car back to Chicago.

Jones testified that defendant originally wanted to drive back to Chicago, but Jones did not know how to drive. As they were making their escape, Jones slowed, and Anteyon threw the victim's cellular telephone out the window. They proceeded through a field before taking a laptop computer from the back seat and abandoning the car. Defendant and the group divided the money, ate pizza and recapped the crime. Anteyon testified that the four men split the victim's cash equally, ate pizza, boasted about their roles in the crime and how "we got away with it[.]" Later, Rolandis

picked up Smith and Anteyon and took them back to Anteyon's grandmother's house. Smith then asked Anteyon to walk him home, and as they did so, the police stopped them and inquired about the robbery. Smith and Anteyon lied to the police, denying any knowledge of the crime. Jones testified that Smith left with Anteyon but returned some time later, saying that "the cops was on us . . . ." Jones, Smith, and defendant called another uncle of Smith's who drove them to the South Bend Airport, where they took a train back to Chicago.

Smith, a childhood friend of Anteyon's from Dowagiac who had moved to Chicago, testified for the defense that he had contacted Anteyon in advance to make arrangements to get together while Smith was in town. Smith also testified that he, Jones, and Anteyon planned the robbery of the victim. Smith testified that he had pleaded guilty to his involvement in the robbery and that defendant was not involved in either the planning or commission of the robbery. During cross-examination, Smith admitted that during the course of the investigation, he told the police on two separate occasions that defendant was involved in the robbery and told them that defendant pointed the gun at the victim. While during defendant's trial Smith denied that a gun was used in the crime, when Smith entered his own guilty plea he had testified that "[a] pellet gun, BB gun," was used in the crime.

Defendant testified that contrary to the rendition of events by Anteyon and Jones, after the basketball activity, he left by himself and went to Louis Thomas's apartment. When he arrived there at 7:00 p.m., no one was home. He watched movies and a basketball game alone, until Jones, Smith, and Anteyon arrived about 10:00 p.m. Defendant was surprised to see they had

pizza boxes, a laptop computer, and $50 to $75 in cash, since neither Smith nor Jones had any money when they left Chicago. Defendant testified that none of the three told him anything about a robbery that night or anytime while they were in Dowagiac, and defendant never saw a BB pistol the entire time he was in Dowagiac. Defendant was surprised to learn about the robbery when Smith told him the following Monday.

The jury convicted defendant of the crimes listed at the start of this opinion, and the trial court sentenced defendant as noted. Defendant now appeals by right his convictions and sentences.

II. MCL 750.226—BB GUN

Defendant first argues that his conviction for carrying a weapon with unlawful intent, MCL 750.226, cannot stand because the evidence only established the use of a BB gun. Defendant argues a BB gun does not qualify as a "pistol or other firearm . . . or any other dangerous or deadly weapon" under the statute and that the trial court's instruction regarding this offense was erroneous. We agree that the evidence was insufficient to sustain defendant's conviction of this offense.[1]

A. STANDARD OF REVIEW

Issues of statutory interpretation present questions of law that are reviewed de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). But where, as here, a claim of error is not preserved, we consider whether plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error affects a defendant's

[1] Because defendant waived any claim of instructional error, we do not specifically address that aspect of defendant's argument.

substantial rights when it affects the outcome of the proceedings. *Id*. at 763; *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

B. ANALYSIS

The information alleged that on or about April 4, 2012, defendant "did, with intent to use the same unlawfully against the person of another, go armed with a pellet gun; contrary to MCL. 750.226." The cited statute provides, in pertinent part:

> Any person who, with intent to use the same unlawfully against the person of another, goes armed with a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, *or any other dangerous or deadly weapon or instrument*, shall be guilty of a felony . . . . [Emphasis added.][2]

This Court recently reviewed the elements necessary to sustain a conviction of carrying a dangerous weapon with unlawful intent under MCL 750.226. *People v Mitchell*, 301 Mich App 282, 292-293; 835 NW2d 615 (2013) (holding that although the word "carrying" is used in the catch line of the statute, it is not an element of the offense). To establish this charge, the prosecution must prove beyond a reasonable doubt that the accused (1) went armed—while possessing a firearm or other dangerous weapon, moved from one location to another location—and (2) at the time of going armed, had the intent to use the weapon unlawfully against another person. *Id*. at 293.

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[2] 2015 PA 22 and 2015 PA 26 were approved by the Governor on May 12, 2015, but will not take effect until July 1, 2015. When they take effect, these acts will amend some of the statutory language at issue in this case. This opinion only addresses the preamendment statutory language.

The evidence at trial established that the weapon defendant used in the instant case was a handgun-style BB gun that appeared to the victim to be a "real" gun. Under the clear language of the statute, the BB gun described as being used in the instant case does not come within the list of weapons or instruments specifically enumerated in MCL 750.226, i.e., "a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length . . . ." The weapons or instruments specifically named in MCL 750.226 are dangerous per se. *People v Parker*, 288 Mich App 500, 507; 795 NW2d 596 (2010). The prosecution argues that the BB gun that defendant used was also a dangerous weapon per se, relying on evidence that the gun "broke the window to Williams's stove." We conclude this argument is not supported by the evidence. We assume the prosecution is referring to the testimony of Jones, who described some horseplay before the crime when he, defendant, and the other conspirators were playing with "long" BB guns inside Williams's house and stated that one of them had shot out the stove glass with it. But Jones also testified that the BB gun used in the crime looked like a handgun; the victim said he reflexively swatted it away when it was pointed in his face, and that the man with the gun was called "Pistol" by his compatriots. Therefore, the evidence shows that the BB gun that shot out the stove glass was different from the BB gun used to rob the victim. Since a BB gun is not among the weapons or instruments listed in MCL 750.226, it is not a dangerous weapon per se. See *Parker*, 288 Mich App at 507. Therefore, the BB gun must be construed as falling within the catchall language of "any other dangerous or deadly weapon or instrument," MCL 750.226, in order to sustain defendant's conviction.

MCL 750.226 does not define the phrase "or any other dangerous or deadly weapon or instrument," or whether a BB gun is included in the statute's prohibition against going armed with a firearm[3] or other dangerous weapon, with the intent to unlawfully use the weapon against another person. Because the Legislature has not expressly defined the general language "or any other dangerous or deadly weapon or instrument" as used in MCL 750.226, it is open to more than one reasonable meaning. A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or it is equally susceptible to more than a single meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). When there is ambiguity, statutory construction is required. See *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.) ("When a statute is ambiguous, judicial construction is appropriate to determine the statute's meaning.").

The primary goal when construing a statute is to give effect to the Legislature's intent. *Id.*; *Mitchell*, 301 Mich App at 291. The most reliable source regarding the Legislature's intent is the language used in the statute. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012); *Mitchell*, 301 Mich App at 291. When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Cole*, 491 Mich at 330; *Mitchell*, 301 Mich App at 291. In

[3] The prosecution concedes that "certain BB guns are not considered firearms under the penal code," citing MCL 750.222(d). That subsection defines "firearm" to mean "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air," but excludes from the definition "a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber."

construing statutes, this Court applies a reasonable construction of the statute, enforces clear statutory language as written, and reconciles any apparent inconsistencies if possible. *Feezel*, 486 Mich at 205. "Unless they are otherwise defined in the statute or are terms of art or technical words, we assign the words of a statute their plain and ordinary meaning." *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). If a statute specifically defines a term, the statutory definition is controlling. *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). A court may consult dictionary definitions regarding the plain and ordinary meaning of undefined terms. *Mitchell*, 301 Mich App at 291. Technical words and phrases that have acquired a peculiar and appropriate meaning in law must be construed and interpreted in accordance with that meaning. See MCL 8.3a. Moreover, it is presumed that the Legislature is aware of, and must have considered the effect on, all existing statutes when enacting new laws. *Feezel*, 486 Mich at 211 (opinion by CAVANAGH, J.).

We first review the plain and ordinary meaning of the words used in the phrase "or any other dangerous or deadly weapon or instrument . . . ." MCL 750.226. We consult *Merriam-Webster's Collegiate Dictionary* (11th ed) to determine the plain meaning of "dangerous," "deadly," "weapon," and "instrument." "Dangerous" is defined as "exposing to or involving danger[.]" *Id*., p 315. "Danger," in turn, is defined as "exposure or liability to injury, pain, harm, or loss[.]" *Id*. "Deadly" is defined as "likely to cause or capable of producing death[.]" *Id*., p 319. And "weapon" is defined as "something (as a club, knife, or gun) used to injure, defeat, or destroy[.]" *Id*., p 1417. Finally, the word "instrument," in this instance clearly not used in its musical or written context, is defined as "a means whereby some-

thing is achieved, performed, or furthered[.]" *Id*., p 649. "It is well known that a term can be defined in a number of different ways; therefore, when interpreting a statute, this Court is to 'determine the most pertinent definition of a word in light of its context.' " *People v Hershey*, 303 Mich App 330, 339; 844 NW2d 127 (2013) (citation omitted). In light of purpose of the statute, the context in which the words are used, and prior judicial interpretations of the statute, we conclude that for criminal liability to attach under MCL 750.226 for "go[ing] armed" with a nonspecified "weapon" or "instrument," the potential for physical injury or death must exist with respect to the use of the weapon or instrument.

Our primary goal in reading the statute is to effectuate the intent of the Legislature and enforce its clear statutory language in light of the purpose of the statute. *Feezel*, 486 Mich at 205 (opinion by CAVANAGH, J.); *Mitchell*, 301 Mich App at 291. In construing the related MCL 750.227, which prohibits the carrying of a concealed weapon, our Supreme Court employed the rule of construction known as *ejusdem generis* as an aid to ascertain and give effect to the Legislature's intent. *People v Smith*, 393 Mich 432, 436; 225 NW2d 165 (1975). The statutory language at issue in *Smith* was the meaning of "a dagger, dirk, stiletto, or *other dangerous weapon except hunting knives adapted and carried as such . . . .*" *Smith*, 393 Mich at 435, quoting MCL 750.227. The *Smith* Court explained that according to the rule of *ejusdem generis*, in "a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *Smith*, 393 Mich at 436. The

Court held that although an M-1 rifle is a dangerous weapon, it did not come within the meaning of the phrase "other dangerous weapon" when that phrase was delineated by examples of, and thereby limited to, stabbing weapons. *Id*. When the rule of *ejusdem generis* is applied to MCL 750.226, the meaning of these general words, "other dangerous or deadly weapon or instrument," must be limited to the same general kind or class as those specifically mentioned. See *Smith*, 393 Mich at 436. Thus, the general phrase "any other dangerous or deadly weapon or instrument" must be construed to include weapons or instruments that are dangerous per se, i.e., are of the same kind as those that are specifically enumerated in MCL 750.226—"a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length . . . ." See *Parker*, 288 Mich App at 506-508.

Another "general rule of statutory construction is that the Legislature is 'presumed to know of and legislate in harmony with existing laws'." *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) (citation omitted). Since at least the enactment of 1992 PA 217, pertinent to the firearms chapter of the Michigan Penal Code, which contains MCL 750.226, the Legislature has defined "firearm" to exclude "a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber." MCL 750.222(d). Indeed, the Legislature has excluded smooth-bore, .177 caliber BB guns from the definition of "firearm" as used in other statutes:

> The word "firearm", except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun

> designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air. [MCL 8.3t, as added by 1959 PA 189.]

Because the Legislature has excluded through both MCL 750.222(d) and MCL 8.3t smooth-bore BB guns that propel BBs not exceeding .177 caliber from the meaning of "firearm" as used MCL 750.226, it is reasonable to infer that the Legislature did not intend to include BB guns of this type within the catchall phrase "or any other dangerous or deadly weapon or instrument" under MCL 750.226. Stated otherwise, by excluding smooth-bore BB guns that propel BBs not exceeding .177 caliber from the meaning of "firearm," the Legislature must have determined that such a BB gun was not a dangerous or deadly weapon or instrument. See, e.g., *Parker*, 288 Mich App at 507-508 (including knives with blades more than three inches in length as dangerous weapons per se indicates that knives with shorter blades are not dangerous per se and, therefore, not included within the phrase "any other dangerous or deadly weapon or instrument"). We accordingly hold that a BB gun as described in MCL 750.222(d) is excluded from the meaning of "any other dangerous or deadly weapon or instrument" in MCL 750.226.

We next consider whether there was sufficient evidence to sustain defendant's conviction under MCL 750.226. In reviewing sufficiency of the evidence claims, all conflicts in the evidence must be resolved in favor of the prosecution, and an appellate court may not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses. *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Although "the prosecutor need not negate every reasonable theory consistent with inno-

cence," it must produce evidence from which all elements of an offense may be proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We must "draw all reasonable inferences and make credibility choices in support of the jury verdict" when determining whether the prosecution has sustained its burden. *Id*.

In applying this deferential review standard, we conclude the evidence shows that defendant went from one place to another while possessing a handgun-style BB gun with the intent to use the weapon unlawfully against another person. See *Mitchell*, 301 Mich App at 293. The prosecution argues that the BB gun defendant used was a dangerous weapon per se because before the robbery it was used to shoot out the glass of a stove. But as discussed already, that reading of the record is not accurate; the testimony showed it was a long, rifle-type BB or pellet gun that shot out the glass of Williams's stove. In this case, as in *Parker*, the prosecution presented no evidence that the BB gun in question was a dangerous weapon per se. Instead, the record shows that the weapon defendant used was a handgun-style BB gun. There was no evidence presented at trial that the handgun-style BB gun defendant used in the robbery was anything other than "a smooth bore . . . handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber." MCL 750.222(d). For the reasons previously discussed, such a BB gun does not come within the meaning of "any other dangerous or deadly weapon or instrument" under MCL 750.226. Consequently, the evidence was insufficient to prove all the elements of MCL 750.226, and defendant's conviction of that offense cannot be sustained. See *Mitchell*, 301 Mich App at 294; *Parker*, 288 Mich App at 509.

III. DOUBLE JEOPARDY

Defendant next argues that because his first trial ended without his consent and manifest necessity did not support a mistrial, his second trial violated the Double Jeopardy Clause of the United States Constitution. The prosecution asserts the requisite manifest necessity supported the trial court's decision to declare a mistrial because the jury in defendant's first trial remained deadlocked after several hours of deliberation and after receiving the deadlocked-jury instruction. We conclude that defendant's retrial, following the trial court's declaration of a mistrial in his first trial, did not violate the successive-prosecutions protections of the Double Jeopardy Clause.

A. PRESERVATION

To preserve appellate review of a double jeopardy violation, a defendant must object at the trial court level. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Defendant did not object to the trial court's decision to declare a mistrial at the time that it did so, or during defendant's second trial; consequently, his double jeopardy claim is unpreserved. *Id.*; *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

B. STANDARD OF REVIEW

A double jeopardy challenge presents a question of constitutional law reviewed de novo on appeal. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). In this case, the unpreserved double jeopardy claim is reviewed for plain error affecting the defendant's substantial rights. *Meshell*, 265 Mich App at 628. Reversal is warranted only if the error resulted in a conviction

despite the defendant's actual innocence, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Meshell*, 265 Mich App at 628, citing *Carines*, 460 Mich at 763.

The decision to declare a mistrial after a finding of manifest necessity because of a deadlocked jury is entrusted to the " 'sound discretion' " of the trial court. *People v Lett*, 466 Mich 206, 216-217; 644 NW2d 743 (2002), quoting *United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824). On appeal, the trial court's decision to declare a mistrial because of a deadlocked jury must be afforded great deference. *Id*. at 213, 219-220, citing *Arizona v Washington*, 434 US 497, 510; 98 S Ct 824; 54 L Ed 2d 717 (1978). "The issue is not whether this Court would have found manifest necessity, but whether the trial court *abused its discretion* in finding manifest necessity." *Lett*, 466 Mich at 220. A reviewing court will generally defer to the trial court's determination that the jury is deadlocked because that court is in the best position to assess all factors that might affect whether the jury would be able to reach a verdict on further deliberation. *Renico v Lett*, 559 US 766, 772, 774; 130 S Ct 1855; 176 L Ed 2d 678 (2010).

C. ANALYSIS

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *Ream*, 481 Mich at 227. The state and federal constitutional guarantees are substantially identical and should be similarly construed. *People v Davis*, 472 Mich 156, 161-162; 695 NW2d 45 (2005). The Double Jeopardy Clause precludes the prosecution from making re-

peated attempts to convict a defendant for the same offense. *Lett*, 466 Mich at 214. Once jeopardy has attached, the accused has a valuable right in having his or her trial concluded by the jury sworn to hear the case. *Id*. at 214-215.

Generally, jeopardy attaches in a jury trial once the jury is empaneled and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). Once jeopardy attaches, the defendant has a constitutional right to have his or her case completed and decided by that tribunal. *People v Henry*, 248 Mich App 313, 318; 639 NW2d 285 (2001). "If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *Mehall*, 454 Mich at 4. A jury's inability to reach a unanimous verdict is one circumstance that constitutes a manifest necessity permitting retrial. *Id*. Indeed, a "hung jury" is the "prototypical example" of a situation when the "manifest necessity" standard is satisfied with respect to granting a mistrial and permitting retrial. *Lett*, 466 Mich at 217 (quotation marks omitted), quoting *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982). "Necessarily intertwined with the constitutional [double jeopardy] issue . . . is the threshold issue whether the trial court properly declared a mistrial." *Lett*, 466 Mich at 213.

Defendant's first jury trial began with jury selection on December 11, 2012, and continued for the next three days with the attorneys' opening statements, the testimony of witnesses, the attorneys' closing arguments, and the trial court's instructions to the jury. The jury began deliberations on December 13, 2012, at approximately 3:48 p.m. After the jury deliberated that afternoon without having reached a verdict, the trial court

excused the jury for the day at approximately 5:37 p.m. It ordered them to return the next morning at 9:00 a.m. to continue their deliberations. The record reflects that the jury continued to deliberate on December 14, 2012. The jury returned to the courtroom at 11:58 a.m. for the trial court to respond to two communications it had received from the jurors. The record shows that the jury was, as of that moment, unable to reach a verdict. The trial court addressed the jury and responded to a request for certain testimony to be read back. The court then stated it had received a note within the last fifteen minutes that read, "Can't agree, no one willing to change their verdict . . . ." After cautioning the jury against revealing "how your voting stands," the trial court read a detailed "deadlocked jury" instruction and asked the jury to continue deliberating after they had lunch. Neither the prosecution nor defense counsel expressed an objection to the deadlocked jury instruction in response to the trial court's invitation to do so.

After a lunch break and further deliberations, the trial court received another communication from the jury. The jury returned to the courtroom at approximately 2:59 p.m., and the trial court again addressed them:

> Members of the jury, the Court has received your most recent communication and it reads as follows: "We are unable to reach a verdict." In light of that and considering the length of time you have spent in deliberations, and the earlier instruction that the Court gave to you after you initially reported that you were unable to reach a verdict, I do hereby declare a mistrial in this case. I thank you, very much, for your jury service. This jury is discharged.

The jury was discharged without any further remark appearing on the record. Defense counsel did not object or further comment in response to the trial court's

decision to declare a mistrial due to the jury's inability to reach a unanimous verdict.

Defendant argues that the trial court abused its discretion by not considering reasonable alternatives before sua sponte declaring a mistrial and that the court should have made findings on the record showing that no reasonable alternative to declaring a mistrial existed. This argument is without merit as neither our Supreme Court nor the United States Supreme Court has ever required that a trial court follow a particular procedure, consider alternatives to a mistrial, or make record findings before declaring a mistrial on the basis that a jury is unable to reach a unanimous verdict. See *Lett*, 466 Mich at 221 ("[T]his Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock; nor have we ever required that the judge conduct a 'manifest necessity' hearing or make findings on the record."). And the United States Supreme Court has stated:

> We have expressly declined to require the "mechanical application" of any "rigid formula" when trial judges decide whether jury deadlock warrants a mistrial. We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of " 'manifest necessity' " nor to "articulate on the record all the factors which informed the deliberate exercise of his discretion." And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. [*Renico*, 559 US at 775 (citations omitted).]

There is nothing in this record to suggest that the trial court abused its broad discretion in determining

that manifest necessity required the declaration of a mistrial because the jury was unable to reach a unanimous verdict in the case. The jury deliberated for almost two hours the first afternoon after receiving the trial court's final instructions. The next morning, the jury continued deliberating for approximately another three hours, from approximately 9:00 a.m. to 11:58 a.m., before advising the trial court that it was having difficulty reaching a verdict because the members of the jury "[c]an't agree, no one willing to change their verdict[.]" The trial court then specifically encouraged the jury to attempt to reach a unanimous verdict by reading them the "deadlocked jury" instruction and requiring the jury to continue deliberations. After further deliberations, the jury again indicated that it was "unable to reach a verdict." The trial court is in the best position to assess all factors that might affect whether the jury would be able to reach a verdict on further deliberation. *Renico*, 559 US at 774. Under these circumstances, with no objection by either party, the trial court's declaration of a mistrial in defendant's first trial was a proper exercise of judicial discretion. As in *Lett*, 466 Mich at 223, "manifest necessity for the jury's discharge existed, and defendant's retrial did not constitute a constitutionally impermissible successive prosecution."

IV. SENTENCING ISSUES

Defendant next argues that the trial court erred by scoring Offense Variable (OV) 10 at 15 points because "predatory conduct" was not involved and also erred by scoring OV 14 at 10 points because defendant was not a leader in a multiple-offender situation. Because defendant timely objected to the scoring of OV 10 and OV 14 and the trial court heard and decided the

objections against him, he has preserved this issue for appeal. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012).

A. STANDARD OF REVIEW

Our review of a sentence imposed under the statutory guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the trial court based its departure from the recommended range upon an articulated substantial and compelling reason. MCL 769.34(2), (3), and (10); *People v Babcock*, 469 Mich 247, 271-274; 666 NW2d 231 (2003); *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013). With respect to any factual findings, we review the trial court's determinations for clear error and for whether they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

B. ANALYSIS

The preponderance of the evidence in the record supports the trial court's assessment of 15 points under OV 10 for predatory conduct in the exploitation of a vulnerable victim, MCL 777.40(1)(a), as well as the trial court's determination that defendant was a leader in a multiple-offender situation, MCL 777.44(1)(a). Accordingly, the trial court did not clearly err when it assessed 10 points for OV 14 and 15 points for OV 10. See *Hardy*, 494 Mich at 438. Because defendant's sentences were within the recommended range of ap-

propriately scored sentencing guidelines, we must affirm those sentences. MCL 769.34(10); *Babcock*, 469 Mich at 261.

OV 10 of the sentencing guidelines addresses the exploitation of a vulnerable victim. MCL 777.40(1). Points are assessed under this OV when exploitive conduct was directed against a vulnerable victim and the vulnerability was readily apparent, in that the victim was susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c); *People v Cannon*, 481 Mich 152, 157-158; 749 NW2d 257 (2008). Under OV 10, a court must assess 15 points if predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). To victimize is to make a victim of someone, and a victim is a person who suffers from a destructive or injurious action. *Cannon*, 481 Mich at 161. Predatory conduct under OV 10 must be preoffense conduct that is predatory rather than purely opportunistic criminal conduct. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). Predatory conduct need not be directed at one particular or specific victim, but it must be directed at *a* victim. *Id*. at 459. The timing and location of an offense—waiting until a victim is alone and isolated—is evidence of predatory conduct. *People v Kosik*, 303 Mich App 146, 160; 841 NW2d 906 (2013); *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Lying in wait while armed to rob a delivery person at an isolated location is predatory conduct. See *Huston*, 489 Mich at 463.

The record contains more than ample evidence to support the trial court's scoring of OV 10 at 15 points on the basis of defendant's predatory planning and

participation in the exploitation of a vulnerable victim. See *id*. at 459-468. Both Anteyon and Jones testified that defendant helped select a suitable location for the planned crime: the empty house with no electricity on a dead-end street. Other testimony confirmed that there was no power at the house and that it was dark. Once the victim arrived with the large, cumbersome pizza order, defendant and his cohorts surrounded the victim while armed with what appeared to be a real gun. Thus, the record shows that defendant engaged in predatory conduct by planning and implementing the crime at the abandoned house and by lying in wait at the isolated, dark location to victimize the pizza delivery person. This evidence supported the trial court's finding that "the conduct involved by the defendants in this case constituted predatory conduct; that is, it was pre-offense conduct designed to lure the victim to this location of the abandoned home where they then, on the pretext of paying him, lured him into a dark and abandoned home where he was jumped and robbed." The trial court properly assessed 15 points for OV 10 on the basis of the exploitation of a vulnerable victim involving predatory conduct. MCL 777.40(1)(a).

OV 14 of the sentencing guidelines addresses the offender's role in the offense. MCL 777.44(1); *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013). "The entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a); see also *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012). A court must assess 10 points when "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a).

A "multiple offender situation" is one in which more than one person—up to several or many persons—participates in a violation of the law. *People v Jones*,

299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013). A "leader" is a person who acts as a " 'guiding or directing head' of a group." *Id*., quoting *Random House Webster's College Dictionary* (1997).

While defendant argues that the trial court erred by assessing 10 points for OV 14, we find that a preponderance of the evidence in the record supports the trial court's scoring. See *Hardy*, 494 Mich at 438. There was testimony that defendant paid Smith's travel expenses from Chicago to Dowagiac. Both Anteyon and Jones testified that it was defendant who first expressed the idea of committing an armed robbery when defendant told them he had done "home delivery robberies" of pizza delivery men in Wisconsin. When Jones protested that he "didn't come out here for that," defendant refused to take no for an answer and insisted that "we need to get this money" in order to return to Chicago. Rolandis also testified he heard defendant suggest a robbery, but that he declined to participate. Testimony showed it was defendant who selected Pizza Hut and directed a female friend to place the false order for him, giving her the address to the abandoned house where the crime was to take place. Defendant initiated the robbery by signaling with the words, "Dad, the pizza man here [sic]." Defendant also directed the group to call him "Pistol," and it was he who held the BB gun to the victim's face during the robbery. Given this evidence, the trial court did not clearly err by assessing 10 points for OV 14. MCL 777.44(1)(a).

In summary, the preponderance of the evidence in the record supports the trial court's assessment of 15 points for OV 10 and 10 points for OV 14.[4] See *Hardy*,

[4] In a footnote, defendant asserts as an "aside" that OV 2, MCL 777.32, was erroneously scored. Defendant has abandoned this claim by

494 Mich at 438. Because defendant's sentences were within the recommended range of appropriately scored sentencing guidelines, we must affirm those sentences. MCL 769.34(10); *Babcock*, 469 Mich at 261.

We affirm all defendant's convictions and sentences except that for carrying a dangerous weapon with unlawful intent, MCL 750.226, which we vacate. We remand for entry of an amended judgment of sentence consistent with this opinion; we do not retain jurisdiction.

RIORDAN, P.J., and WILDER, J., concurred with MARKEY, J.

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merely announcing his position without citation of authority and by expecting this Court to discover and rationalize the basis for his claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Defendant's failure to properly address the merits of his assertion of error constitutes abandonment of this claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

BECKETT-BUFFUM AGENCY, INC v ALLIED PROPERTY & CASUALTY INSURANCE COMPANY

Docket No. 321273. Submitted June 3, 2015, at Grand Rapids. Decided June 9, 2015, at 9:00 a.m.

Beckett-Buffum Agency, Inc filed suit in Kent Circuit Court against Allied Property & Casualty Insurance Company for breaching its statutory and contractual duties to plaintiff. Plaintiff had contracted with defendant to serve as an agency for defendant in the insurance industry. Under MCL 500.1209(2)(e), defendant terminated the agency agreement with plaintiff because plaintiff failed to submit 25 applications for automobile and home insurance within the immediately preceding 12 months. In response to plaintiff's suit, defendant moved for summary disposition under MCR 2.116(C)(10) on the basis that there was no genuine issue of material fact involved. Plaintiff claimed it submitted 29 applications for insurance in the immediately preceding 12 months. However, 6 of the 29 "applications" were for the renewal or reinstatement of previously existing insurance policies. The court, Christopher P. Yates, J., concluded that a request to reinstate a lapsed insurance policy did not constitute an application for insurance, and therefore, the court granted defendant's motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

The trial court properly concluded that plaintiff failed to submit 25 applications for home insurance and automobile insurance within the immediately preceding 12-month period and that, because of plaintiff's failure to produce, defendant was permitted by law to terminate the agency agreement with plaintiff. Although plaintiff claimed it submitted 29 applications for insurance during the applicable time period, 6 of those applications were to reinstate or renew previously existing policies. The trial court correctly ruled that reinstatements and renewals of preexisting policies did not qualify as applications for insurance under MCL 500.1209(2)(e).

Affirmed.

INSURANCE — HOME AND AUTOMOBILE POLICIES — AGENCY AGREEMENTS — WORDS AND PHRASES — APPLICATION.

For purposes of MCL 500.1209(2)(e), an application for home insurance or automobile insurance does not include the reinstatement or renewal of a previously existing policy.

Barrix Law Firm, PC (by *Timothy D. VandenBerg*), and *Robert E. Attmore* for plaintiff.

Harvey Kruse, PC (by *Gary Stec* and *Lanae Monera*), for defendant.

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

PER CURIAM. Plaintiff, Beckett-Buffum Agency, Inc., appeals as of right the trial court's order granting defendant Allied Property & Casualty Insurance Company's motion for summary disposition under MCR 2.116(C)(10). Because plaintiff submitted fewer than 25 applications for insurance during the relevant time period, defendant could cancel plaintiff's Agency Agreement under MCL 500.1209(2)(e), and therefore, we affirm.

On January 7, 2010, plaintiff entered into an Independent Agency Agreement with defendant under which plaintiff was to serve as an agency for defendant in the insurance industry. On December 6, 2011, defendant sent plaintiff a letter terminating the Agency Agreement based on plaintiff's lack of production. In particular, under MCL 500.1209(2)(e) of the Insurance Code, MCL 500.100 *et seq*., an insurer may terminate an insurance producer's authority to represent the insurer with respect to automobile insurance or home insurance, when the insurance producer submits "less than 25 applications for home insurance and automobile insurance within the immediately preceding 12-month period."

In response to its termination, plaintiff filed this action, alleging that defendant breached its contractual and statutory duties to plaintiff when it terminated the Agency Agreement because plaintiff had submitted to defendant 29 applications for insurance policies in the applicable 12-month period. After the close of discovery, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant argued, in relevant part, that 6 of the 29 policies were policy renewals, not applications, meaning that plaintiff had not reached the statutory threshold of 25 applications, and termination was therefore appropriate. The trial court granted defendant's motion on this basis, and plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court erred by granting summary disposition to defendant because plaintiff submitted more than 25 applications to defendant within the relevant 12-month time period. Specifically, consistently with its arguments in the trial court, plaintiff maintains that the disputed 6 renewals of lapsed policies should be counted as "applications for home insurance and automobile insurance" within the meaning of MCL 500.1209(2)(e). If these 6 renewals constitute applications, the parties agree that plaintiff submitted more than 25 applications in the relevant 12-month period.

We review de novo a trial court's grant of summary disposition. *Comerica Bank v Cohen*, 291 Mich App 40, 45; 805 NW2d 544 (2010). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint" and is properly granted as a matter of law when there is no "genuine issue regarding any material fact." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (quotation marks and citation omitted). When reviewing a motion for summary disposi-

tion under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. "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).

In this case, whether the six policy renewals credited to plaintiff constitute applications involves a question of statutory interpretation. We review de novo issues of statutory interpretation. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). "The primary goal of statutory interpretation is to give effect to the Legislature's intent," and it is well-recognized that "[t]he words of a statute provide the most reliable evidence of its intent[.]" *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011) (quotation marks and citations omitted). Consequently, we focus on the statute's plain language. *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." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). A dictionary may be consulted to determine a word's common and ordinary meaning. *Id*. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011).

The relevant statutory language at issue in this case provides:

> (2) As a condition of maintaining its authority to transact insurance in this state, an insurer transacting

> automobile insurance or home insurance in this state shall not cancel an insurance producer's contract or otherwise terminate an insurance producer's authority to represent the insurer with respect to automobile insurance or home insurance, except for 1 or more of the following reasons:
>
> * * *
>
> (e) Submission of less than 25 *applications for home insurance and automobile insurance* within the immediately preceding 12-month period. [MCL 500.1209(2)(e) (emphasis added).]

At its most basic in this context, an "application" is a "request" or "petition." *Merriam-Webster's Collegiate Dictionary* (2014). "Submission" in this context indicates "an act of submitting something (as for consideration or inspection)[.]" *Id*. "Submitting" means "present[ing] or propos[ing] to another for review, consideration, or decision[.]" *Id*. And finally, the term "insurance" generally denotes "coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril[.]" *Id*. Thus, MCL 500.1209(2)(e) plainly envisions that to continue its Agency Agreement, an insurance producer would present for the insurer's consideration requests for insurance contracts providing home and automobile coverage.[1]

Contrary to plaintiff's argument, the statute does not contemplate renewal of existing policies or the reinstatement of lapsed policies as "applications." That is, when an insurance contract is renewed, a request for coverage has been previously made and granted,

[1] As used in MCL 500.1209(2)(e), "home insurance" and "automobile insurance" mean specifically the home and automobile insurance contemplated by MCL 500.2103(3) and MCL 500.2102(2) respectively. See MCL 500.1209(5).

and the renewal is "merely a continuation or extension of the original contract." See 2 Couch, Insurance, 3d, § 29:35, p 68. Indeed, an initial request for insurance typically involves a written application to the insurer, while such a document is not necessarily required for a mere renewal of a policy.[2] See, e.g., MCL 500.3037(1) and (6). Likewise, there is a distinction between a request for an insurance policy and the reinstatement of a lapsed policy. When a lapsed policy is subsequently reinstated, the reinstatement "is not a new contract of insurance, nor is it the issuance of a policy of insurance; but rather it is a contract by virtue of which the policy already issued, under the conditions prescribed therein, is revived or restored after its lapse." *New York Life Ins Co v Buchberg*, 249 Mich 317, 321; 228 NW 770 (1930). Therefore, renewal of an existing policy or reinstatement of a lapsed policy is not in actuality a request for an insurance policy because such a policy already exists. We are, in short, persuaded that the reference to "applications for home insurance and automobile insurance" does not encompass subsequent efforts to extend or revive previously existing coverage. See *Black's Law Dictionary* (6th ed) (defining "application" in the context of insurance as "[t]he *preliminary* request, declaration, or statement made by a party applying for an insurance policy)" (emphasis added).

Consistently with this conclusion, defendant produced, as support for its motion for summary disposition, an affidavit from Jessica Zaugg, an underwriting director for defendant. Zaugg averred that defendant does not consider either the renewal of policies or the reissuance of lapsed or cancelled policies to be applica-

[2] We note, however, that in some cases, an application or request for insurance may be made orally. See MCL 500.2122(1).

tions for insurance. According to Zaugg, defendant does not perform the same underwriting practices for the renewal of policies or the reissuance of policies as it does for new applications, and generally, an insured does not have to submit a signed application before a policy is renewed or reissued. Moreover, for each of the six renewed policies at issue, Zaugg indicated that the policyholders originally applied for and received coverage before the time period at issue. Zaugg further explained that each of the renewed policies had the same policy numbers as the insureds' original policies and that "a signed application was not submitted by or on behalf of" the insureds before the policies were reissued. Plaintiff likewise concedes that the 6 policies at issue were merely renewals or reinstatements of previously existing coverage. Consequently, viewing the record in the light most favorable to plaintiff, it is clear that plaintiff did not submit 25 applications during the 12 months immediately preceding defendant's termination of plaintiff's Agency Agreement, and thus, termination was proper under MCL 500.1209(2)(e).

Because defendant was statutorily permitted to terminate the Agency Agreement if plaintiff submitted "less than 25 applications for home insurance and automobile insurance within the immediately preceding 12-month period," MCL 500.1209(2)(e), plaintiff's claim that defendant breached its statutory duties to plaintiff when it terminated the Agency Agreement fails. Further, the Agency Agreement permitted defendant to terminate the contract at any time by 90 days' written notice, and there is no dispute that defendant complied with this procedure. Therefore, plaintiff's claim that defendant breached its contractual duties to plaintiff when it terminated the Agency Agreement

also fails. As such, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

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

In re PAYNE/PUMPHREY/FORTSON

Docket No. 324813. Submitted June 3, 2015, at Detroit. Decided June 11, 2015, at 9:00 a.m. Leave to appeal denied 498 Mich 869.

The Calhoun Circuit Court, Stephen B. Miller, J., terminated the parental rights of respondent-mother to her four minor children under MCL 712A.19b(3)(c)(*i*) and (*ii*), (g), and (j) on the basis of a petition from the Department of Human Services (DHS) alleging physical abuse, physical neglect, improper supervision, mental instability, and substance abuse. Respondent appealed the order as of right. The Court of Appeals, FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., reversed the trial court's termination order regarding respondent's two Indian children, AP and DP, in an unpublished opinion per curiam, issued September 18, 2014 (Docket Nos. 318105 and 318163), because no qualified expert had testified that respondent's continued custody of AP and DP was likely to result in serious emotional or physical damage to the Indian children as required to support a termination order under the Indian Child Welfare Act (ICWA), 25 USC 1912(f). The panel also concluded that although the trial court had not clearly erred by finding that grounds for terminating respondent's parental rights to her two non-Indian children, KP and DF, were proved by clear and convincing evidence, remand was required because the trial court had failed to articulate a finding regarding whether termination was in the best interests of KP and DF on the record or in writing. On remand, an expert qualified under ICWA testified that he did not believe that the continued custody of AP and DP by respondent would likely result in serious emotional or physical damage to either one or both of the children. Nevertheless, the trial court ruled that despite the expert testimony, there was evidence beyond a reasonable doubt that returning AP and DP was likely to result in serious emotional or physical damage to the children. The trial court also found that terminating respondent's parental rights was in KP's and DF's best interests. Accordingly, the trial court once again terminated respondent's parental rights to all four children. Respondent appealed.

The Court of Appeals *held*:

1. The trial court did not err by making its termination ruling with respect to AP and DP after considering the testimony of only one qualified expert witness. Although 25 USC 1912(f) requires the testimony of "qualified expert witnesses," its Michigan counterparts, MCL 712B.15(4) and MCR 3.977(G)(2), only require the testimony of at least one qualified expert witness. Because the Court of Appeals has repeatedly interpreted the term "witnesses" as used in 25 USC 1912 to mean that only one qualified expert witness need testify, 25 USC 1912(f) did not conflict with MCL 712B.15(4) or MCR 3.977(G)(2).

2. The trial court erred by determining that returning AP and DP to respondent's care would result in damage to the children beyond a reasonable doubt in light of the fact that the lone expert witness testified to the contrary. To terminate parental rights to an Indian child, 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2) each require that evidence beyond a reasonable doubt, including testimony of a qualified expert witness, establish that the continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. Dictionaries define the term "include" as "to contain or encompass as part of a whole" and "to contain as a part of something." Therefore, in order to terminate parental rights to an Indian child, the trial court's finding was required to contain or encompass testimony of a qualified expert witness who opined that continued custody of the Indian child by the parent would likely result in serious physical or emotional harm to the child. The trial court recognized that the only expert witness at the termination hearing did not support termination and specifically testified that returning AP and DP to respondent's care would not likely result in serious emotional or physical damage to either child. In so doing, the trial court essentially disregarded the expert's testimony, contrary to the plain language of 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2). Because the trial court failed to adhere to the requirements of ICWA and its Michigan counterparts, the case was remanded for further proceedings with respect to AP and DP.

3. The trial court did not clearly err by finding that termination of respondent's parental rights was in KP's and DF's best interests. Both children were in need of permanency and stability, and both children were benefitting from the care at their current placements. During the lengthy proceedings, respondent displayed a continuing inability to rectify the barriers that led to adjudication, despite DHS's having offered her a plethora of

services. Once her parental rights were terminated the first time, those services stopped and respondent participated only minimally in voluntary services. Thus, at the time of the second termination hearing, it remained unlikely that the children could be returned to respondent's care in the foreseeable future, if at all. Given the length of time the proceedings lasted, and the minimal likelihood that respondent could rectify her barriers to reunification within a reasonable time, any bond respondent had with KP and DF was outweighed by the children's need for permanency, stability, and finality.

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

1. INDIANS — CHILD CUSTODY — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — QUALIFIED EXPERT WITNESSES.

The provision of the Indian Child Welfare Act that prohibits the termination of parental rights regarding an Indian child 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, requires the testimony of only one qualified expert witness to support a termination order (25 USC 1912(f)).

2. INDIANS — CHILD CUSTODY — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — TESTIMONY OF QUALIFIED EXPERT WITNESSES.

To terminate parental rights to an Indian child, a trial court's finding is required to contain or encompass testimony of a qualified expert witness who opined that continued custody of the Indian child by the parent would likely result in serious physical or emotional harm to the child; if the only qualified expert witness at a termination hearing testifies that returning an Indian child to his or her parent's care would not likely result in serious emotional or physical damage to the child, the court may not terminate parental rights to the child (25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2)).

David E. Gilbert, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for petitioner.

Ronald D. Ambrose for respondent.

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

GADOLA, J. This case implicates the evidentiary standards required to terminate parental rights under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., and the Michigan court rules. Respondent-mother appeals as of right the trial court's second order terminating her parental rights to her four minor children following a remand from this Court. See *In re Payne/Pumphrey/Fortson*, unpublished opinion of the Court of Appeals, issued September 18, 2014 (Docket Nos. 318105 and 318163). We affirm the trial court's order in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent has a lengthy history with the Department of Human Services (DHS) dating back to 2009, involving allegations of physical abuse, physical neglect, improper supervision, mental instability, and substance abuse. The trial court initially terminated respondent's parental rights to her minor children, AP, DP, KP, and DF, under MCL 712A.19b(3)(c)(*i*) and (*ii*), (g), and (j) on September 5, 2013. Respondent appealed that termination order as of right, and in *Payne/Pumphrey/Fortson*, unpub op at 3, this Court affirmed the trial court's order in part, reversed in part, and remanded for further proceedings. Subsequently, on November 6, 2014, the trial court conducted an additional termination hearing as instructed by this Court. That same day, the trial court entered an order affirming its original order terminating respondent's parental rights to each of her

minor children.[1]

A. RESPONDENT'S FIRST APPEAL

In respondent's first appeal, she argued that the lower court erred in terminating her parental rights because the court failed to apply the correct evidentiary standard under ICWA with respect to her two Indian children, DP and AP, and failed to render a finding that termination was in her children's best interests. *Payne/Pumphrey/Fortson*, unpub op at 1-3. This Court concluded that DP and AP were Indian children under ICWA, but that "the trial court did not apply the heightened 'beyond a reasonable doubt' evidentiary standard of proof at the termination hearing as required under ICWA." *Id*. at 2. The Court further noted that "although a representative of DP and AP's Indian tribe testified at the termination hearing, the witness was never qualified as an expert and, importantly, the witness did not testify that respondents' 'continued custody of' DP and AP was 'likely to result in serious emotional or physical damage to the' Indian children." *Id*., quoting 25 USC 1912(f). Accordingly, the Court reversed the trial court's termination order regarding DP and AP and remanded for further proceedings. *Id*.

Regarding KP and DF, respondent's two non-Indian children, the Court determined that the trial court did not clearly err by finding that MCL 712A.19b(3)(c)(*i*) and (*ii*), (g), and (j) were proved by clear and convincing evidence. *Id*. at 3. However, the Court agreed that "the

[1] The trial court also terminated the parental rights of the father of AP and DP on September 5, 2013, and affirmed that termination order on November 6, 2014. The father of AP and DP did not file an appeal as of right from the trial court's November 6, 2014 order; thus, the children's mother is the only respondent participating in this current appeal.

trial court failed to articulate a best interests finding regarding KP and DF at the termination hearing or in its subsequent termination orders." *Id*. Therefore, the Court remanded the case for the trial court to articulate its findings of fact and conclusions of law regarding the best interests of KP and DF on the record or in writing. *Id*.

B. LOWER COURT PROCEEDINGS ON REMAND

On November 6, 2014, the trial court held an additional termination hearing in this matter. Caseworker Kristina Burch testified that she still believed respondent's parental rights to all four children should be terminated. Burch explained that over the course of the several years respondent's children were in protective custody, respondent did not demonstrate a benefit from the services provided to her. Burch said that given the children's ages, the length of time they had been in care, and the lack of benefit shown by respondent, returning the children to her custody would present a serious risk of harm to the children.

Christopher Hillert, a child welfare worker for the Red Cliff Band of Lake Superior Chippewa, was qualified as an expert regarding the customs, family organization, and child-rearing practices of AP and DP's Indian tribe. Hillert testified that DHS made active efforts to reunify the family, and he could not identify any additional services that could have been provided to respondent during the course of the proceedings. However, Hillert opposed terminating respondent's parental rights because it was generally against the tribe's practice to support termination. When asked whether he believed returning AP or DP to respondent's care would present a serious risk of harm to either child, Hillert stated his position in the following exchange:

> *Q*. Alright. Let me ask you a specific question, Mr. Hillert. Do you feel, either yes or no, that the continued custody of the children by the parent and custodian would likely result in serious emotional or physical damage to either one or both of the children?
>
> *A*. No, I do not.
>
> *Q*. Alright. And as it relates to both of the children, sir, why do you feel that way?
>
> *A*. I feel that [respondent] has completed everything that has been placed in front of her by the Department of Human Services. She continues to pursue her children, would like to visit with them more often and move towards reunification. I believe that [respondent] wants to work towards getting her children back and the Department has not allowed her an opportunity.

Following additional proofs and closing arguments, the trial court issued a ruling on the record. First, the trial court found that Hillert was properly qualified as an expert witness under ICWA. The trial court, quoting 25 USC 1912(f), acknowledged that the evidentiary standard for terminating respondent's parental rights to AP and DP required "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." Respondent argued that the standard of proof required for the Indian children was not met because the only expert witness to testify expressly opined that respondent's custody of AP and DP was unlikely to result in serious emotional or physical damage to the children. In response to respondent's argument, the trial court stated the following:

> That does not, in this Court's mind, mean that if a qualified expert witness being a qualified expert under the Indian Child Welfare Act testifies that they do not think

> there is any serious harm, that that ends the discussion. The statute specifically says that it is evidence that includes testimony of [a] qualified expert witness and does not specify that the Court must otherwise discard any other evidence in the case in regard to whether or not there is a serious emotional or physical damage that's likely to result to the child. So, the Court takes into account all the things that are presented to it, including the testimony of Mr. Hillert, in this case, as to whether continued custody of the children . . . would likely [] result in serious emotional or physical damage to the child.
>
> . . . There is, in this Court's opinion, and still is, despite Mr. Hillert's testimony, evidence and I think it is evidence beyond a reasonable doubt, that the return of the children is likely and was likely to result in serious emotional or physical damage to the children, those two children.

The trial court also found that terminating respondent's parental rights was in KP's and DF's best interests. The court noted that the children were benefitting from their current placements, and that respondent had not demonstrated an ability to benefit from the services provided to her throughout the proceedings. Accordingly, the trial court once again terminated respondent's parental rights to all four children.

II. EVIDENTIARY STANDARD UNDER ICWA

A. STANDARD OF REVIEW

"Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). We review a trial court's factual findings underlying the application of legal issues for clear error. *Id*. A decision is clearly erroneous if the reviewing court is left with a definite and firm conviction that the

trial court made a mistake. *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

B. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting statutes, our primary goal is to discern and give effect to the intent of the Legislature. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). If statutory language is unambiguous, courts must honor the legislative intent clearly indicated in the language and "[n]o further construction is required or permitted." *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). In reviewing a statute's language, courts 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." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). When terms are undefined in a statute, courts should assign the terms their plain and ordinary meaning, and may consult a dictionary to accomplish this task. *Id*.

C. ANALYSIS

Congress enacted ICWA in response to 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.' " *Morris*, 491 Mich at 97, quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). ICWA established "minimum Federal standards for the removal of Indian children from their families to protect the best interests of Indian children and to promote the stability and security of Indian tribes and their families." *In re*

Elliott, 218 Mich App 196, 201; 554 NW2d 32 (1996) (citation and quotation marks omitted). Pursuant to ICWA, proceedings involving the termination of parental rights to an Indian child require a dual burden of proof. *Id*. at 209. 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 ICWA before terminating parental rights. *Id*. at 209-210.

Subsection (f) of 25 USC 1912 governs the federal evidentiary standard necessary to terminate parental rights to an Indian child, and provides the following:

> 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.

Both MIFPA and the Michigan Court Rules contain similar requirements. MCL 712B.15(4) states the following:

> 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 as described in [MCL 712B.17], 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.

MCR 3.977(G)(2) provides that a court may not terminate a parent's rights over an Indian child unless "the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness,"

that "continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child."

Respondent first argues that the "beyond a reasonable doubt" standard was not met in this case because only one expert witness testified, and 25 USC 1912(f) requires the "testimony of qualified expert witnesses." She correctly notes that both MCL 712B.15(4) and MCR 3.977(G)(2) vary slightly from 25 USC 1912(f), inasmuch as they merely require the testimony of "at least one qualified expert witness." She argues that to the extent Michigan authority conflicts with 25 USC 1912(f), the federal statute prevails, thus requiring more than one qualified expert witness to testify before a court may terminate her parental rights. However, this Court has repeatedly interpreted the term "witnesses" as used in 25 USC 1912 "to mean that only one 'qualified expert witness' need testify." *Elliott*, 218 Mich App at 207; see also *In re Kreft*, 148 Mich App 682, 690; 384 NW2d 843 (1986). Thus, 25 USC 1912(f) does not conflict with MCL 712B.15(4) and MCR 3.977(G)(2), and only one expert witness was required to testify in this case.

Respondent further contends that the trial court failed to comply with the "beyond a reasonable doubt" evidentiary standard because the only expert witness to testify at the termination hearing expressly opined that returning AP and DP to respondent's care would *not* likely result in serious emotional or physical damage to either child. To terminate parental rights to an Indian child, 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2) each require that evidence beyond a reasonable doubt, *including* testimony of a qualified expert witness, must establish that the continued custody of the child by the parent will likely

result in serious emotional or physical damage to the child. The term "including" is undefined in ICWA, MIFPA, and the Michigan Court Rules. The word "including" is neither a technical nor a legal term, so consultation of a dictionary is appropriate to determine its plain and ordinary meaning within the context of the statute. *Koontz*, 466 Mich at 312. *Random House Webster's College Dictionary* (2000) defines "include" as "to contain or encompass as part of a whole[.]" *Black's Law Dictionary* (10th ed) similarly defines "include" as "[t]o contain as a part of something." Considering these definitions, we conclude that in order to terminate parental rights to an Indian child, a trial court's "beyond a reasonable doubt" finding must "contain" or "encompass" testimony of a qualified expert witness who opines that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child.

To further support this interpretation, we turn to this Court's recent decision in *In re McCarrick/Lamoreaux*, 307 Mich App 436; 861 NW2d 303 (2014). In that case, this Court interpreted 25 USC 1912(e) and MCL 712B.15(2), two different—but very similar—provisions of ICWA and MIFPA, which govern the evidentiary standards required to place an Indian child in protective custody. *Id*. at 464-466. Subsection (e) of 25 USC 1912 provides the following:

> 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 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. [Emphasis added.]

Similarly, MCL 712B.15(2) provides that a trial court may only remove an Indian child "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 . . . 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." (Emphasis added.)

In *McCarrick/Lamoreaux*, 307 Mich App at 439-440, DHS petitioned to remove Indian children from their mother's care because she was abusing drugs and alcohol in the home and allowing her children to do the same. At the removal hearing, Stacey O'Neil was qualified as an expert on the child-rearing practices of the children's tribe. *Id*. at 441. O'Neil provided an overview of the services offered to the mother and the success of those efforts, but she "did not testify about the possible damage to the children." *Id*. at 466. Despite the lack of expert testimony concerning the possibility of damage to the children, the trial court found that probable cause existed to assume jurisdiction over the children. *Id*. at 441-442.

On appeal, this Court concluded that the trial court failed to comply with the evidentiary standards of ICWA and MIFPA, and held the following:

> While it may appear obvious that drug use has the potential to damage children, ICWA and [MIFPA] require the trial court's determination of damage to include the testimony of a qualified expert witness. *Here, there was simply no testimony in that regard, much less testimony by O'Neil, the qualified expert witness*. We conclude that the trial court's determination regarding the damage to the children did not comply with ICWA or [MIFPA] because the trial court's determination of damage did not include the testimony of a qualified expert witness. [*McCarrick/Lamoreaux*, 307 Mich App at 466-467.]

Notably, in remanding the case for further proceedings, the Court instructed the trial court that if it could not "support its finding with testimony from a qualified expert witness at a hearing, it must return the children" to the mother's care. *Id*. at 469-470.

In this case, the trial court explicitly recognized that Hillert, the only expert witness at the termination hearing, did not support termination and specifically testified that returning AP and DP to respondent's care would *not* likely result in serious emotional or physical damage to either child. Nonetheless, considering the other evidence presented, the trial court determined that returning AP and DP to respondent's care *would* result in such damage beyond a reasonable doubt. In so doing, the trial court essentially disregarded Hillert's testimony, contrary to the plain language of 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2). Accordingly, we conclude that the trial court failed to adhere to the requirements of ICWA and its Michigan counterparts, and remand for further proceedings with respect to AP and DP.[2]

III. BEST-INTEREST ANALYSIS

Respondent also argues that the lower court erred by concluding that termination of her parental rights

[2] We sympathize with the trial court's frustration that the testimony of a single expert witness endorsed by AP and DP's tribe, which had an announced policy against terminating parental rights in nearly all circumstances, could essentially trump the totality of other evidence presented at the termination hearing. However, a plain reading of the language of the applicable provisions in ICWA, MIFPA, and the Michigan Court Rules persuades us that expert testimony is required to support a finding that a parent's continued custody would likely result in serious emotional or physical damage to an Indian child. Absent this requirement, the trial court's findings regarding AP and DP were likely otherwise supported by sufficient evidence at the termination hearing.

was in KP's and DF's best interests. "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

As a preliminary matter, the trial court properly established at least one of the statutory grounds for terminating respondent's parental rights to KP and DF. This Court recognized as much in its previous opinion, wherein it affirmed the trial court's findings pertaining to KP and DF that MCL 712A.19b(3)(c)(*i*) and (*ii*), (g), and (j) were all proved by clear and convincing evidence. *Payne/Pumphrey/Fortson*, unpub op at 3. Under the law of the case doctrine, this Court's previous legal determination on this issue remains intact. *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992). Therefore, the only question we must now address is whether termination of respondent's parental rights was in KP's and DF's best interests.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights . . . ." MCL 712A.19b(5). "[T]he focus at the best-interest stage has always been on the child, not the parent." *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). In assessing whether termination of parental rights is in a child's best interests, the trial court should weigh all evidence available to it. See *Trejo*, 462 Mich at 356. Courts may consider such factors as "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's

home." *Olive/Metts*, 297 Mich App at 41-42 (citations omitted). Other considerations include the length of time the child was in care, the likelihood that "the child could be returned to her parents' home within the foreseeable future, if at all," and compliance with the case service plan. *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012).

In this case, the trial court did not clearly err by finding that termination of respondent's parental rights was in KP's and DF's best interests. At the time of the first termination hearing, KP was approximately 12 years old and had been under the care and supervision of DHS since 2009. Likewise, DF, who was nearly one year old at the initial termination hearing, had been under the care and supervision of DHS his entire life. Both children were in need of permanency and stability, and both children were benefitting from the care at their current placements. During these lengthy proceedings, respondent displayed a continuing inability to rectify the barriers that led to adjudication, despite DHS's offering her a plethora of services. Once her parental rights were terminated the first time, those services stopped and respondent participated only minimally in voluntary services. Thus, at the time of the second termination hearing, it remained unlikely that the children could be returned to respondent's care in the foreseeable future, if at all. Given the length of time these proceedings lasted, and the minimal likelihood that respondent could rectify her barriers to reunification within a reasonable time, any bond respondent had with KP and DF was outweighed by the children's need for permanency, stability, and finality. On this record, the trial court did not clearly err by finding that termination was in KP's and DF's best interests.

IV. CONCLUSION

We reverse the termination of respondent's parental rights with respect to her two Indian children, AP and DP, and remand for further proceedings consistent with ICWA and its Michigan counterparts. Following further proceedings on remand, if the trial court determines that sufficient evidence supports terminating respondent's parental rights over AP and DP, we also instruct the court to properly articulate its factual findings and legal conclusions regarding whether termination of respondent's parental rights is in AP's and DP's best interests.[3] We affirm the trial court's termination order with respect to KP and DF. We do not retain jurisdiction.

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

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[3] On first remand from this Court, the trial court acknowledged that it had overlooked its obligation to address whether terminating respondent's parental rights was in KP's and DF's best interests. The court concluded, however, that it made a perfunctory finding regarding AP's and DP's best interests at the first termination hearing. A review of the record reveals that, at the first termination hearing, the trial court addressed whether termination of *the father's* parental rights was in AP's and DP's best interests, but at no time did the court make best-interest findings with respect to respondent's parental rights over AP and DP.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY/TRA SPECIAL PROGRAMS UNIT v KHAN

Docket No. 318799. Submitted June 2, 2015, at Detroit. Decided June 11, 2015, at 9:05 a.m.

Mohammed Khan applied for trade readjustment allowance (TRA) unemployment benefits under the federal Trade Act of 1974, 19 USC 2101 *et seq*. TRA benefits are intended to supplement state unemployment benefits for workers who have lost their jobs because of competition from imports. To receive benefits, the worker must enroll in an approved training program, have completed an approved training program, or have obtained a waiver of the training requirement. The Unemployment Insurance Agency/TRA Special Programs Unit of the Department of Licensing and Regulatory Affairs (LARA), which administers the eligibility portion of the program in Michigan, denied Khan's request for benefits, concluding that his request to waive training was untimely. Khan sought a redetermination of LARA's decision in the Michigan Administrative Hearings System. The administrative law judge (ALJ) determined that Khan was entitled to benefits because the 26-week deadline set forth in 19 USC 2291(a)(5)(A)(ii) applied only to enrollments in training and not to waivers of training. LARA appealed the ALJ's decision to the Michigan Compensation Appellate Commission (MCAC), which affirmed. LARA then appealed in the Macomb Circuit Court, Edward A. Servitto, Jr., J., which affirmed the decision of the MCAC. LARA next sought leave to appeal in the Michigan Court of Appeals. The Court of Appeals denied the application. The Michigan Supreme Court, in lieu of granting LARA's application for leave to appeal in that Court, remanded the case to the Court of Appeals for consideration as on leave granted. 497 Mich 945 (2014).

The Court of Appeals *held*:

Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra, 283 Mich App 212 (2009), addressing the Trade Act as amended in 2002, held that the deadlines in 19 USC 2291(a)(5)(A)(ii) applied only to enrollments in approved training programs, and that Congress intended the waivers permitted by

19 USC 2291(a)(5)(C) and (c) to be subject only to the timing restrictions generally applicable to the provision of TRA benefits. *Dykstra* noted the United States Department of Labor's contrary interpretation, but determined that the department's interpretation was not entitled to any deference given the clear congressional intent. In this case, LARA argued that *Dykstra* was not controlling because it was not the 2002 version of the act at issue, but rather the act as it was amended in 2009. LARA argued that Congress adopted the Department of Labor's waiver-deadline interpretation when it amended the act in 2009 without explicitly setting forth a deadline for waivers. But *Dykstra* held that Congress had deliberately acted to remove the seeking of a waiver from the time limits found in 19 USC 2291(a)(5)(A)(ii) and that, contrary to LARA's assertion, Congress was not silent on the issue. Congress had no need to act again, having already acted to provide that waivers could be sought at any time. LARA's recitation of the Department of Labor's continued opposite interpretation of the act was unpersuasive because *Dykstra* specifically concluded that the department's interpretation of the provisions of the Trade Act was not entitled to any deference.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Peter T. Kotula* and *Susan Przekop-Shaw*, Assistant Attorneys General, for the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency/TRA Special Programs Unit.

Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM. Following a remand from the Supreme Court to review this case as on leave granted,[1] petitioner appeals an order of the circuit court affirming the Michigan Compensation Appellate Commission's (MCAC) determination that respondent is entitled to trade readjustment allowance (TRA) unemployment benefits under the federal Trade Act of 1974, 19 USC 2101 *et seq*. We affirm.

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[1] *Dep't of Licensing & Regulatory Affairs v Khan*, 497 Mich 945 (2014).

This case concerns respondent's attempt to obtain TRA benefits even though he did not participate in training classes, which are a prerequisite to eligibility, or timely file a waiver of training. TRA benefits are offered under a federal program to those whose "firm has been adversely affected by imports" and whose employment has been affected as a result. *Dep't of Labor & Economic Growth v Dykstra*, 283 Mich App 212, 215; 771 NW2d 423 (2009) (citation and quotation marks omitted). Essentially, a group of workers first seeks approval to become certified for the program and then the affected workers seek individual eligibility. Although the program is entirely federally funded, petitioner—through Michigan Works! at the time of respondent's filing—administers the eligibility portion of the program.

On October 22, 2009, workers at respondent's employer, Technicolor, were certified for eligibility for TRA benefits. Respondent was separated from his employment at Technicolor on January 4, 2010 and, on March 24, 2010, he signed a document acknowledging that he had 26 weeks from separation, i.e., until July 5, 2010, to enroll in classroom training or to contact the Michigan Works! office to request a waiver.[2] However, respondent did not enter training. He acknowledged below that he simply forgot to do so, and that he only remembered the deadline after seeing some of his colleagues going to the training. Petitioner denied respondent's request for TRA benefits. Respondent sought a redetermination of petitioner's decision, which was denied on the basis that respondent's September 7, 2011 request to waive training was untimely. Respondent appealed that decision in the Michigan

[2] The act also provides for an alternate deadline under 19 USC 2291(a)(5)(A)(ii)(II), which is not at issue in this appeal.

Administrative Hearings System. Following a hearing on February 1, 2012, the administrative law judge issued a written decision in which he determined that respondent was entitled to benefits because the 26-week deadline contained in the 2009 version of 19 USC 2291(a)(5)(A)(ii) applied only to enrollments in training and not to waivers of training, which were instead covered under 19 USC 2291(a)(1), a statute that did not contain this time limit. In reaching this decision, the administrative law judge relied on this Court's decision in *Dykstra*, which, discussing the 2002 version of the statute, ruled that even though the United States Department of Labor (USDL) had a contrary interpretation concerning the then 16-week deadline, that interpretation was not entitled to any deference. *Dykstra*, 283 Mich App at 229. In this case, petitioner appealed the administrative law judge's decision to the MCAC, which affirmed on the basis that *Dykstra* constituted binding precedent. The MCAC noted that the result was consistent with a 2011 MCAC decision in which the commission found that another individual was entitled to TRA benefits under *Dykstra*. The circuit court affirmed on similar grounds.

Petitioner argues that the MCAC and the circuit court erred by ruling that this case is governed by *Dykstra*'s holding. Noting that Congress amended the Trade Act in 2009 to change the relevant deadlines under 19 USC 2291(a)(5)(A)(ii) from 8 and 16 to 26 and 26 weeks, petitioner essentially argues that Congress's continued silence as to whether the deadlines apply to those seeking a waiver acts as an adoption of the USDL's interpretation that the deadlines apply. Petitioner argues that *Dykstra* no longer is good law and has no precedential value.

A circuit court may reverse a decision of the MCAC only if it is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." MCL 421.38(1).

> [W]hen [this Court] review[s] a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, 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. [*Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).]

As a part of its role in administering the TRA program:

> [E]ach of these "cooperating Stat[e] agencies," [19 USC 2311(a)], becomes an "agent of the United States," [19 USC 2313(a)], charged with processing applications and using federal funds to pay TRA benefits to individuals eligible under the Act. Review of eligibility decisions by these agencies is to be "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." [19 USC 2311(d)]. In making these eligibility determinations, however, state authorities are bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the Act. 29 CFR § 91.51(c) (1985). [*Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Brock*, 477 US 274, 277-278; 106 S Ct 2523; 91 L Ed 2d 228 (1986) (second alteration in original); see also *Dykstra*, 283 Mich App at 215-216.]

In this case, the general question is whether the deadlines in 19 USC 2291(a)(5)(A)(ii) apply to individuals who seek waivers for training, as well as to those

enrolled in an approved training program and what, if any, deference is to be given to the interpretation of the Trade Act by the USDL regarding this issue.

Addressing the 2002 version of the Trade Act, the *Dykstra* Court discussed the then-current deadlines contained in 19 USC 2291(a)(5)(A)(ii):

> In order for a worker to be eligible for benefits, the worker must meet one of three eligibility criteria: the worker must be enrolled in an approved training program, have completed an approved training program, or have obtained a written waiver of the training requirement. See 19 USC 2291(a)(5)(A) to (C); see also 19 USC 2291(c). With regard to the first criterion—enrollment in an approved training program—19 USC 2291(a)(5)(A)(ii) also provides that the worker must enroll no later than the latest of
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> > (I) the last day of the 16th week after the worker's most recent total separation from adversely affected employment which meets the requirements of [19 USC 2291(a)(1) and (2)],
> >
> > (II) the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,
> >
> > (III) 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, or
> >
> > (IV) the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to [19 USC 2291(c)]. [*Dykstra*, 283 Mich App at 216 (alterations in original).]

Citing a 2004 guidance letter from the USDL, the *Dykstra* Court observed that the USDL had interpreted this "8/16 deadline" to apply also to those seeking a waiver. *Id*. at 217-218.

However, after discussing general principles of administrative agency deference, the proper interpretation of statutory language, the language of the Trade Act, as well as the stated purposes of the act, the *Dykstra* Court held both that the deadlines were not applicable to waivers and, more specifically, that the USDL's interpretation was entitled to no deference:

> When the relevant statutory scheme is interpreted as a whole, Congress's decision to limit the strict deadlines specified under § 2291(a)(5)(A)(ii) to enrollments under § 2291(a)(5)(A)(i) and its refusal to create a similar deadline for the waivers permitted by § 2291(a)(5)(C) must be understood to have been deliberate. For this reason, we conclude that *Congress was not silent on the issue*; rather, Congress unambiguously provided that the deadlines stated in § 2291(a)(5)(A)(ii) only applied to the enrollment option provided by § 2291(a)(5)(A)(i). And Congress clearly intended the waivers permitted by § 2291(a)(5)(C) to be subject only to the timing restrictions generally applicable to the provision of TRA benefits. See 19 USC 2291(a)(1). *Because Congress's intent is clear*, the Department's determination that the § 2291(a)(5)(A)(ii) deadlines should apply to the waivers permitted under § 2291(a)(5)(C) and § 2291(c) is not entitled to any deference. Indeed, because the Department's construction of the statutory scheme contradicts Congress's unambiguously stated intent to limit application of the § 2291(a)(5)(A)(ii) deadlines, we must reject that construction.[7] [*Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 843 n 9; 104 S Ct 2778; 81 L Ed 2d 694 (1984)]. With regard to both claimants, the Board properly determined that the claimants were entitled to TRA benefits. Because the Board did not err in this regard, the trial courts properly affirmed the Board's decisions.

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[7] We also do not share the Agency's concern that it must follow the Department's interpretation or risk breaching its agreement with the Department. Under the Department's own regulations, the Agency is tasked with follow-

> ing the law. See 20 CFR 617.59. And because we have determined that Congress plainly provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) do not apply to waivers, that determination is the law and must be given effect. *Chevron*, 467 US at 843 n 9.
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> [*Dykstra*, 283 Mich App at 229-230 (emphasis added).]

Petitioner acknowledges that, with regard to the interpretation of the 2002 law, *Dykstra* is binding on this Court. See MCR 7.215(J)(1). However, petitioner argues that *Dykstra* is not controlling in this case because *Dykstra* involved the 2002 version of the Trade Act rather than the 2009 version of the act at issue in this appeal. According to petitioner, the 2009 amendment extended the 8/16 deadline to a 26/26 deadline because of criticism raised by the Government Accountability Office, which in turn referred to the earlier 8/16 deadline as applying to the issuance of training waivers.

Petitioner concedes that, similar to the previous version of the act, the 2009 amendment did not set forth a deadline by which a claimant must act to waive the training requirement. However, petitioner asserts that it need not have done so given the USDL's continued interpretation that the training deadline also applies to waivers. As petitioner sees it, Congress effectively adopted the USDL's waiver-deadline interpretation when it amended the Trade Act in 2009 without explicitly setting forth a deadline for waivers. In support of its argument, petitioner cites *Lorillard v Pons*, 434 US 575, 580; 98 S Ct 866; 55 L Ed 2d 40 (1978), in which the United States Supreme Court voiced the rule of construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]"

In other words, petitioner argues that this Court should use the doctrine of "legislative acquiescence" to conclude that the USDL's interpretation of the statute is correct.

> [L]egislative acquiescence has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent. . . . [T]he theory requires a court to intuit legislative intent not by anything that the Legislature actually enacts, but by the *absence* of action. Yet a legislature legislates by legislating, not by doing nothing, not by keeping silent. Thus, the doctrine of legislative acquiescence is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence. [*McCahan v Brennan*, 492 Mich 730, 749-750; 822 NW2d 747 (2012) (quotation marks and citations omitted).]

Moreover, under the legislative-acquiescence doctrine, Congress would have been on notice of the *Dykstra* holding as well as the USDL's interpretation, a fact that undercuts petitioner's claim that Congress intended to have the USDL's interpretation apply in Michigan. Again, *Dykstra* specifically held that Congress had deliberately acted to remove the seeking of a waiver from the time limits found in 19 USC 2291(a)(5)(A)(ii) and held, contrary to petitioner's repeated assertion, that Congress was not silent on the issue. *Dykstra*, 283 Mich App at 229. Congress had no need to act again, having already acted to provide that waivers could be sought at any time. Further, petitioner's recitation of the USDL's continued opposite interpretation of the act is unpersuasive because *Dykstra* specifically concluded that the USDL's interpretation of the provisions of the Trade Act was not entitled to any deference.

Finally, petitioner's argument that it is required to follow the USDL's interpretation or risk breaching its agreement was rejected by *Dykstra*, 283 Mich App at 230 n 7, and petitioner does not refer us to any negative action taken by the USDL in response to *Dykstra*.

Affirmed.

SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ., concurred.

KINCAID v CITY OF FLINT

Docket No. 318906. Submitted January 7, 2015, at Detroit. Decided June 11, 2015, at 9:10 a.m.

Plaintiffs, taxpayers and residents of defendant city of Flint, brought an action in Genesee Circuit Court against defendant after defendant increased the costs paid by users of its water and sewer services. The court, Richard B. Yuille, J., granted defendant's motion for summary disposition, holding that defendant's emergency manager was authorized to implement water and sewer rate increases on the basis of the authority given him by statute, which included the authority to ratify the provisions of earlier rate increases that had been implemented in violation of defendant's governing ordinances. The court further held that defendant's deposit of revenue from water and sewer services into a single pooled cash account did not constitute an illegal commingling of funds. The court also denied plaintiffs' motion to amend their complaint. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court improperly granted summary disposition to defendant because defendant's 2011 rate increases for water and sewer services violated Flint Ordinances §§ 46-52.1 and 46-57.1 since defendant's former finance director failed to publish and notice the information concerning the rate increases at least 30 days before the increases became effective. This violation was not cured by a later order issued by defendant's emergency manager that purported to ratify the 2011 water and sewer rate increases.

2. The trial court improperly concluded that defendant's emergency manager possessed the authority to ratify previous rate increases for water and sewer services when those previous rate increases were not made in compliance with defendant's governing ordinances. No statutory provision gives an emergency manager the authority to ratify the unauthorized acts of another public official.

3. The trial court correctly granted summary disposition to defendant on plaintiffs' claim that defendant improperly commingled revenue from its water and sewer services with other

funds in a single pooled cash account. Defendant produced evidence that it appropriately maintained a single pooled cash account of revenue from different sources and that the water and sewer shares were accounted for in that pooled cash account. Plaintiffs failed to present any evidence showing that there was a genuine issue of material fact for trial.

4. The trial court improperly denied plaintiffs' motion to amend their complaint because the court failed to specify an acceptable reason for doing so. A trial court is required to specify its reasons for denying a plaintiff's motion to amend its complaint, unless an amendment to the complaint would be futile.

Reversed and remanded.

Christopher J. McGrath, PLLC (by *Christopher J. McGrath*), and *Valdemar L. Washington, PLLC* (by *Valdemar L. Washington*), for plaintiffs.

Peter M. Bade, Flint City Attorney, and *Anthony Chubb* and *David Roth*, Assistant Flint City Attorneys, for defendant.

Before: DONOFRIO, P.J., and BORRELLO and STEPHENS, JJ.

STEPHENS, J. Plaintiffs, all residents of defendant the city of Flint, appeal as of right the order of the circuit court granting defendant's motion for summary disposition and denying plaintiffs' motion to amend their complaint. We reverse and remand.

I. BACKGROUND

On August 15, 2011, defendant's finance director, Michael Townsend, sent to the city council and mayor a notice of a proposed 35% water and sewer rate increase to be effective September 6, 2011. The increase was proposed to meet a projected fiscal year deficit in the sewer fund of $14,789,666 as well as a

water fund deficit of $8,078,917.[1] The city council adopted the proposal and the mayor signed it.

Shortly thereafter, defendant was declared to be in a state of financial emergency.[2] On November 28, 2011, Governor Rick Snyder appointed Michael Brown as defendant's emergency manager (EM).[3] On May 30, 2012, after he was informed by newly appointed finance director Gerald Ambrose of the financial disarray of defendant's water and sewer funds, EM Brown created Emergency Order No. 31. Order No. 31 ratified and confirmed the water and sewer rates implemented under former finance director Townsend on September 16, 2011, and additionally raised water and sewer rates, 12.5% and 45%, respectively, effective July 1, 2012.

After the emergency order by EM Brown, plaintiffs in this suit filed a complaint seeking this Court's original jurisdiction pursuant to Const 1963, art 9, §§ 31 and 32. The claim of error was that defendant violated the Headlee Amendment.[4] This Court dismissed plaintiffs' claims without a hearing, finding

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[1] It was later determined that the actual losses were $10,560,000 for the sewer fund and $3,210,000 for the water fund.

[2] MCL 141.1545(6)(d), formerly MCL 141.1214, lists the four instances in which a financial emergency exists.

[3] See 2011 PA 4, the local government and school district fiscal accountability act, formerly MCL 141.1501 *et seq*. At the time, former MCL 141.1515(4) provided the governor with the authority to appoint an emergency manager:

> Upon the confirmation of a finding of a financial emergency, the governor shall declare the local government in receivership and shall appoint an emergency manager to act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.

[4] Specifically, the Headlee Amendment to the Michigan Constitution provides standing to "[a]ny taxpayer of the state" to bring suit in this Court to enforce the tax provisions of Const 1963, art 9, §§ 25 to 31. See Const 1963, art 9, § 32.

that the rate increases from September 2011 and those set to take place in July 2012 were "revisions of existing user fees that do not implicate the Headlee Amendment." *Kincaid v City of Flint*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 310221). Plaintiffs' claims not relating to the Headlee Amendment were dismissed for lack of original jurisdiction. *Id*.

After the case before this Court was dismissed, plaintiff filed the instant action. The essence of this case is a claim that the rate increases in September 2011 were made contrary to defendant's Ordinances §§ 46-52.1 and 46-57.1, and a claim that defendant had illegally pooled the monies collected for the water and sewer funds and used them to pay general obligations not related to sewer or water expenses. Plaintiffs requested that the trial court certify a class action suit against defendant by all sewer and water customers of defendant, declare that the rate increases were an illegal tax under the Headlee Amendment, and order the commingling of funds to cease. Additionally, plaintiffs asked for monetary relief in the form of a refund of the illegally collected rates and for damages caused to defendant's residents who were left without water and sewer service.

In lieu of filing an answer, defendant moved the trial court to grant it summary disposition pursuant to MCR 2.116(C)(6), (7), and (8). However, before defendant's motion for summary disposition was heard, plaintiffs moved the trial court for leave to amend their complaint to allege a violation of MCL 123.141(2) and (3).[5]

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[5] MCL 123.141(2) and (3) state:

> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not

Defendant responded to plaintiffs' motion to amend their complaint by arguing that it should be denied as futile. On February 15, 2013, the trial court heard the two outstanding motions. On June 21, 2013, the trial court entered an opinion and order granting summary disposition in favor of defendant. On July 12, 2013, plaintiffs moved the trial court to reconsider its decision after which the court entered an order permitting defendant to respond to plaintiffs' motion for reconsideration. The court denied the motion on October 14, 2013. Plaintiffs now appeal the order granting defendant summary disposition.

During the pendency of this case in the trial court, 2011 PA 4 was repealed after it was rejected by a majority of the electorate.[6] One month later, on December 26, 2012, the Legislature approved the local finan-

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remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state. This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection. Any city that has not adjusted rates in conformity with this subsection by April 1, 1982 shall include in the next ensuing rate period an adjustment to increase or decrease rates to wholesale or retail customers, so that each class of customer pays rates which will yield the same estimated amount of revenue as if the rate adjustment had been retroactive to April 1, 1982. A city that is subject to section 5e of Act No. 279 of the Public Acts of 1909, being section 117.5e of the Michigan Compiled Laws, shall begin proceedings to determine rate changes pursuant to section 5e(b) of Act No. 279 of the Public Acts of 1909, being section 117.5e of the Michigan Compiled Laws.

(3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.

[6] The Board of State Canvassers certified the vote on November 26, 2012. 1990 PA 72 came back into effect while the referendum on 2011 PA 4 was pending.

cial stability and choice act, 2012 PA 436,[7] effective March 28, 2013.[8] Many of the provisions of 2012 PA 436 mirror those of 2011 PA 4.

II. STANDARDS OF REVIEW

The trial court ordered summary disposition under MCR 2.116(C)(8) and the parties base their arguments before this Court on that subsection, but our review of the record shows that the trial court went beyond the pleadings in making its decision as did both parties in making their arguments. Plaintiffs' response to defendant's motion for summary disposition relied on 16 exhibits. Plaintiffs also moved for summary disposition themselves and cited exhibits outside the pleadings. The analysis of this case therefore will be done under MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012) ("[B]ecause the trial court considered documentary evidence beyond the pleadings, we construe the motion as having been granted pursuant to MCR 2.116(C)(10).").

"This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions,

[7] MCL 141.1541 *et seq*.

[8] 2012 PA 436 repealed 1990 PA 72, effective March 28, 2013.

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 when there is no "genuine issue regarding any material fact . . . ." *Id*. A party opposing a motion made under MCR 2.116(C)(10) "has the burden of showing that a genuine issue of disputed fact exists." *Major v Auto Club Ins Ass'n*, 185 Mich App 437, 440; 462 NW2d 771 (1990). "The opposing party may not rest upon mere allegations or denial in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Id*.

This Court also reviews issues of statutory interpretation de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of [legislative] intent. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. When an ambiguity does indeed exist, we may go beyond the statutory text to ascertain legislative intent. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. [*People v Carrier*, 309 Mich App 92, 104; 867 NW2d 463 (2015) (citations and quotation marks omitted; alteration in original).]

III. CLAIMS OF ERROR

Plaintiffs' claims of error are three: (1) water and sewer rate increases that occurred under former fi-

nance director Townsend in September 2011 were not authorized by defendant's ordinances, (2) EM Brown did not have the authority to ratify Townsend's unauthorized increases and then further increase water and sewer rates in violation of the same ordinances, and (3) defendant wrongly deposited funds from water and sewer revenue into a single pooled cash account.

A. ORDINANCE VIOLATIONS

Plaintiffs claim that defendant violated Flint Ordinances §§ 46-52.1 and 46-57.1.

Ordinance 46-52.1 reads as follows:

> (a) Every year the Director of Finance shall calculate and transmit on or before April 15, to the Mayor and City Council the new water rate schedules with a complete itemization of water system costs for all classes of customers as given in § 46-52, for the purpose of calculating all bills for the forthcoming 12 months beginning July 1 of that year. The new water rate schedules shall be published at least 30 days prior to the date of implementation.
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> (b) Water rates shall be reviewed annually and the water rate percentage index (WRI) as applied to the water rate schedules shall be limited to an adjustment of 8% in any year unless:
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> (1) Such adjustment is necessary to provide for all costs of operation, maintenance, replacement and debt service of the water supply system; or
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> (2) Such adjustment is necessary to comply with applicable provisions of the city's water supply revenue bond resolutions or ordinances.

Ordinance 46-57.1 reads:

> Every year the Director of Finance shall calculate and transmit on or before April 15, to the Mayor and City Council the new sewage rate schedules with a complete itemization of sewage system costs for all classes of customers as given in § 46-57, for the purpose of calculat-

> ing all bills for the forthcoming 12 months beginning July 1 of that year. The new sewage rate schedules shall be published at least 30 days prior to the date of implementation.

Plaintiffs argue that the rate increases of September 2011 and those imposed by EM Brown failed to meet the notice and effective date requirements of the ordinances and exceeded the percentage of increase allowed under the ordinances. We agree in part.

The 35% water rate increase in September 2011 violated Ordinance 46-52.1 because it was not published and noticed at least 30 days before its implementation, and because it went into effect almost immediately after it was noticed, instead of being implemented over twelve months beginning on July 1 of the next fiscal year. The sewer rate increases were invalid for the same reasons under Ordinance 46-57.1. The sewer rates were not published and noticed 30 days before their implementation and were implemented soon after the former finance director's recommendation instead of on July 1 of the next fiscal year.

Plaintiffs' argument that the increases also violated Ordinance 46-52.1 by increasing the water rates above 8% is not supported by the language of the ordinance. Ordinance 46-52.1 envisions that water rate increases be limited to an adjustment of 8%, but allows for uncapped increases in the event the "adjustment is necessary to provide for all costs of operation, maintenance, replacement and debt service of the water supply system; or . . . to comply with applicable provisions of the city's water supply revenue bond resolutions or ordinances." On August 15, 2011, former finance director Townsend sent a letter to defendant's mayor and defendant's city council providing justification for the amount of the increase. In that

letter, Townsend stated that the water fund operated at a $3.21 million loss for fiscal year 2011 and that defendant was not meeting its state bond requirements "to maintain operating revenues greater than 125% of the amount of debt service on the bonds." Townsend explained that the rate increases would help cover the rate increases defendant paid to Detroit as well as provide revenue to pay the Drinking Water Revolving Fund bonds. This Court has no basis on which to find those statements invalid. While the notice, publication, and implementation of the water and sewer rate increases were not authorized, the percentage of increase for the rates did not violate the ordinances.

Plaintiffs challenge EM Brown's rate increases under Order No. 31 on the same basis as they challenged the September 2011 increases noticed by former finance director Townsend. However, EM Brown's water and sewer rate increases of 12.5% and 45%, respectively, did not violate defendant's Ordinances 46-52.1 and 46-57.1. On May 30, 2012, EM Brown published notice of the increases and their effective date of July 1, 2012. The order complied with the notice, publication, and implementation provisions of Ordinance 46-52.1 and Ordinance 46-57.1. Plaintiffs again argue that any increase in water rates over 8% is not authorized under Ordinance 46-52.1, but as discussed above, the language of the ordinance does not support that argument. The language of Order No. 31 established both of the exceptions in Ordinance 46-52.1 that allow for an increase in water rates greater than 8%. The order explained that defendant was required under MCL 141.121[9] to set water and sewer rates that were "suf-

[9] MCL 141.121, of the Revenue Bond Act, provides in pertinent part:

ficient to cover the costs of operating the water and sewer systems" and that Townsend's increase was insufficient to meet defendant's obligation under state law. The order stated that additional increases were necessary "to cover the costs of operating the water and sewer systems and pay outstanding bonded indebtedness on the water system . . . ."

B. RATIFICATION AUTHORITY OF THE EMERGENCY MANAGER

EM Brown not only increased water and sewer rates with the implementation of Order No. 31, but he also "expressly ratified and confirmed" the September 16, 2011 rate increases. Whether EM Brown was granted

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(1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:

(a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.

(b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable.

(c) The creation of any reserve for the bonds as required in the ordinance.

(d) Other expenditures and funds for the public improvement as the ordinance may require.

(2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1). The borrower shall covenant and agree in the ordinance authorizing the issuance of the bonds and on the face of each bond to maintain at all times the rates for services furnished by the public improvement sufficient to provide for the amount described in subsection (1). Rates pledged for the payment of bonds that are fixed and established pursuant to a contract or lease shall not be subject to revision or change, except in the manner provided in the lease or contract.

the authority to ratify the unauthorized acts of another public official is an issue of first impression. We conclude that the Legislature did not delegate the power to ratify to an emergency manager.

The EM is a creature of the Legislature with only the power and authority granted by statute. EM Brown derived his authority from the former emergency manager law, 2011 PA 4.[10] That authority was not as broad as defendant argues. We do not agree with defendant that 2012 PA 436, the successor statute to 2011 PA 4, authorized all the actions of the EM taken under 2011 PA 4. MCL 141.1570(1)(a) to (e) state that "[a]ll of the following actions that occurred under the former 2011 PA 4 before the effective date of [2012 PA 436]" became effective under 2012 PA 436:

> (a) A determination by the state treasurer or superintendent of public instruction pursuant to a preliminary review of the existence of probable financial stress or a serious financial problem in a local government.
>
> (b) The appointment of a review team.
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> (c) The findings and conclusion contained in a review team report submitted to the governor.
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> (d) A determination by the governor of a financial emergency in a local government.
>
> (e) A confirmation by the governor of a financial emergency in a local government.

Actions taken under 2011 PA 4 by the State Treasurer, the appointed review team, and the Governor remained effective and were not required to be reapproved under 2012 PA 436. MCL 141.1570(2). Notably, actions taken by the EM are not included.

We also reject defendant's argument that an act of the EM is an act of the governor and that the EM

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[10] Former MCL 141.1501 *et seq*.

derives power to ratify from the Governor. Former MCL 141.1519(1)(dd) and (ee) state that an EM's authority is limited to the local level. An EM "[e]xercise[s] solely, for and on behalf of the local government, all other authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances or resolutions of the local government as provided in [specific listed acts]," and an EM "exercise[s] any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government." MCL 141.1519(1)(dd) and (ee). Thus, the EM acts only on behalf of numerous *local* officials. Former MCL 141.1515(10)[11] and current MCL 141.1549(8)[12] both provide that the Governor may delegate his duties to the Treasurer. Notably, there is no similar provision regarding the delegation of any of the Governor's authority to the EM. Rather, the EM serves at the pleasure of the Governor. Former MCL 141.1515(5)(d); MCL 141.1549(3)(d).

The EM's responsibilities and authority under 2011 PA 4 are listed in former statutory provisions MCL 141.1515 through MCL 141.1530. Those provisions are similarly stated in MCL 141.1549 through MCL 141.1562 under 2012 PA 436. Of all the powers granted to the EM, ratification is not one of them. Ratification, in both 2011 PA 4 and 2012 PA 436, is explicitly granted to the actions of certain persons and entities. Under 2011 PA 4, "[a]ll proceedings and actions taken by the governor, the state treasurer, or a review team . . . are ratified and are enforceable as if the proceedings and actions

[11] 2011 PA 4.

[12] 2012 PA 436.

were taken under this act . . . ." Former MCL 141.1512(6). 2012 PA 436 contains nearly identical language: "All proceedings and actions taken by the governor, the state treasurer, the superintendent of public instruction, the local emergency financial assistance loan board, or a review team under former 2011 PA 4, . . . are ratified and are enforceable as if the proceedings and actions were taken under this act . . . ." MCL 141.1544(6). The clear difference between 2011 PA 4 and 2012 PA 436 is that 2012 PA 436 adds "the superintendent of public instruction" and "the local emergency financial assistance loan board" to legislation governing management of a local government's financial emergency. Neither 2011 PA 4 nor 2012 PA 436 authorizes the ratification action taken by the EM in this case. Further, the EM's power to supersede local government authority does not extend to the superintendent of public instruction or the local emergency financial assistance loan board.[13] Consequently, the Legislature did not grant the EM the power of ratification, nor did the actions of the EM taken under 2011 PA 4 survive the electors' referendum of that act.

Absent the power of ratification, defendant urges this Court to look elsewhere for the EM's authority to approve the unauthorized 2011 water and sewer rate increases. Defendant argues that the additional powers granted to an emergency manager in former MCL 141.1519(1)(a)[14] authorized the EM to raise water and

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[13] The EM's power is superior to and supersedes that of local government officials, employees, and entities. Former MCL 141.1519(1)(ee); MCL 141.1552(1)(ee). The EM's power is not superior to and does not supersede the authority of the superintendent of public instruction. See e.g., MCL 141.1554(c). The EM is not an appointed member of the financial assistance loan board or review team. Former MCL 141.1212(3); MCL 141.1544(3).

[14] Now MCL 141.1552(1)(a).

sewer rates notwithstanding the ordinances. Under that section,

> An emergency manager may take 1 or more of the following additional actions with respect to a local government which is in receivership, notwithstanding any charter provision to the contrary:
>
> (a) Analyze factors and circumstances contributing to the financial emergency of the local government and initiate steps to correct the condition.

We are not persuaded by this argument. MCL 141.1519(1)(a) applies in the instance in which the EM, after having analyzed the factors and circumstances contributing to the financial emergency, *initiates* some action to alleviate the emergency. In other words, some affirmative act is required of the EM. "The word 'initiate' is a synonym of the word 'commence.' " *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999), citing *Black's Law Dictionary* (5th ed). In turn, the plain and ordinary meaning of the word "commence" is "to begin; start," and "begin" is defined as "to take the first step in performing an action."[15] MCL 141.1519, then in effect, supported the 12.5% water and 45% sewer rate increases initiated by the EM after his appointment. Those increases were initiated after the EM was provided with information from the then-current finance director Gerald Ambrose about the operating losses of both the water and sewer systems, and the increases were implemented to correct those conditions. Under former MCL 141.1519(1)(a), the EM had authority to institute the change in rates notwithstanding any charter provision

[15] See *SBC v JT Crawford, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2007 (Docket No. 275334), p 5, quoting *The American Heritage Dictionary of the English Language* (2006).

to the contrary, and the increases complied with the notice, publication, and implementation guidelines of Ordinances 46-52.1 and 46-57.1. MCL 141.1519(1)(a), however, did not support the action taken by the EM to expressly ratify and confirm the increases recommended by former finance director Townsend. In that instance, the EM did not *initiate* the steps to correct the condition by an affirmative act, but rather approved the steps already taken by someone else. Because the EM did not initiate those increases, MCL 141.1519(1)(a) did not apply.

In light of our analysis, we conclude that former finance director Townsend violated defendant's Ordinances 46-52.1 and 46-57.1, by increasing water and sewer rates without first providing notice and publication to its residents 30 days before the increases took effect, and by not waiting to implement those rates until July 1 of the next fiscal year. We also conclude that EM Brown's Order No. 31 did not rectify the violations.

The trial court's grant of summary disposition to defendant was premised on its understanding of the EM's authority as broad, substantial, and complete. Our decision today only highlights that authority for a closer look at the statutory boundaries of the EM's power. Because we disagree with the trial court's conclusion that the EM had the authority to ratify a previously unauthorized rate increase, we reverse its order granting defendant summary disposition.

C. COMMINGLING OF FUNDS

Next, this Court must consider whether the trial court properly summarily disposed of plaintiffs' claims regarding the commingling of funds. Plaintiffs assert that defendant placed water and sewer fees from

customers into a pooled cash account with other funds, that defendant used the water and sewer funds to pay its general obligations in violation of the Revenue Bond Act, and that this practice led to a deficit in the water and sewer funds which precipitated the rate increases by former finance director Townsend and EM Brown. Plaintiffs' arguments rely entirely on the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(8). Indeed, plaintiffs maintain that the trial court should not have considered the affidavit of Pamela Hill, a certified public accountant and the audit manager of defendant's financial statements, nor should the trial court have held against plaintiffs their failure to provide any evidence to the contrary, because MCR 2.116(C)(8) requires the trial court to disregard evidence outside of the pleadings. MCR 2.116(G)(5). However, as has been discussed, defendant's motion was granted pursuant to MCR 2.116(C)(10).

Plaintiffs argue that defendant illegally commingled funds. We find no merit to this claim. The party opposing a motion made under MCR 2.116(C)(10) "has the burden of showing that a genuine issue of disputed fact exists." *Major*, 185 Mich App at 440. "The opposing party may not rest upon mere allegations or denial in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Id*. See also MCR 2.116(G)(4). The record reveals that defendant provided evidence, in the form of the affidavit from Hill, whose practice included auditing municipalities, that defendant's accounting system was entirely legal and was used by several other municipalities. Plaintiffs assert that Hill's affidavit only evidences the practice of commingling without establishing the legality of the practice.

While the trial court only mentioned the Hill affidavit in its order granting summary dismissal, it also had before it plaintiffs' exhibits in support of their response to defendant's motion for summary disposition, which included an affidavit from city treasurer Douglas Bingaman. Bingaman's affidavit stated that the water and sewer funds were deposited in a single pooled cash account, but that funds which state law required to be maintained separately were excluded. The affidavit further indicated that "[t]he account is intended to have each City fund, including the water and sewer funds, end up paying only its own operating and other expenses." Bingaman's affidavit is evidence that defendant was following the State of Michigan's recommendation concerning pooled cash accounts. It was also evidence that the water and sewer funds were not being used to pay the general obligations of defendant. Hill's affidavit averred knowledge of legal accounting practices that require only certain accounts to be excluded from a municipality's single pooled cash account and that water and sewer funds were not excluded. Hill further averred that "[e]ach participating fund's share of the pooled cash account is accounted for as provided in the Department of Treasury's Accounting Procedures Manual for Local Units of Government in Michigan," meaning that the water and sewer funds were also accounted for within defendant's pooled cash account.

In response, plaintiffs provided no evidence that defendant's accounting system was illegal. This Court's decision in *Major* quite plainly requires plaintiffs to provide *some* evidence that there was a disputed issue of fact. See *Major*, 185 Mich App at 440. This, plaintiffs did not do. As such, the trial court correctly determined that there was no genuine issue of mate-

rial fact for trial and properly granted summary disposition on this issue. *Id*.

IV. MOTION TO AMEND

Plaintiffs lastly argue that the trial court erred by denying their request to amend their complaint. We agree.

"This Court reviews grants and denials of motions for leave to amend pleadings for an abuse of discretion." *Hakari v Ski Brule Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). "There are circumstances where a trial court must decide a matter and there will be no single correct outcome; rather, there may be more than one reasonable and principled outcome. The trial court abuses its discretion when its decision falls outside this range of principled outcomes." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

"A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party . . . ." MCR 2.118(A)(1). "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). "Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons." *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). Those reasons include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Further, MCR 2.116(I)(5)

states that when the trial court summarily disposes of a case under subrules (C)(8), (9), or (10), the trial court "shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."

The trial court's reason for denying plaintiffs' motion to amend their complaint was that "[t]he proposed amended complaint is in conflict with this decision." The fact that an amended complaint would present issues at odds with the trial court's decision does not appear to be an accepted particularized reason. "[A] court must specify its reasons for denying the motion; a failure to do so requires reversal, unless amendment would be futile." *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990). Because we cannot discern on what basis the trial court denied plaintiffs' motion to amend their complaint, we remand this issue to the trial court. On remand, the trial court is to consider the additional claims in plaintiffs' proposed amended complaint and articulate its reasons for granting or denying the motion.

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

DONOFRIO, P.J., and BORRELLO, J., concurred with STEPHENS, J.

CITY OF HUNTINGTON WOODS v CITY OF OAK PARK

Docket No. 321414. Submitted June 5, 2015, at Detroit. Decided June 11, 2015, at 9:15 a.m. Leave to appeal sought.

The cities of Huntington Woods and Pleasant Ridge filed a complaint in Oakland Circuit Court against the city of Oak Park and the 45th District Court claiming in part that (1) plaintiffs have no statutory duty to contribute to the costs of operating the 45th District Court, and (2) defendants have a statutory duty to disburse to plaintiffs one-third of the charges that were assessed against individuals adjudicated by the 45th District Court and retained by Oak Park to be allocated to a building fund and a retiree healthcare fund. The court, Rudy J. Nichols, J., granted defendants' motion for summary disposition, ordering plaintiffs to comply with the applicable statutes and to begin providing their share of financial support for the operation of the 45th District Court. The court also confirmed the 45th District Court's authority to assess a monetary charge against individuals adjudicated by the 45th District Court and to designate those monies for the building fund and retiree healthcare fund. The court did not decide whether plaintiffs owed Oak Park monies that had been incorrectly transferred to them in previous years. Plaintiffs appealed by leave granted.

The Court of Appeals *held*:

1. The trial court properly ruled that plaintiffs have a statutory duty to contribute to the operation of the 45th District Court even though the district court sits in a political subdivision different from the plaintiffs' political subdivisions. Plaintiffs relied on language in MCL 600.8104 indicating that a district funding unit is not responsible for funding a district court that does not sit within its political subdivision. However, that language is qualified by further language in the statute—"[e]xcept as otherwise provided in this act." Both MCL 600.8621 and MCL 600.8271 require a district funding unit to contribute to the costs of operating the district court in whose jurisdiction the district funding unit is located. MCL 600.8621 requires all district funding units to contribute to the salaries of the district court recorders and reporters, and MCL 600.8271 requires all district

funding units to annually appropriate funds for the district court's operation. Therefore, a district funding unit is obligated to contribute to the operation of the district court that disposes of the violations of laws or ordinances that occur within that district funding unit's political subdivision, even though the district court is not located within that political subdivision.

2. The trial court properly held that Oak Park was not obligated to disburse to plaintiffs one-third of the monies it received from the district court from charges levied against individuals adjudicated by the district court that had been allocated to the building and retiree healthcare funds. Plaintiffs argued that the monetary charges assessed against individuals adjudicated by the district court were court "costs" subject to distribution under the one-third/two-thirds scheme prescribed by MCL 600.8379. The assessments were not costs, however, because the assessments did not fall within the definition of "costs" in MCL 600.4801. That is, the monetary assessments were not incurred for the purpose of prosecuting, adjudicating, or processing criminal offenses, civil infractions, civil violations, and parking violations. Because the assessments were not costs, they were not subject to the one-third/two-thirds disbursement, and Oak Park was authorized to allocate to the building and retiree healthcare funds the monies collected from the assessments.

Affirmed and remanded for further proceedings.

1. DISTRICT COURTS — FUNDING — RESPONSIBILITY OF INDIVIDUAL POLITICAL SUBDIVISIONS.

Individual district funding units are statutorily obligated to contribute to the operation of the district court that disposes of violations occurring within that funding unit's political subdivision even though the district court does not sit within that funding unit's political subdivision.

2. DISTRICT COURTS — FUNDING — COSTS AND FEES — ALLOCATION OF MONIES COLLECTED.

Costs collected by a district court must be disbursed according to the one-third/two-thirds scheme prescribed in MCL 600.8379; costs are any monetary amounts the court is authorized to assess for the prosecution, adjudication, or processing of criminal offenses, civil infractions, civil violations, and parking violations; monetary amounts assessed for the purpose of funding a building fund or a retiree healthcare fund are fees, not costs, and need not

be disbursed to funding units served by the district court but not located within the political subdivision in which the court sits.

Beier Howlett, PC (by *Timothy J. Currier* and *Peter Gojcaj*), for plaintiffs Huntington Woods and Pleasant Ridge.

Secrest Wardle (by *William P. Hampton* and *Nancy Cooper Green*) for defendant Oak Park.

Dickinson Wright PLLC (by *Peter H. Webster* and *James A. Martone*) for defendant 45th District Court.

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM. Plaintiffs, the cities of Huntington Woods and Pleasant Ridge, appeal by leave granted the trial court's order granting in part defendant city of Oak Park's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs argue on appeal that the trial court erroneously concluded (1) that plaintiffs have a statutory duty to contribute to the costs of operating the 45th District Court and (2) that the city of Oak Park does not have a statutory duty to disburse to plaintiffs a portion of the fees assessed against criminal defendants in 45th District Court proceedings that are allocated to funds for building improvements and retiree healthcare benefits. We affirm.

I. HISTORY OF THE DISTRICT COURT ORGANIZATION

Before July 1, 2012, the 45-B District Court served Royal Oak Township and the cities of Huntington Woods, Pleasant Ridge, and Oak Park. Effective July 1, 2012, the Legislature abolished the 45-B District Court and established in its place the 45th District Court, also serving Royal Oak Township and the cities of Huntington Woods, Pleasant Ridge, and Oak Park.

MCL 600.8123(4). The 45th District is a "district of the third class," meaning that it is "a district consisting of 1 or more political subdivisions within a county and in which each political subdivision comprising the district is responsible for maintaining, financing and operating the district court within its respective political subdivision except as otherwise provided in this act." MCL 600.8103(3). In third-class districts in which the district court does not sit in each political subdivision within the district, only one-third of the specified fines and costs are to be paid to the political subdivision whose law was violated when the district court does not sit in that political subdivision. MCL 600.8379(1)(c).

Defendants maintain that the 45th District Court and its predecessor were historically underfunded, almost from the time of the 45-B District Court's inception. In 1983, the Oak Park City Council passed a resolution requesting plaintiffs to provide court facilities within each of their political subdivisions, or alternatively, to enter into an agreement with Oak Park to share the expenses of maintaining, financing, and operating the 45-B District Court, which was located within Oak Park's political subdivision. Plaintiffs did not accept either proposal.

In 1995, the Oak Park City Council discussed the 45-B District Court's plan to add a $5 charge per ticket to cover the cost of including district court retirees in Oak Park's retiree healthcare plan. The council also discussed increasing "fees" or "fines" to fund construction of a new court facility. In September 1995, the State Court Administrative Office (SCAO) issued a report detailing the inadequacies of the Oak Park court facilities. These included noncompliance with current building standards for occupancy and fire safety, and

inaccessibility to the disabled of areas of the building. Oak Park created a municipal building construction capital fund to account for expenditures made to construct a new district court building. The capital fund would be funded by a $5 per ticket charge on fines levied by the 45-B District Court. Oak Park also created an internal service fund to finance medical benefits for 45-B District Court retirees. The revenues were collected through an additional $5 per ticket charge added to violation fees. In 2007, the Oak Park City Council unanimously passed a resolution to increase the per ticket levies for the building fund and the retiree healthcare fund from $5 to $10. The resolution also imposed $100 in costs on certain misdemeanor defendants, to be allocated to the building fund.

In fiscal year (FY) 2012-2013 (beginning July 1, 2012), the newly established 45th District Court distributed one-third of the building fund and retiree healthcare fund assessments to plaintiffs in the same manner that other costs and fines were distributed. Defendants apparently regard this distribution as an error. In October 2012, SCAO issued a report in which it found that there was no agreement in place for the distribution of fines and costs to political subdivisions other than Oak Park. The report states:

> The court distributed court costs, with the exception of court costs titled as operational costs, using the method of one-third to the political subdivision whose ordinance was violated and two-thirds to the city of Oak Park during the review period. It should be noted that in fiscal year 2013, the court started distributing the operational costs using the method that was previously used for all other court costs.

The SCAO report reviewed the history of the collection of court costs, beginning in August 1995. The court

used an OPCS cash code for receipting these costs. From FY 1996 to FY 2012, the entire amount of cash received under these codes was distributed to Oak Park, which allocated the distributions to the building fund and retiree healthcare fund. Beginning in May 2007, the 45-B District Court began collecting court costs on misdemeanor violations, using an OPBF cash code for receipting the funds. For FY 2007 through FY 2012, the entire amount receipted under the OPBF cash code was distributed to Oak Park. SCAO calculated the amounts of court costs collected from violations occurring in plaintiffs' political subdivisions, and distributed to Oak Park under the OPCS and OPBF codes, for the period of FY 1996 through FY 2012. The report provided more detailed breakdowns of amounts contributed to the building fund and retiree healthcare fund per fiscal year for each political subdivision.

In correspondence to Oak Park's city manager dated May 13, 2013, plaintiffs and Royal Oak Township asserted that Oak Park "knowingly received and retained certain property owned by" plaintiffs, namely "various funds including a building fund, a retiree health care fund, and a serious misdemeanor fund." Plaintiffs demanded return of the funds, and cited SCAO's accounting of $111,696.33 of Pleasant Ridge's property, and $251,021.93 of Huntington Woods's property. In response, the Oak Park City Council passed a resolution declaring that money collected by the 45th District Court and transmitted to the building fund would be used for improvements to the 45th District Court, and money collected and transmitted to the retiree healthcare fund would be used only for the costs of retiree healthcare for district court employees. Defendants did not grant plaintiffs' demand, leading to the instant litigation.

II. PROCEDURAL HISTORY

Plaintiffs alleged in their complaint that from 1996 to 2011 defendants Oak Park and the 45th District Court violated their statutory duty under MCL 600.8379 to disburse one-third of the costs and fees assessed for the building fund and the retirees' healthcare fund. Plaintiffs referred to the October 2012 SCAO report and claimed that Huntington Woods and Pleasant Ridge were entitled to reimbursement of $251,021.93 and $111,696.33, respectively, because defendants wrongfully diverted court costs to the building fund and retiree healthcare fund instead of distributing one-third of these monies to plaintiffs. Plaintiffs asserted a claim for violation of MCL 600.8379 against both defendants, and a claim for statutory conversion under MCL 600.2919a against Oak Park only. Plaintiffs also asserted a claim for breach of contract, alleging (1) that they were third-party beneficiaries of a contract between Oak Park and the 45th District Court, pursuant to which the court collected monies for Oak Park while acting as a trustee of funds generated from fines and costs on tickets and violations that arose in plaintiffs' political subdivisions, and (2) that the court breached its duty to tender to plaintiffs one-third of the fines and costs it owed them. Plaintiffs also asserted a claim for unjust enrichment, alleging that Oak Park retained and used for its own benefit the portion of funds to which plaintiffs were entitled.

Oak Park filed a counterclaim for declaratory relief. Oak Park asserted that all district funding units were required, pursuant to MCL 600.8104, MCL 600.8621, and MCL 600.8271, to contribute to the expenses of the district court operating within their district. Oak Park sought a declaratory judgment that plaintiffs were required to contribute to the expenses of operating the

45th District Court, and that their responsibility to do so was not limited to the amount of fines and costs allocated to Oak Park under the statutory one-third/two-thirds arrangement. Oak Park also alleged that in 2012 and 2013, the court administrator erroneously disbursed to plaintiffs a portion of the fees collected for the building fund and retiree healthcare fund. Oak Park sought a declaratory judgment that these funds were incorrectly disbursed, and an order requiring plaintiffs to reimburse Oak Park for the incorrect disbursements.

Oak Park moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Oak Park asserted that the amounts collected for the building and retiree healthcare funds were fees, and therefore not subject to distribution under MCL 600.8379, which requires distribution only of imposed fines and costs. Oak Park argued that plaintiffs failed to comply with the statutory mandate of MCL 600.8271(1). Oak Park requested that the trial court declare that plaintiffs were required to share the expenses of maintaining, financing, and operating the district court in accordance with an agreement authorized by MCL 600.8104(3), or the formula set forth in MCR 8.201. Oak Park also argued that the doctrine of laches, or alternatively, the statute of limitations, barred plaintiffs from asserting their entitlement to a one-third disbursement of these fees.

In their response to Oak Park's motion, plaintiffs reviewed the funding history of the district court. In December 1974, the city of Pleasant Ridge passed a resolution approving an arrangement in which the district court would sit in Oak Park. In exchange for waiving the requirement that the court sit in Pleasant Ridge, Pleasant Ridge would receive one-third of all fines and costs assessed for offenses that originated in

Pleasant Ridge. The city of Huntington Woods passed a similar resolution. Plaintiffs argued that defendants did not have the authority to collect fines and costs in excess of two-thirds of the amount collected as authorized by the resolutions. Citing SCAO's review for FYs 1996 to 2012, plaintiffs asserted that the additional court costs collected by defendants for infractions originating in the plaintiffs' cities should have been distributed to plaintiffs pursuant to the statutory formula prescribed in MCL 600.8379.

Plaintiffs also argued that Oak Park's contention that MCL 600.8104 mandated that plaintiffs help fund the 45th District Court was based on a misinterpretation of the statute. MCL 600.8104(2) states that "a district funding unit shall be responsible for maintaining, financing, and operating the court only within its political subdivision." MCL 600.8104(3) provides that "district funding units within any district *may* agree among themselves to share any or all of the expenses of maintaining . . . the district court." (Emphasis added.) Plaintiffs argued that the district court was not within their political subdivisions, and therefore, they were not responsible for the expenses set forth in this provision. They emphasized that MCL 600.8104(3) used the permissive term, "may," instead of the directive, "shall." Plaintiffs remarked that the 45th District Court never presented a budget request to plaintiffs, and if it did, they would not have approved it because their populations and governmental operations budgets were significantly smaller than Oak Park's.[1]

[1] According to plaintiffs, Pleasant Ridge has approximately 2,500 residents, and its budget for the 2013-2014 fiscal year was $2.4 million. Huntington Woods has approximately 6,000 residents and had a total budget for the 2013-2014 fiscal year of $6.8 million. In contrast, Oak Park has 30,000 residents, and its 2013-2014 budget was greater than $45 million.

Plaintiffs disputed Oak Park's contention that the assessments at issue were fees, and not costs or fines, and plaintiffs asserted that the assessments were subject to the distribution outlined in MCL 600.8379(1)(c).

Oak Park argued in response that the district court was underfunded by plaintiffs and Royal Oak Township, and that the court facility was "sorely inadequate." Oak Park cited its 1996 Comprehensive Annual Financial Report, which explained that the assessments beginning in 1995-1996 addressed the problems of retiree healthcare and building expenses. Oak Park reiterated that the charges for the building fund and healthcare fund were not costs, and that the charges collected were kept in segregated accounts, pursuant to generally accepted accounting practices.

Regarding plaintiffs' argument that the SCAO reports referred to the assessments as costs, Oak Park argued that the report was not intended as a legal analysis of whether the collected payments for the building and healthcare funds were fees or costs. Oak Park denied that plaintiffs' waiver of the requirement that the court sit in plaintiffs' jurisdictions relieved plaintiffs of their obligation under MCL 600.8103(3) to contribute to the expenses of operating the district court.

The 45th District Court filed a brief concurring with Oak Park's summary disposition motion and asserting its own motion for summary disposition. The 45th District Court asserted that the municipalities within the district could not agree on a means of supporting the district court, so Oak Park became the control unit because of its population size, caseload volume, and available space for court operations. The municipalities could not agree on a formula for sharing expenses

and costs, and thus complied with the statutory default mechanisms under MCL 600.8103, MCL 600.8104, and MCL 600.8379. However, the 45th District Court was never adequately funded. Consequently, it began assessing additional fees for building improvements and retiree healthcare to compensate for inadequate funding.

The 45th District Court cited Oak Park's annual budget for FY 2013-2014 as evidence that the court required the assessments to cover expenses and obligations not paid by plaintiffs. The 45th District Court contended that plaintiffs had not met their responsibility to appropriate their fair share toward the costs of operating the district court, leaving it to Oak Park to make up the difference. Until July 1, 2012, Oak Park's burden was offset by the portion of fines and costs distributed pursuant to MCL 600.8379(1)(c), the building and healthcare fees, and other fees, charges, or penalties. The 45th District Court argued that plaintiffs' obligations to finance, maintain, and support the district court were not limited to the two-thirds allocation of fines and costs pursuant to MCL 600.8379, and that the two-thirds portion attributed to each plaintiff and allocated to the court was not sufficient to cover plaintiffs' obligations to financially support court operations. The 45th District Court also argued that even if the assessed fees were subject to distribution under MCL 600.8379, plaintiffs would not be entitled to the fees because plaintiffs were historically derelict in their duties to finance court operations.

The trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(10). The court concluded in its order that pursuant to "the clear language of MCL 600.8104 and MCL 600.8271(1), all political subdivisions," which includes all the parties,

"are responsible for the funding of the 45th District Court." The trial court ordered plaintiffs to comply with MCL 600.8271(1) "upon receipt of a Chief Judge line item budget which shall also be in with [sic] accord with MCR 8.201(A)." The court granted Oak Park the authority to establish a fund for court building improvements. It determined that funds designated for the building fund and retiree healthcare fund were "not fines and costs subject to distribution under MCL 600.8379." The trial court indicated that its order was not final, because Oak Park's claim for the return of revenues incorrectly transferred to plaintiffs from July 1, 2012, to June 30, 2013, had not been resolved.

III. ANALYSIS

Plaintiffs argue that MCL 600.8104 indicates that when the district court serves more than one political subdivision, but sits in only one of them, the political subdivision where the court sits is responsible for the financial operation of the court. Plaintiffs contend that any obligation they have to support the 45th District Court is satisfied by the district court's retention of two-thirds of the fines and costs assessed against individuals for violations that originate in plaintiffs' political subdivisions.

We review de novo a trial court's decision on a motion for summary disposition. *Mercantile Bank Mtg Co, LLC v NGPCP/BRYS Ctr, LLC*, 305 Mich App 215, 223; 852 NW2d 210 (2014). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "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). "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." *Id*.

This issue primarily involves questions of statutory construction, which we review de novo. *Cheboygan Sportsman Club v Cheboygan Co Pros Atty*, 307 Mich App 71, 75; 858 NW2d 751 (2014). The fundamental goal when construing a statute "is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written." *Id*. "[T]he provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks and citation omitted; alteration omitted). Under the principle of *in pari materia*, "[s]tatutes that relate to the same subject or share a common purpose . . . must be read together as one law . . . ." *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 84; 817 NW2d 621 (2012).

MCL 600.8103(3) defines a "district of the third class" as "a district consisting of 1 or more political subdivisions within a county and in which each political subdivision comprising the district is responsible for maintaining, financing and operating the district court within its respective political subdivision except

as otherwise provided in this act." MCL 600.8104 provides, in pertinent part:

> (1) The term "district funding unit" or "district control unit" means:
>
> * * *
>
> (b) The city or the township in districts of the third class except as provided in subdivision (c).
>
> * * *
>
> (2) Except as otherwise provided in this act, a district funding unit shall be responsible for maintaining, financing, and operating the court only within its political subdivision. In districts of the third class a political subdivision shall not be responsible for the expenses of maintaining, financing, or operating the district court, traffic bureau, or small claims division incurred in any other political subdivision except as provided by section 8621 and other provisions of this act.
>
> (3) One or more district funding units within any district may agree among themselves to share any or all of the expenses of maintaining, financing, or operating the district court. To become effective such agreements must be approved by resolution adopted by the governing body of the respective political subdivisions entering into the agreement, and upon approval such agreements shall become effective and binding in accordance with, to the extent of, and for such period stated in that agreement.

Under this statute, each plaintiff, as a city in a third-class district, qualifies as a "district funding unit" or "district control unit" of the 45th District. Under Subsection (2), plaintiffs are not responsible for the expenses of maintaining, financing, or operating the 45th District Court in Oak Park, except as otherwise provided by MCL 600.8621 or other provisions of the act.

MCL 600.8621(1) provides:

> District court recorders and reporters shall be paid by each district control unit. In districts consisting of more than 1 district control unit, each district control unit shall contribute to the salary in the same proportion as the number of cases entered and commenced in the district control unit bears to the number of cases entered and commenced in the district, as determined by the judges of the district court under rules prescribed by the supreme court.

MCL 600.8271(1) provides:

> The governing body of each district funding unit shall annually appropriate, by line-item or lump-sum budget, funds for the operation of the district court in that district. However, before a governing body of a district funding unit may appropriate a lump-sum budget, the chief judge of the judicial district shall submit to the governing body of the district funding unit a budget request in line-item form with appropriate detail. A court that receives a line-item budget shall not exceed a line-item appropriation or transfer funds between line items without the prior approval of the governing body. A court that receives a lump-sum budget shall not exceed that budget without the prior approval of the governing body.

MCL 600.8379 provides, in pertinent part:

> (1) Fines and costs assessed in the district court shall be paid to the clerk of the court who shall appropriate them as follows:
>
> (a) A fine imposed for the violation of a penal law of this state and a civil fine ordered in a civil infraction action for violation of a law of this state shall be paid to the county treasurer and applied for library purposes as provided by law.
>
> (b) . . . In districts of the third class, costs imposed for the violation of a penal law of this state or ordered in a civil infraction action for the violation of a law of this state

shall be paid to the treasurer of the political subdivision where the guilty plea or civil infraction admission was entered or where the trial or civil infraction action hearing took place.

(c) . . . In districts of the third class, all fines and costs, other than those imposed for the violation of a penal law of this state or ordered in a civil infraction action for the violation of a law of this state, shall be paid to the political subdivision whose law was violated, except that where fines and costs are assessed in a political subdivision other than the political subdivision whose law was violated, 2/3 shall be paid to the political subdivision where the guilty plea or civil infraction admission was entered or where the trial or civil infraction action hearing took place and the balance shall be paid to the political subdivision whose law was violated.

(d) In a district of the third class, if each political subdivision within the district, by resolution of its governing body, agrees to a distribution of fines and costs, other than fines imposed for the violation of a penal law of this state or ordered in a civil infraction action for the violation of a law of this state, differently than as provided by this section, the distribution of those fines and costs among the political subdivisions of that district shall be as agreed to. An existing agreement applicable to the distribution of fines and costs shall apply with the same effect to the distribution of civil fines and costs ordered in civil infraction actions.

(e) A civil fine imposed upon a person for violation of a provision of a code or an ordinance of a political subdivision of this state regulating the operation of a commercial vehicle that substantially corresponds to a provision of the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, shall be paid to the county treasurer and allocated as follows:

(*i*) Seventy percent to the political subdivision in which the citation is issued.

(*ii*) Thirty percent for library purposes as provided by law.

(f) A civil fine imposed upon a person for violation of a provision of a code or an ordinance regulating the operation of a commercial vehicle adopted by a city, township, or village pursuant to section 1 of 1956 PA 62, MCL 257.951, shall be paid to the county treasurer and allocated as follows:

(*i*) Seventy percent to the political subdivision in which the citation is issued.

(*ii*) Thirty percent for library purposes as provided by law.

MCL 600.8261 provides that "[c]ourt facilities shall be provided at those places where the court sits." "[I]n districts of the third class[, court facilities] shall be provided by each political subdivision where the court sits." *Id*. MCL 600.8251(4) governs the locations at which the court must sit:

In districts of the third class, the court shall sit at each city having a population of 3,250 or more and within each township having a population of 12,000 or more and at other places as the judges of the district determine. The court is not required to sit in any political subdivision if the governing body of that subdivision by resolution and the court agree that the court shall not sit in the political subdivision.

MCR 8.201 provides:

(A) Duties of Clerks of Each Third-Class Control Unit Having a Clerk.

(1) On the last day of March, June, September, and December of each year, the clerk of each third-class control unit having a clerk (see MCL 600.8281) shall determine the total number of civil and criminal cases filed during the preceding three months in the district and each political subdivision of the district under subrule (B). These figures are the total number of cases entered and commenced in that district and each political subdivision.

(2) The clerk shall determine the total cost of maintaining, financing, and operating the district court within the district.

(3) The clerk shall determine the proper share of the costs to be borne by each political subdivision by use of the following formula: (the number of cases entered and commenced in each political subdivision divided by the total number of cases entered and commenced in the district) multiplied by the total cost of maintaining, financing, and operating the district court.

(4) The clerk shall determine the proper share of the salary of the court reporter or recorder under MCL 600.8621(1) by use of the following formula: (the number of cases entered and commenced in each political subdivision divided by the total number of cases entered and commenced in the district) multiplied by the total salary of the court reporter or recorder.

(5) The clerk shall certify the figures determined under subrules (A)(3) and (4) to the treasurer of each political subdivision in the district. Payment by each political subdivision of any unpaid portion of its certified share of the cost and salaries is then due.

Plaintiffs deny a statutory obligation to provide financial support for the district court, relying on the following emphasized language in MCL 600.8104(2) and (3):

(2) Except as otherwise provided in this act, *a district funding unit shall be responsible for maintaining, financing, and operating the court only within its political subdivision. In districts of the third class a political subdivision shall not be responsible for the expenses of maintaining, financing, or operating the district court, traffic bureau, or small claims division incurred in any other political subdivision* except as provided by section 8621 and other provisions of this act.

(3) *One or more district funding units within any district may agree among themselves to share any or all of the expenses of maintaining, financing, or operating the*

> *district court*. To become effective such agreements must be approved by resolution adopted by the governing body of the respective political subdivisions entering into the agreement, and upon approval such agreements shall become effective and binding in accordance with, to the extent of, and for such period stated in that agreement. [Emphasis added.]

Plaintiffs overlook the limiting introductory language at the beginning of § 8104(2), "[e]xcept as otherwise provided in this act," and the similar language at the end of that subsection, which again specifies that the provisions of that subsection apply "except as provided by section 8621 and other provisions of this act."

MCL 600.8621 requires each district funding unit to contribute to the salaries of district court recorders and reporters. MCL 600.8271(1) states that "[t]he governing body of each district funding unit shall annually appropriate . . . funds for the operation of the district court in that district." It is well established "that the term 'may' is 'permissive,' as opposed to the term 'shall,' which is considered 'mandatory.' " *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (citations omitted). By using the mandatory term, "shall," instead of the permissive term, "may," MCL 600.8271(1) clearly requires each district funding unit to provide funding for the district court. Reading these provisions of the Revised Judicature Act together, in keeping with the doctrine of *in pari materia*, the statutory scheme clearly imposes on all district funding units in a third-class district a duty to provide financial support for the district court, regardless of the political subdivision in which the court is seated.

Plaintiffs argue that if there is such a requirement, it is not triggered until the chief judge submits a proposed budget to the funding unit. Plaintiffs rely on the second sentence in § 8271(1), which states that

"before a governing body of a district funding unit may appropriate a lump-sum budget, the chief judge of the judicial district shall submit to the governing body of the district funding unit a budget request in line-item form with appropriate detail." The statutory provision goes on to state that "[a] court that receives a line-item budget shall not exceed a line-item appropriation or transfer funds between line items without the prior approval of the governing body," and "[a] court that receives a lump-sum budget shall not exceed that budget without the prior approval of the governing body." MCL 600.8271(1). The relevant context of this requirement pertains to the choice of a lump-sum budget over a line-item budget, not to the funding unit's financial obligation.

Plaintiffs argue that the provision in MCL 600.8379(1)(c), which prescribes the one-third/two-thirds allocation of fines and costs assessed when the "fines and costs are assessed in a political subdivision other than the political subdivision whose law was violated," also provides the means by which a funding unit other than the funding unit where the district court sits fulfills its obligation to support the district court. Nothing in MCL 600.8379 supports this interpretation. Section 8379 provides a formula for revenue sharing, but it does not indicate that the revenue allocation satisfies a district funding unit's obligation to support the district court.

Plaintiffs also argue that there is sufficient evidence of the existence of oral agreements between each plaintiff and defendants, in which defendants agreed to refund one-third of the revenues from tickets and fines originating in plaintiffs' political subdivisions, and plaintiffs would not incur any additional expenses related to the operation of the 45th District Court.

Plaintiffs argue that the evidence shows that the parties formed oral agreements in 1974, or alternatively, that the parties' conduct establishes implied-in-fact agreements. Plaintiffs rely on the 1974 resolutions to support the existence of these contractual agreements. The resolution adopted by the Pleasant Ridge City Commission on December 10, 1974, acknowledges the abolition of the Municipal Court for the city of Pleasant Ridge and the creation of the 45-B District Court to serve Royal Oak Township and the cities of Huntington Woods, Pleasant Ridge, and Oak Park. The resolution states that the judges of the Oak Park Municipal Court will become the district court judges. It also states that these judges "conferred with the appropriate offic[i]als of the City of Pleasant Ridge and with the City Commission and have agreed that the court location requirement of MCLA 600.8251(3) shall be waived and that the district court for the 45-B District shall not be required to sit in the City of Pleasant Ridge[.]" The resolution further states that "the City of Pleasant Ridge will not incur any expenses in connection with the operation of the new district court and will receive one-third of all fines assessed which originate in the City of Pleasant Ridge." Huntington Woods adopted a substantially similar resolution.

Oak Park counters that a search of its records for the years 1974 and 1975 revealed no record of a resolution or agreement pertaining to funding and the operation of the 45-B District Court. Indeed, the 1983 Resolution, CM-04-290-83, clearly indicates that there was no agreement between the communities. The minutes of the April 3, 1983 Oak Park City Council meeting indicate that the council passed a resolution concerning the 45-B District Court. The resolution states, in pertinent part:

WHEREAS, since January 1, 1975 the City of Oak Park, as the district control unit for the 45-B District Court, has borne the total expense of operating said Court located within its municipal offices, and since 1975 the subsidy from the City of Oak Park General Operating Fund required to maintain the operations of said Court has grown from Fifteen Thousand Sixty-Three Dollars ($15,063) to an estimated subsidy of Two Hundred Forty-Nine Thousand One Hundred Fourteen Dollars ($249,114) in fiscal year 1983-84, and

* * *

WHEREAS, the Judges of the 45-B District Court have expressed to the City of Oak Park their inability to properly dispose of cases on their docket due to the inadequacy of facilities . . . and have expressed their desire and intent to have the 45-B District Court sit in other political subdivisions within the 45-B District Court boundaries, unless adequate facilities are provided within the political subdivision of the City of Oak Park, . . .

* * *

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS;

1. That the City of Huntington Woods, City of Pleasant Ridge and Township of Royal Oak each are hereby requested, pursuant to Section 8261 of Public Act 154, to provide court facilities within each of their political subdivisions, and to provide for the maintenance, financing and operation of the 45-B District Court within their political subdivisions as required by Section 8104 of Public Act 154.

2. That in the alternative, the City of Huntington Woods, City of Pleasant Ridge and Township of Royal Oak are hereby requested to enter into an agreement with the City of Oak Park to share all of the expenses of maintaining, financing and operating the 45-B District Court at a location within the boundaries of the political subdivision

> of the City of Oak Park. [Oak Park City Council meeting minutes, April 5, 1983, pp 9, 11.]

MCL 600.8104(3) provides that district funding units "may agree among themselves to share any or all of the expenses of . . . operating the district court," but "[t]o become effective such agreements must be approved by resolution adopted by the governing body of the respective political subdivisions entering into the agreement . . . ." Here, there are no such resolutions. Plaintiffs' resolutions indicate that they will not incur any expenses associated with the new district court's operation, but plaintiffs have not provided any evidence that Oak Park or the 45th District Court assented to these resolutions.

Plaintiffs alternatively argue that the parties' conduct demonstrates that implied contracts were in place. "A contract is implied where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Miller v Stevens*, 224 Mich 626, 632; 195 NW 481 (1923). However, MCL 600.8104(3) provides that such agreements are effective only when "approved by resolution adopted by the governing body of the respective political subdivisions . . . ." "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 390; 738 NW2d 664 (2007) (quotation marks and citations omitted). Plain-

tiffs cannot establish the existence of any valid agreements respecting their funding obligations without satisfying the requirements of MCL 600.8104(3).

Moreover, plaintiffs have failed to establish a genuine issue of fact regarding whether they formed valid contracts with defendants. "The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). "An implied contract must also satisfy the elements of mutual assent and consideration." *Id*. "The essence of consideration—whatever form it takes—is that there be a bargained-for exchange between the parties." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13-14; 824 NW2d 202 (2012). Plaintiffs state that their implied contracts with Oak Park provide that they would receive one-third of all fines and costs assessed for offenses that originated in their respective political subdivisions, and that they would not incur any expenses connected with operating the district court. The alleged agreements lack consideration because plaintiffs do not promise anything in exchange for the relief from their obligations to provide financial support. Accordingly, plaintiffs cannot establish the existence of any valid contracts limiting their financial obligations to the one-third/two-thirds revenue sharing provision.

Plaintiffs argue also that the trial court erred by determining that because the monies allocated to the building fund and the retiree healthcare fund were "fees" and not "costs," the monies were exempt from the one-third/two-thirds split. The language of MCL 600.8379(1)(c) provides that

> all *fines and costs* . . . shall be paid to the political subdivision whose law was violated, except that where fines and

> costs are assessed in a political subdivision other than the political subdivision whose law was violated, 2/3 shall be paid to the political subdivision where the guilty plea or civil infraction admission was entered or where the trial or civil infraction action hearing took place and the balance shall be paid to the political subdivision whose law was violated. [Emphasis added.]

Thus, we must determine whether the monies allocated to the building and retiree healthcare funds are "fines" or "costs" within the meaning of this provision.

MCL 600.4801 provides the following relevant definitions:

> (a) "Costs" means any monetary amount that the court is authorized to assess and collect for prosecution, adjudication, or processing of criminal offenses, civil infractions, civil violations, and parking violations, including court costs, the cost of prosecution, and the cost of providing court-ordered legal assistance to the defendant.
>
> (b) "Fee" means any monetary amount, other than costs or a penalty, that the court is authorized to impose and collect pursuant to a conviction, finding of responsibility, or other adjudication of a criminal offense, a civil infraction, a civil violation, or a parking violation, including a driver license reinstatement fee.
>
> (c) "Penalty" includes fines, forfeitures, and forfeited recognizances.
>
> (d) "Civil violation" means a violation of a law of this state or a local ordinance, other than a criminal offense or a violation that is defined or designated as a civil infraction, that is punishable by a civil fine or forfeiture under the applicable law or ordinance.

Neither the building fund assessment nor the retiree healthcare fund assessment qualifies as a "cost" within the definition of MCL 600.4801(a). The charges were not assessed or collected for the prosecution, adjudication, or processing of criminal offenses, civil

infractions, or other violations. Moreover, we are not persuaded that the term "court costs" in § 4801(a) extends to money collected for a court building fund or court retiree healthcare fund. In interpreting a statute, "effect should be given to every phrase, clause, and word in the statute," and the "statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). MCL 600.4801(a) is a single sentence consisting of a subject (the term "costs"), a linking verb ("means"), and a predicate nominative. The predicate nominative of the sentence is "any monetary amount," which is followed by a series of modifiers. The first modifier is the subordinate clause, "that the court is authorized to assess and collect . . . ." The object of the subordinate clause is the infinitive, "to assess and collect." The infinitive is modified by a prepositional phrase that provides a specific list of purposes *for* assessing and collecting the money, namely the actions of "prosecution, adjudication, or processing." These three actions are in turn modified by the prepositional phrase, "of criminal offenses, civil infractions, civil violations, and parking violations," which provides a specific list of the objects of those three actions. The list of included actions and corresponding objects being then complete, the sentence further modifies the list of actions and corresponding objects with the participial phrase, "including court costs, the cost of prosecution, and the cost of providing court-ordered legal assistance to the defendant." "[I]t is a general rule of statutory, as well as grammatical, construction that a modifying clause is confined to the last antecedent unless a contrary intention appears." *Dale v Beta-C, Inc*, 227 Mich App 57, 69; 574 NW2d 697 (1997). Accordingly, the modifying clause, "including

court costs," pertains to the last antecedent, "for prosecution, adjudication, or processing of criminal offenses, civil infractions, civil violations, and parking violations . . . ." "Court costs" are not standalone items in the list of monetary charges or assessments that come within the definition of "costs." Rather, "court costs" are one of the items included in the subset of costs relating to prosecution, adjudication, or the processing of criminal offenses, civil infractions, civil violations, and parking violations. Accordingly, only court costs assessed and collected for those purposes are included in the statutory definition of "costs" in MCL 600.4801(a).

Therefore, monies assessed and collected for the building fund and the retiree healthcare fund are not "costs" under MCL 600.4801(a). Such assessments come within the statutory definition of "fee," which is defined as "any monetary amount, other than costs or a penalty, that the court is authorized to impose and collect pursuant to a conviction . . . ." MCL 600.4801(b). Because a "fee" is not part of the allocation required by MCL 600.8379(1)(c), neither Oak Park nor the 45th District Court was required to distribute one-third of the assessments to plaintiffs.

Plaintiffs argue that the trial court erroneously relied on *City of Muskegon v Muskegon Co*, 63 Mich App 44; 233 NW2d 849 (1975). Oak Park cited the case, and although the trial court referred to it, the court did so only in the context of summarizing Oak Park's argument. The court did not rely on *City of Muskegon* in support of its analysis of the issue. We agree that the decision is not relevant to this case. In *City of Muskegon*, this Court addressed whether the plaintiffs (a group of six cities) or one of the defendants (Muskegon County) was responsible for paying witness fees for

witnesses called by the cities in cases arising from the cities' ordinances. This Court considered MCL 600.8323, which provides:

> Witnesses in the district court shall be entitled to receive the same fees and mileage allowances to which witnesses in circuit court are entitled. Where the county is responsible for such expenses in the circuit court, the district control unit for the place where the trial occurs shall be responsible for such expenses in the district court.

This Court concluded that "because defendant county would not be responsible for witness and mileage fees for the municipalities' witnesses in circuit court, defendant county is not responsible for such fees in district court." *City of Muskegon*, 63 Mich App at 45. Quoting the trial court's opinion, this Court noted:

> "Plaintiffs further argue that since Muskegon County is a first class district comprised solely of Muskegon County, therefore, as such, it is the sole district control unit involved and is responsible for witness fees. The Plaintiffs further urge that witness fees are an integral part of maintenance, financing and operation of a District Court. See MCLA 600.8104(2)[.]" [*Id*. at 46 (citation omitted).]

The plaintiffs cited MCL 600.8104 for the contention that a political subdivision in third-class districts "shall not be responsible for the expenses of maintaining, financing, or operating the district court . . . incurred in any other political subdivision . . . ." *City of Muskegon*, 63 Mich App at 46-47 (emphasis omitted). The defendants contended that ordinance violation expenses were never treated as an obligation of the county. *Id*. at 47. This Court agreed that "in both civil and criminal cases, the municipality, as a litigant, is required by R.J.A. § 8323 to pay witness and mileage fees." *City of Muskegon*, 63 Mich App at 53.

City of Muskegon is not helpful to the instant analysis, because the Court there did not analyze the issue of distinguishing costs from fees for purposes of distribution under MCL 600.8379. Indeed, this Court quoted extensively from the trial court's opinion, which used the terms interchangeably, as noted here:

> "Witness fees are not a part of or included in the maintenance, operating or financing of a court. The court or forum per se is a passive element of the system. Theoretically, the District Control Unit might create the court, maintain it, operate it, and a case may never be tried in it, or a proceeding of any kind may never take place in it. Having created it, maintained, operated and financed it, the District Control Unit has acquitted its obligation under the statute. It is the litigants and their supporting cast (including their witnesses) who are the active participants in the pit. Witness fees are a part of the cost of litigation, not an element of maintaining, operating or financing the court, and it is the litigants who must initially pay their own costs—whether those costs of litigation, costs of prosecution, costs of defense, are ultimately recoverable depending upon result, is a matter determined by Statute or Court Rule." [*City of Muskegon*, 63 Mich App at 52.]

In this case, plaintiffs observe that the SCAO audit report referred to the charges as "costs." The SCAO report referred to the building fund and retiree healthcare assessments as "court costs" and "operational costs." The report noted that the 45th District Court "distributed court costs, with the exception of court costs titled as operational costs," until FY 2013, when it began distributing the operational costs. However, the SCAO report did not address the legal question whether the building fund and retiree healthcare fund assessments were costs subject to distribution. The terminology used in that report is not dispositive of the proper characterization of the charges for purposes of

this case. Plaintiffs suggest that the trial court's decision was premature because discovery was not complete, and because further discovery could provide more evidence of whether the assessments are properly classified as costs or fees. However, the classification of the assessments as costs or fees is not a question of fact. It is a question of law, about which discovery would shed no further light.

Finally, we find no merit to plaintiffs' argument that the Legislature's recent amendment of MCL 769.1k supports their position that the retiree healthcare fund assessment and the building fund assessment are actually costs subject to distribution. MCL 769.1k addresses a trial court's authority to impose costs when sentencing a criminal defendant. In *People v Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), our Supreme Court observed that MCL 769.1k authorized a court to impose costs at sentencing, but the Court held that the statute did not authorize a court to impose "any cost." Rather, the Court concluded that MCL 769.1k authorized the imposition of "only those costs that the Legislature has separately authorized by statute." *Cunningham*, 496 Mich at 158. In response to the *Cunningham* decision, the Legislature amended MCL 769.1k, effective October 17, 2014. See 2014 PA 352. The enacting sections provide:

> Enacting section 1. This amendatory act applies to all fines, costs, and assessments ordered or assessed under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before June 18, 2014, and after the effective date of this amendatory act.
>
> Enacting section 2. This amendatory act is a curative measure that addresses the authority of courts to impose costs under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before the issuance

of the supreme court opinion in People v Cunningham, 496 Mich 145 (2014). [2014 PA 352.]

The decision in *Cunningham*, and the subsequent statutory amendment, address the trial court's authority to assess certain categories of costs against a convicted criminal defendant. The issue presented in this case does not concern whether the 45th District Court or Oak Park has authority to impose the building fund or retiree healthcare fund assessments, but whether plaintiffs are entitled to one-third of those assessments under MCL 600.8379(1)(c). Neither the *Cunningham* decision nor the statutory amendment of MCL 769.1k have any relevance to the interpretation of MCL 600.4801.

Accordingly, we affirm the trial court's determination that the monies allocated to the building fund and the retiree healthcare fund are not subject to the one-third/two-thirds distribution scheme in MCL 600.8379(1)(c). In light of this decision, it is unnecessary to address Oak Park's alternative argument that the doctrine of laches should also preclude plaintiffs from receiving a one-third distribution of monies collected for the building and retiree healthcare funds.

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

JANSEN, P.J., and SAWYER and FORT HOOD, JJ., concurred.

SIMPSON v ALEX PICKENS, JR, & ASSOCIATES, MD, PC

Docket No. 320443. Submitted June 9, 2015, at Detroit. Decided June 16, 2015, at 9:00 a.m. Leave to appeal sought.

Shakeeta Simpson, individually and as personal representative of the estate of Antaun Simpson, brought an action in the Wayne Circuit Court against Alex Pickens, Jr., & Associates, M.D., PC; Brightmoor General Medical Center Inc.; and others. Plaintiff alleged that defendants were negligent with regard to her prenatal care, resulting in the premature birth and death of Antaun, plaintiff's nonviable fetus. Specifically, plaintiff alleged that she suffered a miscarriage because her physician, Alex Pickens, Jr., failed to perform a cerclage. Plaintiff's individual claims were dismissed by stipulated order. Defendants moved for summary disposition with regard to plaintiff's wrongful-death claim, arguing that dismissal was required under MCL 600.2922a because plaintiff alleged that an omission led to the death of the fetus. The court, Lita M. Popke, J., agreed and granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

The wrongful-death statute, MCL 600.2922, provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death. A wrongful-death action may be brought on behalf of a nonviable fetus under the current language of the statute, which refers to a death as described in MCL 600.2922a. A death as described in MCL 600.2922a means the death of an embryo or fetus. The language "a death as described in section 2922a" was added to the wrongful-death statute through the enactment of 2005 PA 270, and it merely expanded the scope of actionable deaths to include the death of an embryo or fetus. The first requirement for a wrongful-death action is a death. The second requirement is that the death be caused by wrongful act, neglect, or fault of another. The third requirement is that the wrongful act, neglect, or fault of another be such that, if death had not ensued, a cause of action could have been filed against the responsible party and damages recovered from them. There is no reason to treat the death of an

embryo or fetus differently under the wrongful-death statute than the death of a person. A wrongful-death action brought on behalf of an embryo or fetus is not required to be construed as though it were brought under MCL 600.2922a. In this case, accordingly, plaintiff was not required to allege that defendants committed an affirmative or positive act that caused the death of her fetus in order to state a claim under MCL 600.2922. To the contrary, the expansive terms "neglect" and "fault of another" used in the wrongful-death statute permit liability on the basis of omissions. Plaintiff stated a valid cause of action under MCL 600.2922 when she alleged that defendants' failure to perform a cerclage led to the death of her fetus. Accordingly, the trial court erred by granting summary disposition in favor of defendants with regard to plaintiff's wrongful-death claim.

Reversed and remanded.

STATUTES — WRONGFUL-DEATH STATUTE — EMBRYOS OR FETUSES — OMISSIONS OF DUTIES.

The wrongful-death statute, MCL 600.2922, provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death; a wrongful-death action may be brought on behalf of a nonviable fetus or embryo under the current language of the statute; the wrongful-death statute permits the imposition of liability on the basis of an omission by the defendant, and there is no reason to treat the death of an embryo or fetus differently under the wrongful-death statute than the death of a person.

Mark Granzotto, PC (by *Mark Granzotto*), and *The Thurswell Law Firm, PLLC* (by *Ardiana Culaj*), for plaintiff.

Tanoury, Nauts, McKinney & Garbarino, PLLC (by *Linda M. Garbarino* and *Anita Comorski*), for defendants.

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

CAVANAGH, J. Shakeeta Simpson, as the personal representative of the estate of Antaun Simpson, appeals as of right an order granting partial summary disposi-

tion in favor of defendants and dismissing the wrongful-death claim brought on behalf of her decedent.[1] We reverse.

In this wrongful-death action, it was alleged that defendants were negligent in the prenatal care and treatment of Simpson, which caused the premature birth and death of the decedent, Simpson's nonviable fetus, Antaun, at 18.2 weeks' gestation. In particular, Simpson suffered a miscarriage allegedly because her physician, defendant Alex Pickens, Jr., failed to perform a cerclage despite knowing that Simpson had two previous pregnancy losses as a consequence of cervical insufficiency.

Defendants filed a motion for partial summary disposition of the wrongful-death claim under MCR 2.116(C)(8) and (10), arguing that dismissal was required under MCL 600.2922a because plaintiff alleged that an omission—the failure to perform a cerclage—led to the death of the fetus. Defendants argued that, in *Johnson v Pastoriza*, 491 Mich 417, 436-440; 818 NW2d 279 (2012), our Supreme Court held that to state a cause of action under MCL 600.2922a, an "affirmative or positive act[]" must be alleged, not merely an omission or failure to act. Further, defendants argued, "the amendment of MCL 600.2922 to reference MCL 600.2922a does not change the essential nature of the underlying claim brought under MCL 600.2922a. That is, the essential elements of a claim brought under MCL 600.2922a remain the same, including the need to establish 'an affirmative or positive act' to state a valid cause of action." Accordingly, defendants argued that the wrongful-death claim should be dismissed.

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[1] Shakeeta Simpson brought claims on her own behalf, but those individual claims were dismissed by stipulated order and are not subject to this appeal.

Plaintiff responded, arguing that MCL 600.2922a was not applicable here because this is a wrongful-death action brought on behalf of the decedent, a nonviable fetus. The underlying theory of liability is medical malpractice, not MCL 600.2922a. A wrongful-death claim brought under MCL 600.2922 imposes liability for death caused by "wrongful act, neglect, or fault of another"; therefore, acts of omission are sufficient to state a claim and to establish liability.

The trial court agreed with defendants, holding that MCL 600.2922a must be incorporated into MCL 600.2922 because that statute refers to "death as described in 2922a . . . ." Further, the court held, an affirmative act must be alleged to state a claim under MCL 600.2922a and plaintiff only alleged that an omission occurred. Therefore, defendants were entitled to summary disposition of the wrongful-death claim.

The sole issue on appeal is whether this wrongful-death action was properly dismissed on the ground that plaintiff failed to allege that defendants committed an affirmative act as required for actions brought under MCL 600.2922a. We conclude that dismissal was improper, and reverse.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). It appears the trial court granted defendants' motion under MCR 2.116(C)(8), after concluding that plaintiff's complaint failed to state a claim upon which relief could be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and may be granted only when the claim alleged is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

The resolution of this matter requires the interpretation of statutory provisions. We review issues of statutory construction de novo. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).[2] The rules of statutory interpretation are well established. The primary goal is to discern the intent of the Legislature. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). The best indicator of that intent is the language of the statute, and, in determining intent, the words of the statute are given their common and ordinary meaning. *Id*. at 205-206. Statutory language must be read and understood in its grammatical context, and effect should be given to every phrase, clause, and word in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). No word should be treated as surplusage or rendered nugatory. *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980). When statutory language is unambiguous, "further construction is neither required nor permitted." *Joseph*, 491 Mich at 206. Only when the statutory language is ambiguous "is it proper for a court to go beyond the statutory text to ascertain legislative intent." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013). A statute is not rendered ambiguous merely because reasonable minds may differ regarding its meaning. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). "Rather, a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision . . . or when it is *equally* susceptible to more than a single meaning." *Id*., quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (alteration in original). Such a conclusion

[2] Modified on other grounds by *Mich Federation of Teachers & Sch Related Personnel v Univ of Mich*, 481 Mich 657 (2008).

should be arrived at "only after 'all other conventional means of [ ] interpretation' have been applied and found wanting." *Lansing Mayor*, 470 Mich at 165, quoting *Klapp*, 468 Mich at 474 (alteration in original).

This is a wrongful-death action brought on behalf of the deceased nonviable fetus. The death alleged is that of the nonviable fetus, and the underlying theory of liability is medical malpractice. Because it was alleged that the wrongful act, neglect, or fault of another resulted in the death of the nonviable fetus, this action had to be brought under the wrongful-death act, MCL 600.2922, which "provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004); see also MCL 600.2921. "[T]he wrongful-death act is essentially a 'filter' through which the underlying claim may proceed." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008). In other words, for example, "a wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent." *Jenkins*, 471 Mich at 165-166. Therefore, statutory and common-law limitations, like the noneconomic-damages cap applicable in medical malpractice actions, apply to wrongful-death actions. *Wesche*, 480 Mich at 90.

The wrongful-death act, MCL 600.2922(1), provides:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwith-

> standing the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

There is no dispute in this case that a wrongful-death action may be brought on behalf of a nonviable fetus. Before the language of the statute was amended in 2005, however, a wrongful-death action brought on behalf of a nonviable fetus was not cognizable.[3] That was so because, before the 2005 amendment, MCL 600.2922(1) provided: "Whenever the death of a person or injuries resulting in death shall be caused . . . ."[4] Accordingly, a wrongful-death action could not be based on the death of an embryo or nonviable fetus. See *Thomas v Stubbs*, 455 Mich 853 (1997); *Toth v Goree*, 65 Mich App 296, 304; 237 NW2d 297 (1975). In *Johnson*, our Supreme Court recognized that "[b]efore the 2005 amendment of the wrongful-death statute, a plaintiff could not bring an action under MCL 600.2922 for the death of a nonviable fetus." *Johnson*, 491 Mich at 433.

While there is no dispute that a wrongful-death action may now be brought on behalf of a nonviable fetus, there is a dispute regarding the meaning, and operation, of the 2005 amendatory language. As amended, MCL 600.2922(1) provides, "Whenever the death of a person, injuries resulting in death, *or death as described in section 2922a* shall be caused . . . ." (Emphasis added to highlight the amendatory language.) Defendants argued in the trial court that, in light of the amendatory language, plaintiff brought this action under § 2922a, which must be incorporated in its entirety into § 2922. The trial court agreed with

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[3] MCL 600.2922(1) was amended by 2005 PA 270, which took effect on December 19, 2005.

[4] See MCL 600.2922(1), as amended by 2000 PA 56.

defendants, holding that MCL 600.2922a must be incorporated into MCL 600.2922. Essentially, then, the trial court concluded that MCL 600.2922(1) should be read as follows:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a ["[a] person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus"] shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

We do not agree with the trial court's interpretation.

It is clear by a plain reading of MCL 600.2922 that the amendatory language refers to another death that is actionable under the wrongful-death statute—a "death as described in section 2922a . . . ." Thus, we turn to MCL 600.2922a(1), which provides:

> A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus.

There is no ambiguity; the "death as described in section 2922a" is the death of an embryo or fetus. No other "death" is described in § 2922a.[5] The statutory

[5] We note that the death of either an embryo or nonviable fetus is generally considered a "miscarriage," and a "stillbirth" is "the birth of a dead fetus[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).

language is not equally susceptible to more than this single meaning. See *Lansing Mayor*, 470 Mich at 166. The amendatory language merely differentiates between the death of "a person," as that term had been construed under MCL 600.2922,[6] and the death of an embryo or fetus. Under the language of the 2005 amendment, the first requirement for a wrongful-death action—that there be a death—is satisfied when the death is of an embryo or fetus.[7] And that is the extent of the effect this amendment had on the wrongful-death statute; it merely expanded the scope of actionable deaths to include the death of an embryo or fetus.[8] The trial court's interpretation of the amendatory language as incorporating the entirety of one statute into the other statute contravenes our long-standing rules of statutory interpretation that statutory language is to be read and understood in its grammatical context, words are to be accorded their plain and ordinary meaning, and no word should be treated as surplusage or rendered nugatory. See *Joseph*, 491 Mich at 206; *Sun Valley Foods Co*, 460 Mich at 237; *Baker*, 409 Mich at 665.

Neither defendants nor the trial court provided any sound legal basis for treating a wrongful-death action

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[6] See *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492, 495; 665 NW2d 484 (2003) ("[A]n action for wrongful death . . . cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a "person" within the meaning of the wrongful-death act.").

[7] Although a wrongful-death action could not be filed on behalf of an embryo or nonviable fetus before the 2005 amendment of MCL 600.2922(1), a wrongful-death action could be filed on behalf of a *viable* fetus for prenatal injuries that caused death. See *O'Neill v Morse*, 385 Mich 130, 132, 139; 188 NW2d 785 (1971); *Jarvis v Providence Hosp*, 178 Mich App 586, 590-591; 444 NW2d 236 (1989).

[8] Because the statutory language is not ambiguous, we may not go beyond the statutory text and consider legislative history; the intent is clear. See *Whitman*, 493 Mich at 312.

brought on behalf of an embryo or fetus any differently than a wrongful-death action brought on behalf of "a person." Again, the first requirement for a wrongful-death action is a death. The second requirement is that the death "be caused by wrongful act, neglect, or fault of another . . . ." The third requirement is that the "wrongful act, neglect, or fault of another" be such that, if death had not ensued, a cause of action could have been filed against the responsible party and damages recovered from them. See MCL 600.2922. As our Supreme Court noted in *O'Neill v Morse*, 385 Mich 130, 133; 188 NW2d 785 (1971), the "obvious purpose" of the wrongful-death statute "is to provide an action for wrongful death whenever, *if death had not ensued*, there would have been an action for damages." In other words, the action brought on behalf of the deceased is the same legal action—with all of its statutory and common-law limitations—that the deceased could have brought if the injuries the deceased sustained because of the wrongful act, neglect, or fault of another had not caused death. See *Wesche*, 480 Mich at 90-91; *Hardy v Maxheimer*, 429 Mich 422, 438-439; 416 NW2d 299 (1987). The nature and purpose of this type of action does not change because it is the death of an embryo or fetus giving rise to the wrongful-death action.

Further, contrary to defendants' argument, a wrongful-death action brought on behalf of an embryo or fetus is not required to be construed as "brought under § 2922a" because of the amendatory language at issue. As our Supreme Court noted in *Johnson*, MCL 600.2922a "is separate from the wrongful-death statute . . . ." *Johnson*, 491 Mich at 422-423. While MCL 600.2922a does recognize as actionable certain prenatal injuries—miscarriage, stillbirth, and physical injury to, or the death of, an embryo or fetus—it does not

require that the prenatal injuries result in death to be actionable. Therefore, for example, the "pregnant individual" and the child who suffered but survived injury in utero[9] may pursue statutory causes of action under MCL 600.2922a for such prenatal injuries. See, e.g., *Johnson*, 491 Mich at 433 n 36. However, a legal action for death or injuries resulting in death brought on behalf of a deceased person, fetus, or embryo must be brought under the wrongful-death statute, MCL 600.2922, which provides the exclusive remedy. See MCL 600.2921; *Jenkins*, 471 Mich at 164.

We also reject defendants' argument that the Supreme Court's holding in *Johnson* is applicable here. The circumstances in this case are clearly distinguishable. In that case, a wrongful-death action could not be brought on behalf of the deceased fetus because the injuries resulting in death occurred before the effective date of the amendatory language. *Johnson*, 491 Mich at 420-421. In this case, the cause of action arose after the effective date of the 2005 amendatory language so, as the *Johnson* Court acknowledged, "the representative of the fetus's estate is now able to file a wrongful-death claim on the basis of the fetus's death." *Id*. at 433. In *Johnson*, "wrongful-death claim" was clearly distinguished from a claim brought under MCL 600.2922a. *Id*. at 420, 433.

In summary, Simpson brought a wrongful-death action on behalf of her decedent and it was grounded in medical malpractice. This action was not brought under MCL 600.2922a and it need not be considered a statutory cause of action brought under MCL 600.2922a.

[9] We note that before MCL 600.2922a was enacted, a common-law negligence action could be brought on behalf of a surviving child who sustained injuries in utero during pregnancy. *Womack v Buchhorn*, 384 Mich 718, 719, 725; 187 NW2d 218 (1971).

Therefore, Simpson was not required to allege that defendants committed an affirmative or positive act that caused her decedent's death in order to state a claim under MCL 600.2922. To the contrary, under the wrongful-death statute, MCL 600.2922(1), a cause of action may be brought when death is "caused by wrongful act, neglect, or fault of another . . . ." As the *Johnson* Court explained, the "more expansive terms 'neglect' and 'fault of another' that [the Legislature] included in MCL 600.2922(1) . . . permit liability on the basis of omissions." *Johnson*, 491 Mich at 437. In this case, the alleged "omission" that caused the decedent's death was the failure to perform a cerclage; therefore, plaintiff stated a valid cause of action under MCL 600.2922. Accordingly, the trial court's order granting defendants' motion for partial summary disposition of this wrongful-death action is reversed.

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

METER, P.J., and WILDER, J., concurred with CAVANAGH, J.

GRAHAM v FOSTER

Docket No. 318487. Submitted February 3, 2015, at Detroit. Decided June 16, 2015, at 9:05 a.m. Leave to appeal sought.

Shae Graham brought this action under the Revocation of Paternity Act, MCL 722.1431 *et seq*., against Sharea Foster in the Oakland Circuit Court, alleging that he was the biological father of Sharea's third child. The child's birth certificate identified Sharea's husband, Christopher Foster, as the child's father. Sharea moved for summary disposition alleging, in part, that Christopher was a necessary party to the action and that because the period of limitations had expired, he could no longer be added to the case, which had to be dismissed. The court, Joan E. Young, J., ruled that Christopher was not a necessary party and denied the motion for summary disposition. Defendant sought leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

A party is necessary to an action if that party has an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. In this case, Christopher had interests that would not be adequately addressed if he were not made a party to the lawsuit. As the presumed father, Christopher had custodial rights that warranted due process protection. He was, therefore, a necessary party and the trial court erred by concluding otherwise. Generally, if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action with regard to the new defendant. However, an exception to that rule is that an additional defendant may be brought in after the expiration of the limitations period if the new party is a necessary party. Because Graham properly named Sharea as a defendant, Christopher could be added as a necessary party, and the claim was not barred by the statute of limitations. Graham requested in the trial court that he be permitted to amend his complaint to add Christopher as a defendant. The trial court should have permitted the amendment under MCR 2.118(A)(2) because justice so required.

Trial court order denying summary disposition affirmed on other grounds. Case remanded for the addition of Christopher Foster as a defendant.

1. STATUTES — REVOCATION OF PATERNITY ACT — NECESSARY PARTIES.

Under the Revocation of Paternity Act, MCL 722.1431 *et seq*., in an action brought by an alleged father, the presumed father has custodial rights that warrant due process protection and is a necessary party.

2. PARTIES — NECESSARY PARTIES — AMENDMENT OF THE COMPLAINT — STATUTES OF LIMITATIONS.

Generally, if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action with regard to the new defendant, but an exception to that rule is that an additional defendant may be brought in after the expiration of the limitations period if the new party is a necessary party.

Perkins Law Group, PLLC (by *Todd Russell Perkins* and *David Melton, Jr.*), for Shae Graham.

T. Daniels & Associates, PLLC (by *Tammy Daniels*), for Sharea Foster.

Before: CAVANAGH, P.J., and METER and SHAPIRO, JJ.

METER, J. In this action to revoke paternity, defendant appeals by leave granted a circuit court order denying her motion for summary disposition. We affirm the denial of summary disposition but conclude that defendant's husband, Christopher Foster (hereinafter "Foster"), is a necessary party to plaintiff's lawsuit. We therefore remand this case for the addition of Foster as a defendant.

Defendant and Foster were married on September 18, 2004, and they continue to be married. In the summer of 2008, defendant and plaintiff engaged in an extramarital affair. Plaintiff alleged that on January 1, 2009, he and defendant conceived a child. Defendant's

third child, Blake Foster, was born on September 23, 2009. Plaintiff filed an affidavit averring that he was present at Blake's birth and cut the umbilical cord during the delivery. Despite the foregoing, Foster was listed as the father on the child's birth certificate.

On September 22, 2010, plaintiff filed a complaint under the Paternity Act, MCL 722.711 *et seq*., in which he alleged that he was Blake's biological father. The circuit court dismissed the action, concluding that plaintiff lacked standing. The Legislature subsequently enacted the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*. The RPA, among other things, confers standing on an "alleged father"[1] to seek a determination that a child was born out of wedlock, even though the mother was married at the time of the conception or birth. MCL 722.1441(3); MCL 722.1433(e). On May 15, 2013, plaintiff filed a complaint under the RPA. Once again, plaintiff alleged that he was Blake's biological father. Plaintiff sought (1) an order determining his paternity of the child, (2) an order of filiation naming him as the child's father, (3) an order providing for joint legal and physical custody of the child, and (4) an order allowing reasonable parenting time. Only defendant was named as a defendant in the complaint.

In lieu of filing an answer, on June 14, 2013, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10). She argued, in part, that plaintiff could not satisfy the factual requirements of MCL 722.1441(3), which, in relevant part, states:

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of

[1] The RPA defines an "alleged father" as "a man who by his actions could have fathered the child." MCL 722.1433(c).

> establishing the child's paternity if an action is filed by an alleged father and any of the following applies:
>
> (a) All of the following apply:
>
> (*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.
>
> (*ii*) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
>
> (*iii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.
>
> (*iv*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

Defendant claimed that plaintiff knew at all pertinent times that she and Foster were married. Defendant also claimed that Foster was a necessary party to the action and that, because the period of limitations in MCL 722.1441(3)(a)(*iii*) had expired, plaintiff could no longer add Foster to the proceedings. Defendant asserted that the case had to be dismissed because of plaintiff's failure to add a necessary party.

In response to defendant's motion for summary disposition, plaintiff argued, in part, that there was nothing in the plain language of the RPA requiring that plaintiff name Foster as a defendant. In the alternative, plaintiff argued that he should be granted leave to amend the complaint to add Foster as a defendant.

At a hearing held on August 21, 2013, the circuit court ruled that the RPA did not require plaintiff to

name Foster as a defendant and that Foster was not a necessary party to the lawsuit. It further found that genuine issues of fact existed with respect to whether plaintiff could satisfy the necessary elements of his claim under the RPA.[2] Accordingly, the circuit court denied defendant's motion for summary disposition; subsequently, the court also denied defendant's motion for reconsideration.

We review de novo a trial court's decision regarding a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We also review de novo issues of statutory and court-rule construction. *Id.*; *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006).

MCR 2.205(A) addresses the issue of when the joinder of parties is necessary and provides:

> Subject to the provisions of subrule (B) [discussing the effect of the failure to join a necessary party] and MCR 3.501 [discussing class actions], persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

This Court has held that a party is necessary to an action if that party "has an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Mather Investors, LLC v Larson*, 271 Mich App 254, 257-258; 720 NW2d 575 (2006) (citations and quotation marks

[2] We note that defendant does not take issue with this aspect of the circuit court's ruling.

omitted). In *Mather*, *id*. at 259, this Court noted that the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*., indicates that a transferor must be "liable for [a] claim" in order to be considered a "debtor" under the act. The Court concluded that the person at issue (the transferor/alleged debtor) was an essential party in that case because her liability had not been adjudicated and was vital to the plaintiff's claim. *Mather*, 271 Mich App at 255, 259-260. The Court noted that "unless the transferor's liability has already been determined in a proceeding that afforded the transferor a meaningful opportunity to defend, the transferor's 'presence in the action is essential to permit the court to render complete relief . . . .' " *Id*. at 259-260, quoting MCR 2.205(A).

Similar to the transferor's interests in *Mather*, Foster has interests that would not be adequately addressed if he were not a party to plaintiff's lawsuit under the RPA. Under the RPA, a "presumed father" is "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(e). This Court has determined that under the Paternity Act, the custodial rights of a presumed father (i.e., of a man presumed to be a child's father because of his marriage to the child's mother) are significant and warrant due process protection. *Aichele v Hodge*, 259 Mich App 146, 164; 673 NW2d 452 (2003). "There is an important liberty interest in the development of the parent-child relationship." *Id*. The RPA's definition of a "presumed father" clearly implies that the presumed father is afforded the legal right of parenthood, unless that presumption is rebutted in a successful action under the act. See, e.g., *Grimes v Van Hook-Williams*, 302 Mich App 521, 527; 839 NW2d 237 (2013) (stating that the RPA governs actions to determine whether a

presumed father is not a child's father). A successful action by plaintiff would strip Foster of interests that must not be set aside without Foster's fair chance to defend those interests. See, e.g., *Mather*, 271 Mich App at 257-260. We thus hold that Foster is a necessary party under MCR 2.205(A).

Defendant argues that plaintiff's failure to add a necessary party (Foster) within the limitations period bars his lawsuit. We disagree. Generally, if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action with regard to the new defendant. *Amer v Clarence A Durbin Assoc*, 87 Mich App 62, 65; 273 NW2d 588 (1978). However, an exception to that rule is that an additional defendant may be brought in after the expiration of the limitations period if the new party is a necessary party. *Id*.; *O'Keefe v Clark Equip Co*, 106 Mich App 23, 26-27; 307 NW2d 343 (1981).

In *O'Keefe*, 106 Mich App at 24-25, 27, this Court was confronted with unique circumstances when the plaintiff had sued a fictitious entity in order to satisfy the statute of limitations and later added the proper defendant after the limitations period had ended. This Court held that a plaintiff cannot amend the complaint to add another party when the plaintiff first sued a fictitious entity in order to satisfy the statute of limitations. *Id*. at 27. However that is not the situation in the present case. Instead, plaintiff properly named defendant in his timely filed lawsuit, and now Foster will merely be *added* as a necessary party. In this circumstance, the statute of limitations does not bar plaintiff's claim. See *Amer*, 87 Mich App at 65. As noted, plaintiff did request, in the circuit court, that he be allowed to amend his complaint by adding Foster as

a defendant. MCR 2.118(A)(2) allows for the amendment of pleadings "when justice so requires," and justice requires this amendment for the reasons already discussed. See also MCR 2.205(B) (discussing the effect of the failure to join a necessary party).[3]

We affirm the denial of summary disposition but remand this case for the addition of Foster as a defendant in the lawsuit. We do not retain jurisdiction.

CAVANAGH, P.J., and SHAPIRO, J., concurred with METER, J.

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[3] We note that if Foster were not added as a defendant, plaintiff's claim would be defective in that it would lack a necessary party. See, e.g., MCR 2.504(B)(3) (mentioning dismissal "for failure to join a party"). We further note that defendant briefly requests that this Court strike the circuit court's grant of plaintiff's motion for genetic testing. In light of our holding today, the order was premature in that Foster was not a party to the case before the order was issued. The issue may be revisited upon remand.

CHEESMAN v WILLIAMS

Docket No. 320446. Submitted June 9, 2015, at Detroit. Decided June 18, 2015, at 9:00 a.m.

Kyle Cheesman brought an action in the Wayne Circuit Court against Danilia Williams, seeking custody of the parties' minor daughter, KC. The court, Martha M. Snow, J., dismissed the action after concluding that Michigan did not have jurisdiction and that, even if it did, Michigan would be an inconvenient forum. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 722.1201(1) of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) is the exclusive jurisdictional basis for making a child custody determination by a Michigan court. The trial court concluded that it did not have jurisdiction because Michigan was not KC's "home state" as defined by MCL 722.1102(g). But the court failed to consider whether it had jurisdiction under either MCL 722.1201(1)(b) or (d). From the timelines supplied by the parties, it appeared that neither Ohio nor Georgia, other states in which KC had recently lived, could exercise home-state jurisdiction under MCL 722.1201(1)(a). The fact that neither Ohio nor Georgia, (or any other state) could exercise home-state jurisdiction under MCL 722.1201(1)(a) would fulfill the first part of MCL 722.1201(1)(b). But despite the fact that the first part of MCL 722.1201(1)(b) appeared to be satisfied, the trial court did not consider any evidence regarding the factors that compose the second part of MCL 722.1201(1)(b), specifically whether under Subparagraph (*i*) KC and plaintiff had a significant connection with Michigan other than mere presence and whether under Subparagraph (*ii*) substantial evidence was available in Michigan concerning KC's care, protection, training, and personal relationships. The trial court also failed to consider whether Ohio or Georgia had jurisdiction under MCL 722.1201(1)(b), and, as a result, failed to determine whether Michigan could exercise jurisdiction under MCL 722.1201(1)(d). Because there were factual disputes regarding KC's residency and there was insufficient evidence in the trial

court record to determine whether a Michigan court could exercise jurisdiction, the case had to be remanded for the trial court to take additional evidence and determine whether Michigan could exercise jurisdiction under MCL 722.1201(1)(b) or (d).

2. MCL 722.1207 addresses the circumstances in which a trial court may decline to exercise its jurisdiction under the UCCJEA on the basis of a finding that the state is an inconvenient forum and the procedures that the trial court must follow in doing so. That statute states that a court that has jurisdiction to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. Before determining whether it is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court must allow the parties to submit information and must consider all relevant factors, including (a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child, (b) the length of time the child has resided outside this state, (c) the distance between the court in this state and the court in the state that would assume jurisdiction, (d) the parties' relative financial circumstances, (e) an agreement by the parties as to which state should assume jurisdiction, (f) the nature and location of the evidence required to resolve the pending litigation, including the child's testimony, (g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence, and (h) the familiarity of the court of each state with the facts and issues of the pending litigation. Because the trial court in this case failed to determine whether it had jurisdiction under MCL 722.1201(1)(b) or (d)—which was necessary for it to conclude whether it did, in fact, have jurisdiction before it could decline to exercise that jurisdiction—and subsequently failed to consider each of the relevant factors as required under MCL 722.1207(2), the trial court abused its discretion when it declined to exercise jurisdiction over the case on the basis of its finding that Michigan was an inconvenient forum. The remedy for a failure to make explicit findings under MCL 722.1207 is to remand the case to the trial court for a reevaluation of the relevant factors.

Trial court orders declining jurisdiction and dismissing the case vacated. Case remanded for further proceedings.

PARENT AND CHILD — CUSTODY — DETERMINATION OF INCONVENIENT FORUM — RELEVANT FACTORS.

Under MCL 722.1207 of the Uniform Child-Custody Jurisdiction and Enforcement Act, a court that has jurisdiction to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum; before determining whether it is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction; for this purpose, the court must allow the parties to submit information and must consider all relevant factors, including (a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child, (b) the length of time the child has resided outside this state, (c) the distance between the court in this state and the court in the state that would assume jurisdiction, (d) the parties' relative financial circumstances, (e) an agreement by the parties as to which state should assume jurisdiction, (f) the nature and location of the evidence required to resolve the pending litigation, including the child's testimony, (g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence, and (h) the familiarity of the court of each state with the facts and issues of the pending litigation; the remedy for a failure to make explicit findings under MCL 722.1207 is to remand the case to the trial court for a reevaluation of the relevant factors.

Carolyn J. Jackson for plaintiff.

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

PER CURIAM. Plaintiff appeals by right an order dismissing this child custody case. The issues raised on appeal relate to a previous order wherein the trial court declined to exercise jurisdiction over the instant case. We vacate those orders and remand for further proceedings consistent with this opinion.

This case arises out of a custody dispute involving KC, who was born to plaintiff and defendant on June 11, 2003. The parties were never married, but plaintiff and

defendant executed an affidavit of parentage on June 13, 2003, listed plaintiff's name on KC's birth certificate, and continuously held out KC as plaintiff's daughter. KC "lived jointly between" plaintiff and defendant until 2009, when defendant was incarcerated. After defendant's release, KC remained in Detroit, Michigan, until 2011, when she moved to Ohio with defendant. Between 2011 and 2013, KC moved from Ohio to Georgia and back to Ohio with defendant, but she visited plaintiff in Michigan during the summer and school breaks. It appears that the trial court dismissed this case on the basis of its conclusion that Michigan did not have jurisdiction, and, even if did, Michigan constituted an inconvenient forum.

Plaintiff first argues on appeal that the trial court abused its discretion when it failed to exercise jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. We agree, but only to the extent that we conclude that the trial court failed to fully consider whether it had jurisdiction under the UCCJEA.

Absent a factual dispute, this Court reviews de novo, as a question of law, whether a trial court has jurisdiction under the UCCJEA. *Foster v Wolkowitz*, 486 Mich 356, 362; 785 NW2d 59 (2010). But even if a court may exercise jurisdiction under the UCCJEA, the decision do so is " 'within the discretion of the trial court, and [will] not be reversed absent an abuse of that discretion.' " *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008) (citation omitted). "Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008). Additionally,

"[t]he clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law." *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). This Court reviews issues of statutory construction de novo. *Nash*, 280 Mich App at 108.

The UCCJEA "prescribes the powers and duties of the court in a child-custody proceeding involving [Michigan] and a proceeding or party outside of this state . . . ." *Fisher v Belcher*, 269 Mich App 247, 260; 713 NW2d 6 (2005) (citation and quotation marks omitted). Because it is undisputed that defendant resides outside Michigan, this case requires the interpretation and application of the UCCJEA. This Court previously summarized rules of statutory interpretation in a case in which it interpreted the jurisdictional provisions of the UCCJEA:

> 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 language or by reading the statute as a whole. [*Atchison v Atchison*, 256 Mich App 531, 535; 664 NW2d 249 (2003) (citations omitted).]

MCL 722.1201(1) is the "exclusive jurisdictional basis for making a child-custody determination by a court of this state." MCL 722.1201(2). MCL 722.1201(1) provides:

> Except as otherwise provided in [MCL 722.1204] [which concerns temporary emergency jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207 or 722.1208], and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
>
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under [MCL 722.1207 or 722.1208].
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

Additionally, "[p]hysical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination." MCL 722.1201(3).

At the final hearing held in the trial court, the trial court appeared to conclude that it did not have jurisdiction over the case on the sole basis that Michigan

was not KC's "home state" as defined in MCL 722.1102(g). Likewise, as both parties agree, it is evident that the trial court could not exercise jurisdiction over this case under MCL 722.1201(1)(a), because Michigan was not the home state of KC on the date of the commencement of the proceeding or within six months before the commencement of the action. "Home state" is defined as follows:

> [T]he state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. . . . A period of temporary absence of a parent or person acting as a parent is included as part of the period. [MCL 722.1102(g).]

"Commencement" is defined as "the filing of the first pleading in a proceeding." MCL 722.1102(e). The complaint, which was the first pleading filed in this child custody proceeding, was filed on August 19, 2013, so the relevant six-month period is from February 19 to August 19, 2013. According to the residency timelines provided in the pleadings and briefs submitted by both parties and defendant's statements on the record at the hearing, KC resided in Michigan until 2011 and resided in either Ohio or Georgia at least between December 2011 and June 2013, although the parties dispute the dates on which defendant and KC moved from state to state. Likewise, both parties acknowledge that KC was physically present in Michigan when plaintiff filed his complaint on August 19, 2013. Because KC did not live in Michigan for at least six consecutive months before the filing of the complaint on August 19, 2013, and Michigan was not KC's home state within six months before the filing of the complaint, the trial court could not exercise jurisdiction over the case under MCL 722.1201(1)(a). See *Nash*, 280 Mich at 110-111.

The trial court, however, failed to consider whether it had jurisdiction over the case under any of the other jurisdiction provisions of MCL 722.1201(1)—despite the fact that plaintiff argued in the trial court that the court should exercise jurisdiction under MCL 722.1201(1)(b) or MCL 722.1201(1)(d).[1] Although this Court may review de novo whether a trial court has jurisdiction under the UCCJEA when there are no factual disputes, *Foster*, 486 Mich at 362, the parties dispute (1) the length of time during which KC lived in Ohio and Georgia, (2) the state with which KC has the strongest relationship, and (3) the state in which the most evidence regarding KC is located.

Nevertheless, despite the conflicting dates, it appears that neither Ohio nor Georgia could exercise "home state" jurisdiction under MCL 722.1201(1)(a). According to the timelines provided by the parties, KC had not resided in Ohio for at least six consecutive months immediately before the complaint was filed and had not resided in Ohio for a consecutive six-month period that ended within the six months before the complaint was filed. Additionally, even if we were to assume that KC did, in fact, live in Georgia for six consecutive months, it is undisputed that neither defendant nor KC continued to live in Georgia after April 2013. The fact that neither Ohio nor Georgia (or any other state) could exercise home state jurisdiction under MCL 722.1201(1)(a) would fulfill the first part of MCL 722.1201(1)(b). But despite the fact that the first part of MCL 722.1201(1)(b) appears to be satisfied, the trial court did not consider any evidence regarding the

[1] We note that the trial court could not have jurisdiction under MCL 722.1201(1)(c), given that both parties acknowledge that no other custody proceeding regarding KC has been initiated in another state, so no other state has already declined to exercise jurisdiction over this case in favor of Michigan.

factors that compose the second part of MCL 722.1201(1)(b), i.e., whether under Subparagraph (*i*) KC and plaintiff had a "significant connection" with Michigan other than mere presence and whether under Subparagraph (*ii*) substantial evidence is available in Michigan concerning KC's care, protection, training, and personal relationships. Instead, it appears that the trial court only considered where defendant and KC had lived and *defendant's* ties to Ohio in making its determination. Additionally, the record does not include any evidence—apart from the parties' conclusory assertions in their briefs—regarding whether plaintiff and KC have a significant connection with Michigan and whether more evidence is available in Michigan, as opposed to Ohio or Georgia, concerning KC. See MCL 722.1201(1)(b)(*i*) and (*ii*). In fact, given this Court's construction of "significant connection," i.e., "where one parent resides in the state, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in the state," *White v Harrison-White*, 280 Mich App 383, 394; 760 NW2d 691 (2008), and the parties' characterization of plaintiff's relationship with KC, which included an ongoing relationship and parenting time in Michigan, it appears that it would have been especially important for the trial court to consider additional evidence and determine whether it could exercise jurisdiction under MCL 722.1201(1)(b). Unfortunately, given the limited evidence in the record regarding the factors under MCL 722.1201(1)(b), this Court is unable to review de novo whether Michigan could have jurisdiction under that subsection.

Additionally, by focusing solely on residency, the trial court failed to consider whether defendant and KC have a significant connection with Ohio or Georgia *other than mere presence* and whether substantial evidence is

available in either state regarding KC's care, protection, training, and personal relationships. As a result, the trial court failed to consider whether Ohio or Georgia may have jurisdiction under MCL 722.1201(1)(b), and, as a result, failed to determine whether Michigan could exercise jurisdiction under MCL 722.1201(1)(d). Because the lower court record lacks evidence concerning both factors under MCL 722.1201(1)(b) with regard to Ohio and Georgia, this Court is also unable to determine whether the trial court could exercise jurisdiction under MCL 722.1201(1)(d). Consequently, the trial court erroneously applied the jurisdictional provisions of the UCCJEA when it failed to consider whether it could exercise jurisdiction under MCL 722.1201(1)(b) and (d). See *Foskett*, 247 Mich App at 4-5.

Because there are factual disputes regarding KC's residency and there is insufficient evidence in the lower court record for this Court to review de novo whether a Michigan court may exercise jurisdiction over the instant case under MCL 722.1201(1)(b) or (d), we remand this case pursuant to MCR 7.216(A)(5) so that the trial court may take additional evidence and determine whether Michigan may exercise jurisdiction under MCL 722.1201(1)(b) or (d). If the trial court concludes that it has jurisdiction over the case, it is within the discretion of the court to determine whether to exercise that jurisdiction. *Nash*, 280 Mich App at 108.

Next, plaintiff argues that the trial court abused its discretion when it declined to exercise jurisdiction over the case on the basis of its finding that Michigan is an inconvenient forum. Plaintiff asserts that the court should have taken testimony from both parties regarding the disputed facts and should not have relied on an ex parte communication from defendant. We agree, but

on the basis that the trial court failed to comply with MCL 722.1207. We review issues of statutory construction de novo and a court's decision to decline to exercise jurisdiction for an abuse of discretion. *Nash*, 280 Mich App at 108.

MCL 722.1207 expressly addresses the circumstances under which a trial court may decline to exercise its jurisdiction under the UCCJEA on the basis of a finding that the state is an inconvenient forum and the procedures that the trial court must follow in doing so. MCL 722.1207 provides, in relevant part:

> (1) A court of this state that has jurisdiction under this act to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the motion of a party, the court's own motion, or the request of another court.
>
> (2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. *For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including all of the following*:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.
>
> (b) The length of time the child has resided outside this state.
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction.
>
> (d) The parties' relative financial circumstances.
>
> (e) An agreement by the parties as to which state should assume jurisdiction.

> (f) The nature and location of the evidence required to resolve the pending litigation, including the child's testimony.
>
> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
>
> (h) The familiarity of the court of each state with the facts and issues of the pending litigation. [Emphasis added.]

At the hearing, the trial court first appeared to conclude that it did not have jurisdiction over this case. If the trial court did, in fact, conclude that it did not have jurisdiction, it could not subsequently *decline* to exercise jurisdiction that it did not possess. See MCL 722.1207(1) ("A court of this state *that has jurisdiction under this act* to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.") (emphasis added).

Assuming, however, that the trial court concluded that Michigan is an inconvenient forum even if it did have jurisdiction over the case, we note that the record contains no indication that the trial court considered all the factors requisite under MCL 722.1207(2). Instead, the trial court only provided the following reasoning:

> It would be foolish to have jurisdiction here when the child lives with mom in Ohio. She has been married, remarried for two years and her husband has a job there. And even if I had jurisdiction and she filed a change of domicile[,] I would likely grant it, so it would be foolish for me to take jurisdiction of a case I don't -- I've not had.
>
> I don't think Michigan is the home state, and based on MCL 722.1102(G)[,] which defines home state, and then I find that this is an inconvenient forum for these parties to

> litigate any further issues regarding this child, so I'm not going to take jurisdiction. And if dad wants to change his parenting time or anything else[,] he needs to file an action in Ohio in the county that this child lives in, okay.

The trial court should have acknowledged evidence already in the record or requested additional information as it considered each factor under MCL 722.1207(2). For example, the parties' pleadings and a stamp on plaintiff's complaint indicate that a previous case between the parties related to child support and custody was filed, and ultimately dismissed, in the Wayne Circuit Court and assigned to the trial court judge who presided over the instant case, which suggests that the trial court should have considered its familiarity with the facts of the instant case pursuant to MCL 722.1207(2)(h). Further, the lower court record received on appeal includes no information—apart from the conclusory assertions in the parties' briefs regarding jurisdiction and an e-mail that purportedly contains a "diary" entry that KC wrote on a Kindle device—regarding the various factors listed in MCL 722.1207(2). From the record, it is evident that the trial court determined that Michigan was an inconvenient forum without sufficient evidence regarding the relevant factors and without considering all the relevant factors.

Moreover, MCL 722.1207(2) provides that the court "shall allow the parties to submit information," but it does not appear that the trial court did so before it determined that Michigan was an inconvenient forum. Additionally, MCL 722.1207(3) states:

> If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly

> commenced in another designated state and may impose any other condition the court considers just and proper.

Therefore, even if the trial court had properly concluded that Michigan was an inconvenient forum, it erred by dismissing the case instead of staying the proceeding in accordance with the procedure mandated in MCL 722.1207(3).

A trial court abuses its discretion when it misinterprets or misapplies the law. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). Because the trial court failed to determine whether it has jurisdiction under MCL 722.1201(1)(b) or MCL 722.1201(1)(d)—which was necessary for it to conclude whether it did, in fact, have jurisdiction before it could *decline to exercise* that jurisdiction, MCL 722.1207(1)—and subsequently failed to consider each of the relevant factors as required under MCL 722.1207(2), the trial court abused its discretion when it declined to exercise jurisdiction over the case on the basis of its finding that Michigan is an inconvenient forum.

There are no published Michigan cases that directly address a trial court's failure to make explicit findings under MCL 722.1207. But in general, the remedy for a failure to make proper findings of fact under the Child Custody Act (CCA), MCL 722.21 *et seq*., is to remand the case to the trial court for a reevaluation of the relevant factors. See *Rittershaus v Rittershaus*, 273 Mich App 462, 475-476; 730 NW2d 262 (2007) (remanding the case after the trial court made no factual findings regarding the best-interest factors delineated in the CCA and denied the defendant's motion to change custody with no explanation). We conclude that the same standard should apply to a trial court's failure to make factual findings under MCL 722.1207(2) before it concludes that it is an inconve-

nient forum. Accordingly, on remand, the trial court must take additional evidence and consider each factor under MCL 722.1207(2).

Finally, plaintiff argues that the trial court's orders should be reversed because it relied on an ex parte communication from defendant. We disagree.

"Generally, to preserve an issue for appellate review, the issue must be raised before and decided by the trial court." *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Plaintiff did not object to the trial court's consideration of the ex parte communication, a statement of residency that defendant faxed to the trial court. Therefore, this issue is not preserved for appeal. Unpreserved claims are reviewed for plain error, which "occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

We note that plaintiff has failed to cite any caselaw in his brief on appeal regarding the applicable standard to review this issue, and he has not supported with authority his assertion that the trial court's orders must be reversed because of the ex parte communication. An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). Further, "[t]his Court will not search for authority to sustain or reject a party's position." *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Consequently, we find that plaintiff has abandoned this argument. Moreover, were there any error, it would be harmless.

In *Grievance Administrator v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000), our Supreme Court discussed the danger of ex parte communications:

> "*Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption." [Quoting Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), § 5.01, pp 159-160.][2]

The hearing transcript indicates that the trial court was not aware that counsel for the parties had not received a copy of the statement of residency that defendant personally faxed to the trial court. But, even assuming that the trial court erred by considering the ex parte communication, the record contains no indication that plaintiff was prejudiced by the trial court's consideration of the document. The trial court acknowledged that it had received a statement of residency by fax at the beginning of the hearing, and when the court realized that neither attorney had received a copy of the document, the court immediately had copies provided to counsel. The trial court also asked defendant to "corroborate that document" on the record. Defendant did, in fact, verify and explain her timeline of KC's residency since June 2011, but she was not under oath when she did so. While defendant was confirming the timeline, plaintiff's counsel stated on the record that based on school records, she disputed

[2] The Code of Judicial Conduct, Canon 3(A)(4), also provides guidance for the judiciary regarding ex parte communications.

the amount of time that defendant claimed that she and KC lived in Georgia. It is apparent that plaintiff had the opportunity to challenge information in the ex parte communication and, in fact, disputed its accuracy. Likewise, it appears that the risks of incomplete or inaccurate information and one-sided argumentation identified by the Michigan Supreme Court in *Lopatin* were cured by the parties' discussion on the record during the hearing regarding the facts in the document. See *Lopatin*, 462 Mich at 262-263.

Further, MCR 2.613(A) provides the following with regard to harmless errors: "[A]n error or defect in anything done or omitted by the court . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Given that plaintiff had an opportunity to challenge, and actually did challenge, the information in the ex parte communication, we find no indication that the trial court's consideration of the document was inconsistent with substantial justice. Therefore, because the trial court's consideration of the ex parte communication did not constitute a plain error that affected plaintiff's substantial rights, and was instead harmless error, we will not reverse or otherwise modify on that basis the orders entered in this case. *Id*.; see also *Duray*, 288 Mich App at 150.

We vacate the trial court's orders declining jurisdiction and dismissing the case. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

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

PRANSKY v FALCON GROUP, INC

Docket Nos. 319266 and 319613. Submitted May 13, 2015, at Detroit. Decided June 18, 2015, at 9:05 a.m. Leave to appeal sought.

Jaime Pransky brought an action in the Oakland Circuit Court against Falcon Group, Inc., in connection with the consulting agreement she entered into with Falcon Group related to finding investors for a business she wanted to start. Falcon Group was not registered under the Uniform Securities Act (2002), MCL 451.2101 *et seq*., in any capacity. Pransky sought rescission of the agreement on the ground that it required Falcon Group to provide services that would be illegal for it to provide without registering under the act; alleged misrepresentation, silent fraud, and breach of the securities act on the grounds that Falcon Group had a duty to disclose that it was illegal for it to perform the services, failed to inform her of that fact, and induced her to enter into an illegal agreement; and alleged conversion on the ground that the agreement was illegal and Falcon Group's exercise of dominion over her retainer was wrongful. Falcon Group moved for summary disposition, arguing that the consulting agreement did not involve any services for which it had to be registered under the securities act. Noting that each of Pransky's claims was premised on the belief that Falcon Group had to be registered to perform the agreement, the court, Nanci J. Grant, J., held that while the agreement required Falcon Group to perform services that fell within those covered by the definition of a finder under the securities act, the act did not require finders to be registered. The court concluded that the agreement did not on its face require Falcon Group to engage in any activity for which it needed to be registered under the act. Accordingly, Pransky's claims premised on Falcon Group's failure to register necessarily failed, and the court granted Falcon Group's motion for summary disposition. Falcon Group subsequently moved for its costs and attorney fees as provided in the consulting agreement, which the court granted. Pransky appealed.

The Court of Appeals *held*:

1. MCL 451.2102(d) defines "broker-dealer" as a person engaged in the business of effecting transactions in securities for the

account of others or for the person's own account. The term is limited to those persons whose business operations regularly include transactions in securities. Moreover, it is not enough that the person's business involves transactions in securities in just any way. The person's business must be one effecting transactions in securities, which is more than tangential involvement in the transfer of securities; rather, the person's business must involve bringing about or accomplishing those transactions. MCL 451.2102(i) defines "finder" in as a person who, for consideration, participates in the offer to sell, the sale of, or the purchase of securities by locating, introducing, or referring potential purchasers or sellers. The Legislature intended to differentiate finders from broker-dealers, agents, and investment advisors, all of which are entities required to be registered under the act. It did not include finders within the definition of "broker-dealer" (or any other category, such as "agent," MCL 451.2102(b), or "investment advisor," MCL 451.2102a(e)). By giving the term "finder" its own definition and failing to include finders within the definition of "broker-dealer," the Legislature excluded the activities of finders from those activities that fall within the ambit of a broker-dealer. A person who meets the definition of a finder does not constitute a broker-dealer unless his or her participation or activities go beyond that described in MCL 451.2102(i). A finder will not have to register under the securities act as long as the finder constrains his or her activities to those described in MCL 451.2102(i). A person serving as a finder whose activities go beyond those described in that statute, however, must register as an agent, broker-dealer, or investment advisor, as the case may be. Further, the finder may avoid the need to register under multiple categories by registering as a broker-dealer.

2. The trial court did not err by granting Falcon Group summary disposition. None of Pransky's claims depended on Falcon Group's actions after entering into the consulting agreement; rather, each involved the legality of the agreement itself, which in turn depended on whether Falcon Group could perform the services required under the agreement without being registered as a finder, broker-dealer, agent, or investment advisor. The resolution of this case therefore depended solely on the nature of the services that Falcon Group agreed to perform. Because Falcon Group could perform all the necessary services as a finder, and therefore without having to be registered, the consulting agreement was not illegal on its face under the securities act.

3. The trial court lacked the authority to order Pransky to pay Falcon Group's attorney fees as damages for breach of the

consulting agreement. Michigan courts follow the American Rule with respect to the payment of attorney fees and costs. Under that rule, each party is responsible for his or her own attorney fees unless a statute or court rule specifically authorizes the trial court to award attorney fees. However, the parties to an agreement may include within the agreement a provision respecting the payment of attorney fees, which courts will enforce like any other term unless it is contrary to public policy. Because the authority to award attorney fees arises under the terms of the agreement, the attorney fees are a type of general damages. To obtain an award of attorney fees as damages under a contractual provision requiring that they be paid, the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term. That is, the party seeking the award of attorney fees under the terms of an agreement must do so as part of a claim against the opposing party. Falcon Group did not file a counterclaim for damages under the consulting agreement. Instead, it moved for an award of attorney fees and relied on the agreement as authority for the award. Because no statute or court rule authorized the award of attorney fees and they were instead part of a contract, the trial court could only award the fees as damages in a claim brought under the contract. By entering the order requiring Pransky to pay Falcon Group's attorney fees, the trial court in effect entered a judgment against Pransky on a claim that was never brought. A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding.

Affirmed in part, order granting attorney fees vacated, and case remanded.

SECURITIES — UNIFORM SECURITIES ACT (2002) — FINDERS — BROKER-DEALERS — REGISTRATION REQUIREMENTS.

MCL 451.2102(i), part of the Uniform Securities Act (2002), MCL 451.2101 *et seq*., defines a finder as a person who for consideration participates in the offer to sell, the sale of, or the purchase of securities by locating, introducing, or referring potential purchasers or sellers; while the act requires broker-dealers, agents, and investment advisors to register under it, a finder need not register as long as the finder constrains his or her activities to those described in MCL 451.2102(i); a person serving as a finder whose activities go beyond those described in that statute, however, must register as an agent, broker-dealer, or investment advisor, as the case may be.

Conlin, McKenney & Philbrick, PC (by *Douglas G. McClure*), for plaintiff.

Jaffe, Raitt, Heuer & Weiss, PC (by *James W. Rose*), for defendant.

Before: WILDER, P.J., and OWENS and M. J. KELLY, JJ.

M. J. KELLY, J. In this dispute over the validity of a consulting agreement, plaintiff, Jaime Pransky, appeals by right the trial court's opinion and order dismissing her claims against defendant, Falcon Group, Inc., under MCR 2.116(C)(8) and (10).[1] She argues the trial court erred when it determined that the consulting agreement did not require Falcon Group to provide any services that would require it to be registered under Michigan's Uniform Securities Act (2002), MCL 451.2101 *et seq*. (the Securities Act). Contrary to the trial court's determination, Pransky maintains, the consulting agreement required Falcon Group to provide services that could only be provided by someone registered under the Securities Act and, because Falcon Group was not registered under the act, the agreement was illegal and could be rescinded. For similar reasons, she contends the trial court erred when it determined that her remaining claims were invalid. Pransky also argues that the trial court did not have the authority to order her to pay Falcon Group's attorney fees as damages under the agreement because Falcon Group did not file a counterclaim for damages.

[1] Pransky first appealed the trial court's order dismissing her claims, and this Court assigned that appeal Docket No. 319266. After the trial court entered an order requiring Pransky to pay Falcon Group's attorney fees, she appealed that order and this Court assigned that appeal Docket No. 319613. This Court then consolidated the appeals. See *Pransky v Falcon Group, Inc*, unpublished order of the Court of Appeals, entered January 7, 2014 (Docket Nos. 319266 and 319613).

For the reasons more fully explained below, we conclude that the trial court did not err when it dismissed Pransky's claims against Falcon Group. However, we agree that the trial court did not have the authority to award Falcon Group damages under the consulting agreement because Falcon Group did not sue Pransky for breach of contract. Accordingly, we affirm the trial court's opinion and order dismissing Pransky's claims, but vacate the trial court's order compelling her to pay Falcon Group's attorney fees.

I. BASIC FACTS

Pransky averred that she intended to open and operate a health and wellness spa in her home state of Vermont. She claimed that Falcon Group's principal, David Maciejewski, promised to find investors for her spa. She said Maciejewski introduced her to a potential investor, who told her that he wanted to invest $20 million in a franchised version of her spa. She felt pressured to sign a consulting agreement in order to obtain the financing.

Pransky executed the consulting agreement with Falcon Group in August 2012. As part of the agreement, Falcon Group represented that it was "in the business of providing non-legal advice and consulting services to individuals and to business entities concerning, among other matters: mergers and acquisitions, marketing techniques and ideas, business opportunities, business operations, business management, financial issues and concerns, and business assets and liabilities[.]" Falcon Group recited that it would provide consulting services to Pransky in an effort to help her "build a publicly traded franchised company . . . ." Although Falcon Group stated that it was in the business of providing advice and consultation, the agreement primarily in-

volved compensating Falcon Group for its efforts to obtain investments or financing for Pransky's business.

As a preliminary matter, Pransky agreed to pay Falcon Group a $50,000 retainer, which was not refundable. The first $20,000 was due upon signing the agreement, and the remaining $30,000 was due upon receipt of the first investment. Pransky apparently added a handwritten provision that made the $30,000 payment contingent on the first investment being at least $30,000. Pransky also agreed to pay Falcon Group a "Success Fee" if she was able to sell her business through Falcon Group's efforts under the agreement. She agreed to pay a fee equal to 10% of "any monies [Falcon Group] raises or causes to be raised by [Falcon Group] or through [Falcon Group's] connections . . . ." She similarly agreed to pay Falcon Group a fee equal to 3% of any financing that Pransky might obtain through Falcon Group's "efforts or connections," which included any "line of credit or mortgage through a bank or financial institution introduced by [Falcon Group]." These fees were to be paid out of the escrowed funds at the closing of the funding or financing. Finally, according to Pransky, she handwrote a paragraph into the agreement that specifically required Falcon Group to provide its consulting services in connection with "identifying and procuring investors and financing" for Pransky's business.

Pransky alleged that she notified Falcon Group in April 2013 that she had discovered that it was not registered as a broker-dealer under the Securities Act and, for that reason, believed it could not legally perform the services required by the consulting agreement. Pransky informed Falcon Group that she was rescinding the consulting agreement and demanded the return of her $20,000 retainer.

In June 2013, Pransky sued Falcon Group to recover the $20,000 retainer. She alleged that Falcon Group acted as a "finder" under the Securities Act and, as such, had to be registered as a "broker-dealer." Because Falcon Group was not registered under the act, the consulting agreement was illegal and void. Accordingly, she asked the trial court to rescind the agreement and order Falcon Group to return her $20,000 retainer. Pransky also alleged that Falcon Group's failure to disclose that it was not registered as a broker-dealer, as required by the Securities Act, amounted to silent fraud or misrepresentation and a breach of the Securities Act. Finally, she alleged that Falcon Group's refusal to return the $20,000 retainer that it took under the illegal agreement amounted to conversion.

In October 2013, Falcon Group moved for summary disposition under MCR 2.116(C)(8) and (10). Falcon Group stated that it was a business intermediary and that Pransky hired it to provide advice and consultation "to get her to the point where she, as an officer or manager of an entity (i.e. an 'issuer' under securities jargon) would be in a position to sell her own securities." It also asserted that it was undisputed that Falcon Group had provided Pransky with valuable advice on the development of her business, but she refused to follow the advice. It then argued that each of her claims must be dismissed.

Falcon Group argued that the consulting agreement did not involve any services for which it had to be registered under the Securities Act. It stated that the evidence showed that Pransky did not own a business entity that had or could issue securities and, therefore, there were no securities that Falcon Group could sell on Pransky's behalf as a broker-dealer. Falcon Group

further argued that even if the "success fee" provision of the consulting agreement violated the Securities Act, the severability clause would preserve the remainder of the agreement. Because the only provisions that might arguably be invalid under the Securities Act could be severed, and Pransky did not allege that Falcon Group failed to provide her with consulting and advising services, Falcon Group argued that the trial court should dismiss Pransky's claims under MCR 2.116(C)(8).

Pransky argued in response to Falcon Group's motion that she was entitled to summary disposition under MCR 2.116(I)(2) because the consulting agreement on its face demonstrated that Falcon Group had to be registered under the Securities Act in order to provide the services identified in the agreement. Pransky notes in particular that the agreement included compensation for "monies" that Falcon Group "raises or causes to be raised" or raised through its "connections," which, she maintained, involved performing as a broker-dealer, agent, or investment advisor under the Securities Act. She also argued that Falcon Group agreed to connect her with investors, which made it a finder under the Securities Act. Because finders must be registered as broker-dealers and it was undisputed that Falcon Group was not registered as a broker-dealer, she maintained that the consulting agreement was void as against public policy. Because the agreement was void in its entirety, the severability clause could not save the agreement and her remaining claims also remained viable.

The trial court held a hearing on Falcon Group's motion in November 2013. The trial court noted that Pransky's claims were each premised on the belief that Falcon Group had to be registered under the Securities

Act in order to perform the services required by the consulting agreement. The trial court stated that the agreement unambiguously required Falcon Group to perform services that fell within the definition of a finder under the Securities Act, but determined that the Securities Act did not require finders to be registered. Moreover, because the consulting agreement did not require Falcon Group to "have any meaningful role in effecting the actual transaction," the court determined that the agreement did not require Falcon Group to act as an agent or broker-dealer. Finally, the agreement did not require Falcon Group to advise anyone to invest, purchase, or sell a security. The consulting agreement, the trial court concluded, did not on its face require Falcon Group to engage in any activity for which it would have to be registered under the Securities Act. Having determined that Falcon Group did not have to be registered under the Securities Act in order to perform the services required under the act, the trial court concluded that Pransky's claims premised on Falcon Group's failure to register necessarily failed. For that reason, it granted Falcon Group's motion for summary disposition.

In November 2013, Falcon Group moved for its costs and attorney fees, as permitted under the consulting agreement. Later that same month, the trial court granted the motion and ordered Pransky to pay more than $6,800 in attorney fees to Falcon Group.

Pransky now appeals in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, Pransky argues the trial court erred when it determined that the consulting agreement did

not require Falcon Group to perform any service for which it had to be registered under the Securities Act. For that reason, she maintains, the trial court erred when it granted summary disposition in favor of Falcon Group.[2] This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court "correctly selected, interpreted, and applied the relevant statutes." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). Finally, this Court reviews de novo the trial court's construction of a contractual agreement. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. THE SECURITIES ACT

Michigan's Legislature enacted the Securities Act to protect the public from fraud and deception in the issuance, sale, and exchange of securities. See *Fred J Schwaemmle Constr Co v Dep't of Commerce*, 420 Mich 66, 77; 360 NW2d 141 (1984) (examining the prior version of the Securities Act).[3] It accomplished this in significant part by limiting the types of securities that may be offered and sold and by prohibiting certain practices involved with the offer and sale of securities. See MCL 451.2301 (prohibiting persons from offering or selling a security in Michigan unless

[2] Because the trial court considered evidence outside the pleadings—the consulting agreement—in reaching its decision, we review the decision to grant summary disposition as having been made under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[3] The prior act was the Uniform Securities Act, see former MCL 451.816, and was patterned on the 1956 Uniform Securities Act. See Unif Sec Act (1956); 7C ULA 748 *et seq*.

the security meets certain criteria); MCL 451.2501 (prohibiting persons from directly or indirectly engaging in schemes or practices to defraud or making misrepresentations in connection with the offer, sale, or purchase of a security). However, it also chose to protect the public by regulating the persons who are involved with the offer and sale of securities. See MCL 451.2401 to MCL 451.2413. In particular, the Legislature prohibited a person from transacting business in this state as a broker-dealer, agent, or investment advisor unless he or she is registered as a broker-dealer, agent, or investment advisor under the act.[4] See MCL 451.2401(1); MCL 451.2402(1); MCL 451.2403(1).

1. BROKER-DEALERS AND FINDERS

On appeal, Pransky maintains that her consulting agreement with Falcon Group required it to perform services that fell within the definitions of "broker-dealer," "agent," or "investment advisor." She further contends that although the trial court did not err when it determined that the agreement required Falcon Group to act as a finder, it erred when it stated that finders were not required to register under the Securities Act. In her view, the Securities Act specifically contemplates that finders must register as broker-dealers.

Under the Securities Act, a broker-dealer is defined to be "a person engaged in the business of effecting transactions in securities for the account of others or

[4] The Securities Act also regulates investment adviser representatives, federal covered investment advisers, and Michigan investment markets, but those categories are not at issue on appeal. See MCL 451.2404(1); MCL 451.2405(1); MCL 451.2453.

for the person's own account." MCL 451.2102(d).[5] By defining a broker-dealer to be a person "engaged in the business of effecting transactions in securities," *id*., the Legislature limited the term to those persons whose business operations regularly include transactions in securities. See *Heligman v Otto*, 161 Mich App 735, 739, 741-742; 411 NW2d 844 (1987) (interpreting the definition of "broker-dealer" under the prior act, which defined a broker-dealer to be "any person engaged in the business of effecting transactions in securities or commodity contracts for the account of others or for his or her own account,"[6] and concluding that the isolated transaction at issue did not constitute being engaged in the business of effecting transactions). Moreover, it is not enough that the person's business involves transactions in securities in any way; the person's business must be one "effecting" transactions in securities. MCL 451.2102(d). The verb "effect" suggests something stronger than tangential involvement in the transfer of securities; rather, the person's business must involve bringing about or accomplishing the transactions in securities. See 5 *Oxford English Dictionary* (2d ed, 1991 rev) (defining the verb to mean "[t]o bring about (an event, a result); to accomplish (an intention, a desire)"). As one foreign court has explained,[7] a broker-dealer is a person who participates

[5] This definition of "broker-dealer" corresponds to the definition of "broker" under federal securities law except that under federal law a broker is someone who acts for the account of others. See 15 USC 78c(a)(4)(A) (defining broker to mean "any person engaged in the business of effecting transactions in securities for the account of others"). Federal law defines the term "dealer" separately as someone who buys and sells securities for his or her own account. 15 USC 78c(a)(5)(A).

[6] See former MCL 451.801(c), as amended by 1985 PA 120.

[7] The Securities Act is a modified version of the Uniform Securities Act (2002). See 2008 PA 551; Unif Sec Act (2002); 7C ULA 20 *et seq*. When interpreting a uniform act, this Court may look for guidance in the

in the transaction by effectuating the trade—that is, by performing any function in connection with processing the transaction. See *Overstock.com, Inc v Goldman Sachs & Co*, 231 Cal App 4th 513, 530-533; 180 Cal Rptr 3d 269 (2014) (examining the meaning of the terms "effect" and "effecting" as used in California's securities laws and specifically referring to the definition of "broker-dealer," which is the same as this state's definition); see also *Legacy Resources, Inc v Liberty Pioneer Energy Source, Inc*, 2013 Utah 76, ¶¶ 21-28; 322 P3d 683, 688-690 (2013) (construing the definition of "broker" under Utah's securities laws and holding that "one who is engaged in the business of 'effecting' a securities transaction is one who is involved in 'bring-[ing it] about; mak[ing it] happen, caus[ing] or accomplish[ing it]' ") (citation omitted) (alterations in original); *Indus Partners, LLC v Intelligroup, Inc*, 77 Mass App 793, 796-798; 934 NE2d 264 (2010) (stating that a person effects transactions in securities when he or she participates in the transaction at key points in the chain of distribution); *In re Slatkin*, 525 F3d 805, 817 (CA 9, 2008) (examining federal securities law and stating that the operative term, "effecting," means to bring about or make happen). With regard to persons who find investors for securities, some courts have held that whether a person actively—as opposed to passively—solicits investors for securities is a factor to consider when determining whether that person's activities fall within the definition of a broker-dealer. See *Legacy Resources*, 2013 Utah 76 at ¶ 21; 322 P3d at 688. Other courts have held that the activities of a finder fall under the definition of "broker-dealer." See *Black Diamond Fund, LLLP v Joseph*, 211 P3d 727, 734

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caselaw of other jurisdictions where the uniform act has been adopted. See *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 632; 774 NW2d 332 (2009).

(Colo App, 2009) ("Individuals who solicit investors by phone and in person, and who distribute documents and prepare and distribute sales circulars in the hope that potential investors will deposit money in the account, are seeking to effect securities transactions."). But this Court must be careful when considering whether the definition of "broker-dealer" necessarily includes the activities of finders because, unlike other jurisdictions, our Legislature has specifically addressed the activities of finders within our Securities Act.[8]

The Legislature defined a finder as a "person who, for consideration, participates in the offer to sell, sale, or purchase of securities by locating, introducing, or referring potential purchasers or sellers." MCL 451.2102(i). One might conclude that, by using the term "participates in" rather than "effecting," the Legislature intended to differentiate between participating in the offer, sale, or purchase and effecting a transaction in securities—that is, the Legislature might have intended to exclude participation in that way from the definition applicable to broker-dealers. It is notable that the Legislature did not define "broker-dealer" to specifically include finders. See MCL 451.2102(d).[9] If the Legislature understood participating in the offer to sell, the sale of, or the purchase of a

[8] The uniform version of the act does not include a definition for "finder." See Unif Sec Act (2002), art 1; 7C ULA at 22-47. It appears that the provisions for finders in the current Michigan act were drawn from the prior version of the act. See, e.g., former MCL 451.502(c); former MCL 451.801(c), (d), (i), and (*l*), as amended by 2000 PA 494. Although the Legislature modeled the prior version of the Michigan act on the 1956 and 1985 versions of the uniform securities acts, those uniform laws also did not include provisions for finders. See Unif Sec Act (1956), § 401; 7C ULA at 817; Unif Sec Act (1985), § 101; 7C ULA at 223.

[9] Under the prior act, the Legislature specifically defined the term "investment advisor" to include finders. See former MCL 451.801(*l*), as

security by locating, introducing, or referring potential purchasers and sellers as activities that amounted to "effecting transactions in securities," it would not have provided a separate definition for persons who engage in those activities; there would have been no need for a separate definition because those persons would fall under the definition of broker-dealer. *Id*. Thus, by giving the term "finder" its own definition and failing to include finders within the definition of "broker-dealer," the Legislature expressed its intent to exclude the activities of finders from the activities that fall under the definition of "broker-dealer." This is not to say that a person who acts as a finder might not also meet the definition of a broker-dealer, but in order to respect the Legislature's decision to separately define finder as a category distinct from broker-dealer, we conclude that a person who meets the definition of a finder does not constitute a broker-dealer unless his or her participation goes beyond that described in MCL 451.2102(i). See *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (stating that courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory). And, because the Legislature did not enact any statutory provision that requires finders to register *as finders*, we further conclude that the Legislature intended to exempt persons who limit their activities to those described in MCL 451.2102(i) from the registration requirements. Cf. MCL 451.2406(1) (providing a method for persons to register as a broker-dealer, agent, or investment advisor, but not providing any method for a person to register as a finder).

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amended by 2000 PA 494. Thus, finders had to register as investment advisors. See former MCL 451.601(c), as amended by 2000 PA 494.

This construction is also consistent with the Legislature's overall scheme for regulating transactions in securities. The Legislature specifically regulated the practices of a broker-dealer or investment advisor who also provides services as a finder. See MCL 451.2413 (regulating acts by broker-dealers who act as finders); MCL 451.2502(2) (stating additional regulations that apply to investment advisors who act as a finder).[10] By imposing additional requirements on a broker-dealer or investment advisor who acts as a finder, the Legislature recognized that there was a distinction between the services provided by a broker-dealer or investment advisor and those provided by a finder. The broker-dealer plays a more active role in effecting the transaction than the finder, who might merely locate and introduce the sellers and buyers, but have no further part in the transfer of securities. This additional involvement might give rise to a conflict of interest between the broker-dealer's activities as a broker-dealer and his or her activities as a finder. Similarly, the impartiality of an investment advisor's advice might be compromised by the desire to obtain compensation for his or her finding activities. Indeed, the extra regulations for broker dealers address the potential for self-dealing that arises when a broker-dealer both solicits buyers and effects the transfer. See MCL 451.2413(a) (prohibiting a broker-dealer who acts as a finder from taking possession of the funds or securities for any transaction in which the broker-dealer received payment as a finder); MCL 451.2413(b) and (e) (imposing disclosure requirements on a broker-dealer who also acts as a finder); MCL 451.2413(d) (requiring broker-dealers who act as finders to obtain certain

[10] These sections do not appear in the uniform version. See Unif Sec Act (2002), art 4; 7C ULA 102 *et seq*.

types of information about the securities before participating in the offer, purchase, or sale of the securities); MCL 451.2413(f) (prohibiting broker-dealers who act as finders from locating, introducing, or referring persons that the broker-dealer knows or should reasonably know are not suitable investors). The extra regulations for investment advisors who act as finders are substantially similar. See MCL 451.2502(2)(a) to (f).

On the surface, it seems possible that the Legislature intended the activities of a finder to invariably meet the definition of a broker-dealer and merely provided a separate definition for the term "finder" in order to provide a convenient means to impose additional requirements on broker-dealers or investment advisors whose activities also involve serving as a finder. But this understanding leads to the incongruous result that persons who strictly confine their activities to locating, introducing, and referring purchasers and sellers in conformity with MCL 451.2102(i)—that is, who act as finders and not as a broker-dealers or investment advisors—would nevertheless be subject to all the regulations that apply to a broker-dealer in addition to the special requirements applicable to a broker-dealer who acts as a finder. In other words, every finder would automatically be a broker-dealer and finder, but not every broker-dealer would be a finder. Under this construction, we would have to conclude that the Legislature intended to subject persons who act strictly as finders to more comprehensive regulation than it applied to persons who act strictly as broker-dealers.[11]

[11] It should also be recalled that nothing precludes a person acting as a finder under Michigan law from being deemed a broker-dealer under another state's law or under federal law.

This construction also leads to additional difficulties. If the definition of "broker-dealer" necessarily includes finders, then any person acting as a finder would have to register as a broker-dealer. See MCL 451.2401(1) (prohibiting persons from transacting business as a broker-dealer without being registered as a broker-dealer). Every finder who complied with the law would therefore be a "finder registered as a broker-dealer," and for that reason, there could never be an investment advisor who acts as a finder. See MCL 451.2102a(e)(*ix*) (excluding a "finder registered as a broker-dealer" from the definition of an investment advisor). Hence, the extra regulations imposed on investment advisors who act as finders would have no practical effect under this construction. Pransky in effect asks this Court to construe the definition of "broker-dealer" to always include finders so that a finder must register as a broker-dealer and fully comply with all the applicable regulations, notwithstanding that the Legislature elected to separately define "finder," chose not to include finder within the definition of "broker-dealer" (or "agent" or "investment advisor"), and chose not to require finders to register. Because this Court must avoid a construction that renders any part of the statute surplusage or nugatory, we cannot construe the statute in this way. See *Johnson*, 492 Mich at 177.

It is important to recall that, by defining a finder within the act as a person who participates in the offer to sell, the sale of, or the purchase of securities, the Legislature subjected finders to the general prohibition against the use of schemes to defraud, misstatements, and fraudulent or deceitful practices made "in connection with the offer, sale, or purchase of a security." MCL 451.2501. Accordingly, even though the Legislature did not require finders to specifically register as

finders under the Securities Act, it still subjected finders to regulation under the act. See also MCL 451.2601 to MCL 451.2612. Of course, if a person's activities go beyond participating in an offer to sell or a sale of securities by locating, introducing, or referring potential purchasers and sellers of securities, MCL 451.2102(i), that person might fall within the definition of a finder in addition to that of a broker-dealer, agent, or investment advisor or any combination of those categories. In that case, the person would be subject to the regulations and registration requirements imposed on broker-dealers, agents, or investment advisors, as the case may be.

Pransky nevertheless argues that the Legislature's decision to specifically exclude finders who are registered as broker-dealers from the definitions of "agent" and "investment advisor" indicates that the Legislature intended to require finders to register as broker-dealers, even though it chose not to specifically provide such a requirement in the act. Normally, this Court must assume that the Legislature acted with due deliberation when it provided a separate definition for "finder" and chose not to include finders within the definition of a broker-dealer. Similarly, it must generally conclude that the Legislature elected to forgo a statutory provision requiring finders to register as broker-dealers because it did not intend to require finders to register as broker-dealers. See *Johnson*, 492 Mich at 177, 187. But even setting the canons of construction aside, there is nothing within the exceptions provided under the definition of "agent" or "investor advisor" that is inconsistent with treating finders as members of a category that is distinct from broker-dealers and whose members are exempt from registration.

2. AGENTS AND INVESTMENT ADVISORS

The Legislature defined an agent to be "an individual other than a broker-dealer who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities." MCL 451.2102(b). The Legislature, however, excluded from the definition of "agent" those persons who represent broker-dealers or issuers if the person was acting solely as a finder and registered as a broker-dealer: "The term ["agent"] does not include a person acting solely as a finder and registered as a broker-dealer under this act . . . ."[12] *Id*.

Pransky argues that this exclusion demonstrates that the Legislature intended to require finders to register as broker-dealers. But, contrary to Pransky's suggestion, the fact that the Legislature defined an agent to be a person "other than a broker-dealer" and then provided an exception to the definition of an agent for finders who are registered as broker-dealers can best be understood as a recognition by the Legislature that some finders are not broker-dealers and that a finder need not be registered as a broker-dealer. Because an agent is broadly defined to include a person who "represents" a broker-dealer or issuer in either "effecting" or "attempting to effect" a transaction in securities, MCL 451.2102(b), a finder who serves as a representative for a broker-dealer or issuer might easily fall within the definition of an agent by going beyond the activities described in MCL 451.2102(i):[13]

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[12] This exclusion does not appear in the uniform version. See Unif Sec Act (2002), § 102(2); 7C ULA at 22.

[13] By limiting the definition of an agent to those persons who represent a broker-dealer or issuer, the Legislature limited the term to those situations in which the agent purports to act under the authority of the

> The activities of a finder easily can fall within the agent definition so as to require further registration. If a finder becomes an advocate and seeks to induce a person to invest, the exemption for activities as a finder is lost. A finder operating under the Act may not actively participate in the offer and sale but rather may introduce the individual investor to the issuer or its representative. Counsel to issuers, broker-dealers, and finders should exercise caution in reviewing and directing the finders' activities. Since the statutory distinction between finders and agents is not always clear, an active participant in the transaction will likely be classified an unregistered agent and endanger an exemption from registration. [Moscow & Makens, eds, Michigan Securities Regulation (2d ed), § 4.09, p 116 (discussing the prior securities act, which contained substantially similar definitions for "finder" and "agent," see former MCL 451.801(b) and (u), as amended by 1988 PA 408) (citation omitted).][14]

By contrast, a person acting as an independent finder, rather than as the representative of a broker-dealer or issuer, will not fall within the definition of

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broker-dealer or issuer. But a person can locate and refer investors without purporting to act under another's authority. See *Ferar v Hall*, 330 Mich 214, 222; 47 NW2d 79 (1951) (construing a prior version of the securities law and stating that an agent is one who is actually authorized to act for his or her principal, or holds himself or herself out as having that authority). This is consistent with the Legislature's prohibition on agents representing more than one broker-dealer or issuer at a time. See MCL 451.2402(5). If the term "represents" were broadly construed to apply to all acts to locate and introduce interested parties at someone's request, a finder could never work for more than one broker-dealer or issuer.

[14] Pransky also relies on a June 2009 article in the Michigan Bar Journal concerning the newly enacted Securities Act, wherein these same two editors along with another coauthor opined that a finder would have to register as a broker-dealer under the new act. But the authors did not offer any analysis or cite any authority to support their opinion. See Moscow, Makens, & Hansen, *New Michigan Securities Law Effective October 1, 2009*, 88 Mich B J 38, 40 (June 2009). Accordingly, this article provides no useful insight into the proper construction of the Securities Act.

"agent" and need not be registered as either an agent or broker-dealer. Understood in this context, the exclusion from the definition for a person acting solely as a finder, even if the finder is the representative of a broker-dealer or issuer, can best be construed as a means to avoid duplicate registration—that is, to prevent a finder whose activities rise to the level of an agent and broker-dealer from having to register as both an agent and a broker-dealer. This same logic applies to the exclusion provided for the definition of an investment advisor.

The Legislature defined an investment advisor to be a "person that, for compensation, engages in the business of advising others . . . as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." MCL 451.2102a(e). The term excludes a "finder registered as a broker-dealer under this act." MCL 451.2102a(e)(*ix*). Similar to the situation with agents, a finder who goes beyond acting as a mere finder, as described in MCL 451.2102(i), may fall within the definition of an investment advisor or broker-dealer or both and, as such, might have to register as both an investment advisor and a broker-dealer if there were no exceptions. The Legislature might have excluded a finder who is registered as a broker-dealer in order to avoid the duplicate registrations. In that way, a finder who registers as a broker-dealer will automatically be excluded from the definitions of both an agent and an investment advisor even if his or her activities would otherwise bring the finder within the definition of "agent" or "investment advisor."

This construction has the added benefit of giving effect to the extra regulations for investment advisors

who act as finders. With this understanding, a person who qualifies as an investment advisor would be able to provide services as a finder without having to be registered as a broker-dealer, which he or she would have to do if finders invariably fell within the definition of a broker-dealer. However, an investment advisor who elects to provide services as a finder would then be subject to the additional regulations provided under MCL 451.2502(2).

On appeal, Pransky asks this Court to *infer* that the Legislature intended to require finders to register as broker-dealers—even if their activities do not fall within the definition of a broker-dealer—on the basis of these exclusions and in the absence of a direct statutory requirement. But, as explained, the exclusions can be understood as a means to avoid duplicate registration for persons whose activities as a finder also include activities that cause them to fall within the definition of "agent," "investment advisor," or "broker-dealer" and, for that reason, these exclusions do not give rise to an inference that the Legislature intended to require finders to register as broker-dealers. There is no reasonable interpretation of this statutory scheme that leads to the conclusion that the Legislature intended to require finders to register as broker-dealers in every case. In order to reach Pransky's desired result, we would have to assume that the Legislature intended to include finders within the definition of "broker-dealer" or intended to require finders to register as broker-dealers, but forgot to include either provision in the statutory scheme. We would then have to correct the Legislature's error by reading Pransky's preferred requirement into the statute, which we cannot do. See *Johnson*, 492 Mich at 187 (stating that courts are not permitted to supply a provision in a statutory scheme on the assumption that the Legislature unintentionally omitted it); *Book-*

Gilbert v Greenleaf, 302 Mich App 538, 547; 840 NW2d 743 (2013) (stating that this Court cannot read into a statute what the Legislature did not include).

Finally, Pransky also relies on agency regulations that require finders to register. This Court normally defers to an agency's interpretation of an act that it was charged to implement when the act is silent or ambiguous. *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 223-224; 771 NW2d 423 (2009). It is not evident that the Securities Act contains any ambiguity, however, and the Legislature plainly made provision for the registration of persons under the act and chose not to include finders in the registration requirement. See MCL 451.2406(1). In any event, the current regulations were promulgated under the authority of the prior version of the Securities Act, which has since been repealed, see 2008 PA 551, and the specific regulation that Pransky relies on, Mich Admin Code, R 451.803.7, has also been rescinded (although it was still in force during the events at issue). See 2014 Mich Reg 15, pp 128, 137. Therefore, we conclude that the regulations are not entitled to any deference and, indeed, provide no guidance whatsoever.

Examining the scheme as a whole and construing it according to its plain language, we conclude that the Legislature intended to differentiate finders from broker-dealers, agents, and investment advisors. Because the Legislature chose not to include finders within the definition of a broker-dealer (or any other category) and chose not to specifically require finders to register, a finder will not have to register as long as the finder constrains his or her activities to those stated under MCL 451.2102(i). A person serving as a finder whose activities go beyond those described

under MCL 451.2102(i), however, must register as an agent, broker-dealer, or investment advisor, as the case may be. Further, the finder may avoid having to register under multiple categories by registering as a broker-dealer.

C. APPLYING THE LAW

In her complaint, Pransky alleged four claims: rescission, misrepresentation/silent fraud, breach of the Securities Act, and conversion. She alleged that she was entitled to rescind the consulting agreement because the agreement required Falcon Group to provide services that it was illegal for it to provide without the requisite registration. As this Court has explained, a party may rescind an agreement made in violation of the Securities Act. *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003). If rescinded, the agreement is abrogated from the beginning and none of its provisions are applicable. *Id*. As for her misrepresentation and statutory claims, Pransky alleged that Falcon Group had a duty to disclose that it was illegal for it to perform the services required under the consulting agreement because it was not registered under the Securities Act, failed to inform her of that fact, and breached the Securities Act by inducing her to enter into an illegal agreement without informing her that it was unregistered. Finally, she alleged that because the consulting agreement was illegal, Falcon Group's exercise of dominion over her retainer was wrongful and amounted to a conversion.

As can be seen, none of Pransky's claims depends on Falcon Group's actions after entering into the consulting agreement.[15] Rather, each claim involves the legal-

[15] We offer no opinion as to whether Falcon Group might have violated the Securities Act during the performance of its obligations.

ity of the consulting agreement. The legality of the consulting agreement, in turn, depends on whether Falcon Group could perform the services required under the agreement without being registered as a finder, broker-dealer, agent, or investment advisor. Because it is undisputed that Falcon Group is not registered under the Securities Act in any capacity and Pransky's claims do not depend on acts that it took after entering into the agreement, resolution of this case depends solely on the nature of the services that Falcon Group agreed to perform under the consulting agreement. If it could *in theory* perform the required services without being registered under the Securities Act, Pransky's claims must fail.[16] If, however, Falcon Group had to be registered under the Securities Act in order to provide any of the services required under the agreement, the agreement would be illegal and Pransky's claims would remain viable.

In the first eight paragraphs of the consulting agreement, the parties agreed to various recitations, which they characterized as "background" to the main provisions. Falcon Group, for example, recited that it was "engaged in the business of providing non-legal advice and consulting services to individuals and to business entities concerning, among other matters: mergers and acquisitions, marketing techniques and ideas, business opportunities, business operations, business management, financial issues and concerns, and business assets and liabilities." The parties further recited that Pransky desired to retain Falcon Group's services

[16] The better course of action would be for finders acting pursuant to similar contracts to protect themselves by registering, at the very least, as broker-dealers; the line between a finder's activities and that of a broker-dealer, agent, or investment advisor is a thin one, and persons acting under such contracts without being registered are inviting litigation.

because she had a "need for [Falcon Group's] advice and consulting services . . . ." Finally, in this background section, Pransky agreed that she was not retaining Falcon Group to provide services as a lawyer, accountant, or real estate broker.

None of the first eight paragraphs required Falcon Group to provide illegal services. Falcon Group's statement of the services that it provides did not require it to perform any of those services and, even if it had, none of the services necessarily required that it provide advice or perform services involving securities. One can provide general advice concerning mergers and acquisitions, marketing, business opportunities and operations, business management, financing, and assets and liabilities without becoming involved in an activity regulated under the Securities Act.

In ¶¶ 10 through 24, the parties also agreed to several general provisions concerning the consulting agreement that did not directly involve the provision of services. Because these paragraphs did not require Falcon Group to perform a particular service, they do not implicate the Securities Act. Pransky nevertheless relies on ¶ 15 as evidence that Falcon Group agreed to provide services that require registration under that act. That paragraph requires Pransky to submit or direct "all communications regarding the financing, acquisition of, sale to and/or any transaction with or concerning [Pransky's] Business and all discussions or questions about the Business" to Falcon Group, rather than third parties. A plain reading of this paragraph shows that it does not require Falcon Group to do anything; it requires Pransky to submit the identified business communications to Falcon Group, presumably so it can provide her with advice or consultation on the communicated matter. Therefore, this para-

graph does not implicate the Securities Act. The only paragraph in the consulting agreement that implicates the Securities Act is ¶ 9.

The majority of ¶ 9 addressed the compensation that Pransky would pay to Falcon Group for its services. Pransky first agreed to pay a "non-refundable Retainer of $50,000 . . . ." She agreed to pay $20,000 on signing and the remainder with the "first investment money received." She also agreed to pay Falcon Group "10% of any monies" that Falcon Group "raises or causes to be raised" by Falcon Group "or through [its] connections . . . ." Pransky agreed to pay Falcon Group "3% of the financing obtained" "as a result of [Falcon Group's] efforts or connections," including financing from "a bank or financial institution introduced by [Falcon Group]." Finally, Pransky added a handwritten provision, which she labeled "9.e," to the paragraph on compensation. That provision required Falcon Group to "provide non-legal advice and consulting services to [Pransky] in connection with identifying and procuring investors and financing for the Business."

None of these provisions required Falcon Group to advise Pransky or anyone else on the "value of securities or the advisability of investing in, purchasing, or selling securities" or otherwise serve as a financial planner. MCL 451.2102a(e). Similarly, the parties specifically agreed in ¶ 19 that they did not intend to "create or establish an agency . . . relationship" by means of the agreement. And there is nothing in the agreement that suggests that Falcon Group would serve as a representative for a broker-dealer. Because the parties agreed that Falcon Group was not authorized to serve as Pransky's agent, even if Pransky were an "issuer" for purposes of the Securities Act, see MCL 451.2102a(g), the agreement did not require Falcon

Group to represent her "in effecting or attempting to effect purchases or sales of securities," MCL 451.2102(b). Therefore, Falcon Group could perform these services consistently with the agreement without necessarily falling within the definition of an investment advisor or agent.[17]

These provisions do unambiguously provide that Falcon Group would not receive any compensation beyond the retainer unless it found investors or financing for Pransky. When read together and in light of Falcon Group's agreement to provide its service "in connection with identifying and procuring investors and financing," it is evident that Falcon Group agreed to act as a finder as that term is defined under MCL 451.2102(i). However, the provisions do not require Falcon Group to provide services beyond serving as a finder.

As we have already explained, the Legislature intended to differentiate finders from agents, investment advisors, and broker-dealers, and intended to exempt from registration persons who act solely as finders. Accordingly, because Falcon Group could perform under the consulting agreement as a finder without having to be registered, the consulting agreement was not on its face illegal under the Securities Act. The trial court did not err when it determined that Falcon Group could perform the consulting agreement without having to be registered under the Securities Act. Because each of Pransky's claims were premised on her belief that Falcon Group had to be registered under

[17] Of course, it remains possible that Falcon Group's actual performance of the agreement might involve activities that fall within these definitions, but Falcon Group's violation of the Securities Act while performing under the agreement does not render the agreement illegal on its face. Because Pransky's claims all involve the facial illegality of the agreement, her claims must be evaluated on the basis of the actual requirements of the agreement.

the act in order to perform the consulting agreement, the trial court also did not err when it concluded that those claims were not supported by the evidence and dismissed them under MCR 2.116(C)(10).

III. ATTORNEY FEES

A. STANDARDS OF REVIEW

Pransky next argues that the trial court erred when it amended the judgment in favor of Falcon Group to award Falcon Group its attorney fees. Specifically, she maintains that an award of attorney fees pursuant to a contractual provision constitutes damages, which must be asserted in a claim for breach of contract. Because Falcon Group did not assert a counterclaim, the trial court lacked the authority to award attorney fees under the agreement and any future claim is now barred by res judicata. She also argues that Falcon Group was not entitled to the award because ¶ 21, the paragraph at issue, only permits recovery if Falcon Group has to retain an attorney to "enforce" a "collection action." Because it hired its attorney to defend against Pransky's claims rather than to bring a collection action, she argues, Falcon Group did not establish its right to fees under the agreement.

This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). This Court also reviews de novo the proper interpretation and application of a contractual agreement. *Rory*, 473 Mich at 464.

B. ANALYSIS

Michigan courts follow the American Rule with respect to the payment of attorney fees and costs.

Haliw v Sterling Hts, 471 Mich 700, 706; 691 NW2d 753 (2005). Under that rule, each party is responsible for his or her own attorney fees unless a statute or court rule specifically authorizes the trial court to order an award of attorney fees. *Id*. at 707. However, the parties to an agreement may include within the agreement a provision respecting the payment of attorney fees, which courts will enforce like any other term unless contrary to public policy. See *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007) (stating that a contractual provision for payment of reasonable attorney fees is judicially enforceable); *Wilson Leasing Co v Seaway Pharmacal Corp*, 53 Mich App 359, 366; 220 NW2d 83 (1974) (opinion by R. B. BURNS, P.J.) (explaining that a contractual provision awarding attorney fees may be contrary to public policy if unrelated to the fair value of the services rendered). Because the authority to award attorney fees arises under the terms of the agreement, the attorney fees are a type of general damages. *Fleet*, 274 Mich App at 589-592 (holding that an award of attorney fees under a contractual provision constitutes general damages that need not be specifically pleaded). In order to obtain an award of attorney fees as damages under a contractual provision requiring such a payment, the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term. See *Wilson Leasing*, 53 Mich App at 367 (stating that, in an action on a contract, the reasonable attorney fees allowed under the contract are an element of the debt owed); see also 25 CJS, Damages, § 85, pp 428-429 ("Contractual attorney's fees are recoverable only in a suit brought directly on the contract. Unlike statutorily permitted or rules-based attorney's fees, contractually based attorney's fees form part of the

damages claim."). That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party.

Falcon Group did not file a counterclaim for damages under the consulting agreement. Instead, it moved for an award of attorney fees and relied on the consulting agreement as authority for the award. However, because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract. By entering an order requiring Pransky to pay Falcon Group's attorney fees, the trial court in effect entered a judgment against Pransky on a claim that was never brought. A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding. See, e.g., *Green v Ziegelman*, 282 Mich App 292, 303-304; 767 NW2d 660 (2009) (holding that the trial court erred when it allowed the plaintiffs to assert a claim for piercing the corporate veil in a postjudgment proceeding because that claim had not been brought in the original action). Therefore, the trial court lacked the authority to order Pransky to pay Falcon Group's attorney fees as damages for breach of the consulting agreement.

Pransky also asks this Court to conclude that Falcon Group would be barred under the doctrine of res judicata from subsequently filing suit to recover its attorney fees under the consulting agreement. We decline to address this issue because it is premature. It is unclear whether Falcon Group will try to recover its attorney fees by filing a contract claim. *Id*. at 305. And should it do so, whether Falcon Group could have

brought a claim for contractual damages in this litigation is a matter best addressed by the trial court at that time. See *Adair v Michigan*, 470 Mich 105, 123-125; 680 NW2d 386 (2004) (discussing the same-transaction test for res judicata). For similar reasons, we decline to address whether Falcon Group was a "prevailing party in [a] collection action," as required under ¶ 21 of the consulting agreement. The trial court should address the proper construction of that paragraph and whether the present litigation amounted to a collection action if and when the claim is properly before it.

IV. CONCLUSION

The trial court did not err when it determined that Falcon Group could in theory perform its obligations under the consulting agreement without having to be registered as a broker-dealer, agent, or investment advisor under the Securities Act. It also did not err when it determined that the consulting agreement required Falcon Group to perform services as a finder, but that finders did not have to be registered under the Securities Act. Because Falcon Group could perform its obligations under the consulting agreement without being registered, the consulting agreement was not on its face illegal. The trial court properly dismissed under MCR 2.116(C)(10) Pransky's claims premised on the illegality of the consulting agreement. Consequently, we affirm the trial court's order dismissing Pransky's claims.

The trial court, however, lacked the authority to award Falcon Group its attorney fees as damages under a contract claim because Falcon Group did not file a contract claim against Pransky. Accordingly, we

vacate the trial court's order compelling Pransky to pay Falcon Group's attorney fees.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because neither Pransky nor Falcon Group prevailed in full, we order that neither party may tax costs. MCR 7.219(A).

WILDER, P.J., and OWENS, J., concurred with M. J. KELLY, J.

EDDINGTON v TORREZ

Docket No. 320882. Submitted June 10, 2015, at Lansing. Decided June 23, 2015, at 9:00 a.m. Leave to appeal denied 498 Mich 951.

Mark Eddington brought a defamation per se case against Raymond Torrez and Admiral Petroleum Company in the Saginaw Circuit Court. Plaintiff alleged that Torrez, acting as an agent of Admiral, falsely reported to the police that plaintiff had stolen gasoline from a gas station. Defendants moved for summary disposition. The court, Robert L. Kaczmarek, J., granted the motion, concluding that Torrez's statements to the police were subject to an absolute privilege and could not support a defamation claim. The court denied plaintiff's motion for reconsideration. Plaintiff appealed.

The Court of Appeals *held*:

A claim of defamation requires proof of the following elements: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication 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 publication. In this case, the second element was in dispute. Under *Shinglemeyer v Wright*, 124 Mich 230 (1900), an absolute privilege arises in the context of defamation claims that covers any report of criminal activity to law enforcement personnel. Persons who make statements to the police when reporting crimes or assisting the police in investigating crimes enjoy a privilege in those statements against the police divulging them for any purpose other than law enforcement. Accordingly, those statements may not be used to sustain a defamation claim. The trial court correctly granted summary disposition in favor of defendants and correctly denied plaintiff's motion for reconsideration.

Affirmed.

TORTS — DEFAMATION — PRIVILEGED COMMUNICATIONS — STATEMENTS MADE TO LAW ENFORCEMENT PERSONNEL.

An absolute privilege arises in the context of defamation claims that covers any report of criminal activity to law enforcement

> personnel; persons who make statements to the police when reporting crimes or assisting the police in investigating crimes enjoy a privilege in those statements against the police divulging them for any purpose other than law enforcement, and those statements may not be used to sustain a defamation claim.

The Mastromarco Firm (by *Victor J. Mastromarco, Jr.*, and *Russell C. Babcock*) for plaintiff.

Law Office of John C. Candela (by *John C. Candela*) for defendants.

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

PER CURIAM. In this defamation per se case, plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). Plaintiff alleged that defendant Raymond Torrez was an agent of defendant Admiral Petroleum Company and falsely reported to the police that plaintiff had stolen gasoline from a gasoline station on four occasions. Plaintiff alleges that the reports were made with knowledge that they were untrue or with reckless disregard for the truth. No factual development took place; the trial court concluded that the statements were subject to an absolute privilege and could not be the basis of a defamation claim. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only when the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*. at 119. The applicability of a privilege is a question of law that is also reviewed de novo.

Oesterle v Wallace, 272 Mich App 260, 263; 725 NW2d 470 (2006).

A claim of defamation requires proof of the following elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication 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 publication. [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

At issue in the present case is the second element, specifically whether statements made to the police regarding criminal activity are absolutely privileged and therefore immune from suit for defamation.

The privilege asserted here had its genesis in *Shinglemeyer v Wright*, 124 Mich 230; 82 NW 887 (1900). In that case, the defendant's bicycle was stolen, and he reported to the police that he believed the plaintiff had stolen it and the plaintiff was of unsavory character; on that basis, the plaintiff was arrested but subsequently released when it was established that she had not in fact stolen the bicycle. *Id*. at 231-238. The plaintiff commenced suit against the defendant for, in relevant part, slander, premised on the defendant's statement to the police officer. *Id*. at 231. Our Supreme Court held that the trial court should not have admitted the defendant's statements to the police because the statements

> were privileged communications. They were introduced and admitted for the purpose of showing malice. The trial judge was in doubt as to their competency, but finally admitted them. Privileged communications cannot be used for that purpose. Defendant's property was stolen,

> and it was not only his privilege and right, but his duty, to give to the detectives, who, in this case, were specially appointed for the purpose, all information he had, and, if he had suspicions of any person, to state who the person was, and the reasons for suspecting him. Such communications are made in the strictest confidence, and are as sacred, in the eye of the law, as the communications between client and lawyer, or patient and physician. To be evidence of malice, these communications must in themselves have been malicious, and would, therefore, form the basis themselves for an action for slander. If this be the law, no person would be safe from prosecution in communicating to police officers, whose duty it is to examine into the case and hunt for the criminal, his suspicions, or statements which might tend to implicate a person. Public policy forbids the adoption of such a rule. These detectives were under legal, as well as moral, obligations to keep these communications secret. They were not made for publication, and the officers had no right to divulge them to others. It is very doubtful if these detectives could be compelled to disclose in court such privileged communications. Such officers, especially in large cities, are entitled to know from the citizen against whom a crime has been committed all his suspicions and knowledge, both in regard to the person suspected, and also in regard to his character and habits. The defendant did not make these statements for repetition. He made them for the exclusive use and benefit of the trusted and sworn officers of the law. They should have been forever locked in their breasts, and never disclosed; otherwise, few persons would dare to disclose to an officer the name of a suspect, or anything they had learned about his character. [*Shinglemeyer*, 124 Mich at 239-240.]

Consequently, persons who make statements to the police when reporting crimes or assisting the police in investigating crimes enjoy a privilege in those statements against the police divulging them for any purpose other than law enforcement. Accordingly, those statements may not be used to sustain a defamation claim.

Plaintiff disputes the continued validity of any such absolute privilege. *Shinglemeyer*, however, has never been overruled. Furthermore, our Supreme Court has repeatedly cited it for this exact proposition: that reports of crimes or of information about crimes to the police are absolutely privileged. *People v Pratt*, 133 Mich 125, 133-135; 94 NW 752 (1903) (GRANT, J., dissenting); *Flynn v Boglarsky*, 164 Mich 513, 517; 129 NW 674 (1911); *Wells v Toogood*, 165 Mich 677, 679-680; 131 NW 124 (1911); *Powers v Vaughan*, 312 Mich 297, 305-306; 20 NW2d 196 (1945); *Simpson v Burton*, 328 Mich 557, 562-563; 44 NW2d 178 (1950). In the latter case, our Supreme Court additionally emphasized that the privilege attached even if the reporting party made the report maliciously. *Simpson*, 328 Mich at 562.

Furthermore, the important principles underlying the decision in *Shinglemeyer* remain just as valid today as they were at the turn of the last century: we could not reliably have practical law enforcement if crime victims, or those with knowledge of crimes, were forced to risk a lawsuit upon reporting what they know or what they suffered. The law is not blind to the fact that such reports are occasionally maliciously fictitious: it is a crime to lie to a police officer about an ongoing investigation, MCL 750.479c, or to make an intentionally false report to the police, MCL 750.411a. As noted, the *Shinglemeyer* privilege would not insulate a person against an investigation or charge for such crimes. Consequently, false reports may not be made with impunity. We further disagree with plaintiff's contention that any meaningful difference exists between statements made to the police that commence an investigation, as opposed to statements to the police during an ongoing investigation.

The simple fact is that *Shinglemeyer* created an absolute privilege that arises in the context of a defamation claim and covers any report of criminal activity to law enforcement personnel, and *Shinglemeyer* remains the law. Plaintiff's reliance on unpublished opinions of this Court is misplaced; such opinions may be of persuasive interest but have no binding authority, and the Court of Appeals has no authority to overturn precedent from our Supreme Court. The fact that this Court in *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619-620; 396 NW2d 809 (1986), raised the *hypothetical* possibility that there would remain a qualified privilege *if* no absolute privilege exists has no bearing on the actual law. Plaintiff's reliance on Supreme Court cases that do not discuss the privilege at issue is likewise misplaced. If the privilege set forth in *Shinglemeyer* is to be abrogated in any way, our Legislature must enact a statute on point, or our Supreme Court must abrogate the *Shinglemeyer* privilege. We have been unable to discover any indication that either manner of abrogation has occurred. Accordingly, the trial court correctly granted summary disposition in favor of defendants and correctly denied plaintiff's motion for reconsideration. We decline to address the issue any further.

Affirmed.

RONAYNE KRAUSE, P.J., and MURPHY and SERVITTO, JJ., concurred.

In re APPLICATION OF DETROIT EDISON COMPANY FOR 2012 COST RECOVERY PLAN

Docket No. 318388. Submitted May 6, 2015, at Lansing. Decided June 23, 2015, at 9:05 a.m.

Detroit Edison Company filed an application requesting authority from the Public Service Commission to implement a power supply cost recovery plan in its rate schedules for 2012 metered jurisdictional sales of electricity. The Michigan Environmental Council (MEC) intervened in the action. MEC challenged Edison's reduced-emission fuel (REF) project, which involved applying chemicals to coal to produce REF. Edison proposed to sell at book cost a portion of its coal inventory to two affiliated unregulated fuels companies. The coal would be chemically treated at those plants and then sold back to Edison at the same price. The fuels companies would generate revenue by obtaining tax credits from selling the treated coal to Edison. The administrative law judge assigned to the case recommended that Edison be denied permission to implement the REF project, but the commission rejected that recommendation, approving Edison's application to implement a power supply cost recovery plan in its rate schedules for 2012 metered jurisdictional sales of electricity and the REF project. MEC appealed.

The Court of Appeals *held*:

1. In accordance with MCL 460.10a(4), the commission established a Code of Conduct. MEC argued that (1) Edison's sale of coal to the fuels companies, and the repurchase of treated coal at the same price from them, violated the Code of Conduct in that the sales subsidized the fuels companies because the companies were able to receive favorable tax treatment as a result of the transactions and (2) Edison's sale of the coal at the fully allocated embedded cost and repurchase of the coal at the same price violated the pricing provision of the Code of Conduct. The Code of Conduct prohibited acts that would result in cross-subsidization and preferential treatment between a regulated utility and an unregulated affiliate. Nothing in the code, however, prevented an unregulated affiliate from making a profit from a project with a regulated utility. Edison did not give or grant money to the fuels

companies and did not subsidize the companies in any indirect way. In addition, MEC presented no evidence to support its assertion that Edison's sale of coal to the fuels companies at the fully allocated embedded cost, which is the same as the market price at which Edison bought the coal, and Edison's repurchase of the coal from the fuels companies at the same price, violated the pricing provisions of the Code of Conduct. MEC failed to establish that the commission's order approving the REF project was unlawful or unreasonable.

2. Under MCL 460.6j(6), when evaluating a power supply cost recovery plan, the commission must consider whether the utility has taken all appropriate actions to minimize the cost of fuel. MEC argued that the commission erred by failing to consider the fact that the fuels companies received favorable tax treatment by dealing with Edison, and that Edison should have negotiated more advantageous arrangements with the fuels companies to account for the fact that the companies were able to obtain tax credits for selling treated coal to Edison. The commission, however, had no clear authority to consider the fuels companies' tax credits when determining whether Edison's power supply cost recovery decisions were reasonable and prudent. Therefore, the commission did not err by failing to consider the tax credits. The commission's decision approving the power supply cost recovery plan was not unlawful or unreasonable.

Affirmed.

Bruce R. Maters, *Jon P. Christinidis*, *David S. Maquera*, and *Fahey Schultz Burzych Rhodes PLC* (by *William K. Fahey* and *Stephen J. Rhodes*) for the Detroit Edison Company.

Olson, Bzdok & Howard, PC (by *Emerson Hilton* and *Christopher M. Bzdok*), and *Shannon Fisk* for the Michigan Environmental Council.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission.

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

PER CURIAM. Michigan Environmental Council (MEC) appeals by right from an order of the Michigan Public Service Commission (PSC) granting the application filed by Detroit Edison Company (Edison) to implement a power supply cost recovery (PSCR) plan in its rate schedules for the 2012 metered jurisdictional sales of electricity, and for approval of its five-year forecast. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case concerns MEC's challenge to Edison's reduced-emission fuel (REF) project. This project involves applying chemical additives to coal to produce REF. Edison maintains that the use of REF results in reduced sulfur dioxide, mercury, and possibly nitrous oxide emissions, and thus reduced emission expenses. Edison proposed to sell at book cost a portion of its coal inventory to affiliated unregulated fuels companies Belle River Fuels Company (BRFC) and the St. Clair Fuels Company (SCFC). The coal would be chemically treated at those plants and then sold back to Edison.

The PSC considered the REF project in an earlier case[1] but did not grant Edison permission to implement the project at that time, concluding that it needed more information on the efficacy of the methods for reducing emissions. The PSC also required Edison to demonstrate that the REF project was a reasonable and prudent method of achieving maximum emission

[1] See *In re Application of Detroit Edison Company for 2011 PSCR Plan*, order of the Public Service Commission, entered December 6, 2011 (Case No. U-16434).

reduction at minimum cost, and that the REF project complied with the PSC's "Code of Conduct."[2]

On September 30, 2011, Edison filed an application requesting authority to implement a PSCR plan in its rates schedules for the 2012 metered jurisdictional sales of electricity. The application indicated that Edison intended to move forward with implementation of its REF project, but represented that the decision would have no impact on the requested maximum PSCR factor for 2012.

The proposal for decision issued by the administrative law judge (ALJ) assigned to the case recommended that Edison be denied permission to implement the REF project; however, contrary to the ALJ's recommendation, the PSC approved the REF project, stating as follows:

> The Commission finds that Detroit Edison's REF project should be approved and that it complies with the Code of Conduct and the Guidelines. The Commission reviewed

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[2] The Legislature enacted 2000 PA 141, the Customer Choice and Electricity Reliability Act (Act 141), MCL 460.10 *et seq*., to further the deregulation of the electric utility industry. *Detroit Edison Co v Pub Serv Comm No 1*, 261 Mich App 1, 4; 680 NW2d 512 (2004), vacated in part on other grounds 472 Mich 897 (2005). Act 141 required the PSC to implement a code of conduct to be applicable to all regulated electric utilities. MCL 460.10a(4) provides:

> No later than December 2, 2000, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10cc.

The PSC adopted its Code of Conduct in 2001.

the company's testimony and Exhibits A-21 through A-23 and finds that Detroit Edison, in compliance with the directive in the December 6 order [in Case No. U-16434], provided the Commission with sufficient additional information to evaluate the reasonableness and prudence of the REF project.

The Commission believes that the REF project is a reasonable means of attaining maximum emission reductions for minimum cost. As explained by Detroit Edison, at [Edison's St. Clair Power Plant and its Belle River Power Plant], PSCR customers will receive a reduction in annual working capital expense through the sale, at market price, of a portion of the company's coal inventory to its affiliated fuels companies. The affiliated fuels companies will treat the coal with REF adder and then resell the treated coal to Detroit Edison. The cost of the REF adder will be offset by a corresponding savings in PSCR emissions allowance expense, resulting in a net cost of zero or less to PSCR customers. At [Edison's Monroe Power Plant], Detroit Edison receives a coal fee rate from the affiliated fuels company, reducing the cost of every ton of coal treated with REF adder that is consumed, which translates into a credit for the company's PSCR customers.

In response to the ALJ's finding that Detroit Edison did not provide any of the actual contracts between the company and its affiliated fuels companies for consideration, the Commission agrees with Detroit Edison that [1982 PA 304 (Act 304), MCL 460.6j *et seq*.] only requires a description of all relevant major contracts, but does not require admission of the actual contracts. In addition, the Commission agrees with Detroit Edison and the Staff that the company's eligibility for the tax credits and the potential for the affiliated fuels companies to profit from the REF project is irrelevant to an Act 304 proceeding. As explained by Detroit Edison, Act 304 does not permit "the Commission to include third party expenses or revenues related to coal or any other fuel supply into Act 304 review and ratemaking." Detroit Edison's replies to exceptions, p. 27. As a result, the Commission may not consider whether the tax credits may be used to offset fuel costs.

The Commission disagrees with the Attorney General that REF costs should be treated as O&M costs. As explained by Detroit Edison, MCL 460.6j(13)(d) refers to "fuel movement that occurs after the utility receives the fuel at the power plant." Detroit Edison's replies to exceptions, p. 21. The Commission finds that all of the coal processing costs take place before the coal is delivered to the company.

Based on the evidence presented in Exhibits A-21 and A-23, the Commission finds that the REF project complies with the Code of Conduct. There is structural separation between the company and its affiliated fuels companies; they do not engage in joint advertising, marketing, or other promotional activities related to the provision of the fuels processing service; and there is no preferential treatment for or subsidization of the affiliated fuels companies by Detroit Edison.

The Commission finds that Detroit Edison has complied with Section III.C of the Code of Conduct. As discussed previously, the record supports that Detroit Edison purchases coal from a third party at market price, then sells the coal at the same market price to its affiliated fuels companies. The cost of the coal for the affiliated fuels companies is Detroit Edison's booked cost, or its fully allocated embedded cost. Therefore, both the market cost and the fully allocated embedded cost is higher than the other, compensation to Detroit Edison by the affiliated fuels companies complies with Section III.C of the Code of Conduct.

When the affiliates resell the treated coal to Detroit Edison, it is for the same market price the affiliated fuels companies paid to the company (or in this case, the fully allocated embedded cost), plus the cost of REF adder. The price of the treated coal is offset by a corresponding savings in PSCR emissions allowance expense, resulting in zero cost for the treated coal. Under Section III.C of the Code of Conduct, compensation to the affiliated fuels companies by Detroit Edison for the treated coal must be the lower of market price or 10% over fully allocated embedded cost. Because market price and the fully allo-

> cated embedded cost are the same in this case, the Commission finds that market price is lower than 10% over the fully allocated embedded cost. By paying the affiliated fuels companies market price for the treated coal, Detroit Edison has complied with Section III.C of the Code of Conduct.
>
> The Commission agrees with Detroit Edison that the company did not violate the pre-sale notification requirements of the Guidelines with the sale of its coal inventory. As stated by Detroit Edison, the pre-sale notification requirement was intended to provide the Commission with notice of intent to sell significant utility plant property, and not the routine sales involved here. The Commission finds that Detroit Edison's sale of its coal inventory is not utility plant property, but is part of the utility's day-to-day business.
>
> Based on the testimony and evidence provided by Detroit Edison, the Commission finds credible Detroit Edison's claim that it investigated REF arrangements with the two other licensees, CERT and A.J. Gallagher, but that [DTE Energy Services] offered Detroit Edison the best deal. Detroit Edison provided substantial testimony about the price of REF adder at other licensees' facilities and provided ample evidence that Detroit Edison's customers would have paid more had the company contracted with these other companies. [*In re Detroit Edison's Application for a 2012 PSCR Plan*, order of the Public Service Commission, entered June 28, 2013 (Case No. U-16892), pp 31-34.]

The PSC approved Edison's application for a PSCR plan for Edison's 2012 metered jurisdictional electric sales and the REF project. This appeal followed.

II. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well defined. Under MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed,

prima facie, to be lawful and reasonable. See *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. See *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. See *Attorney General v Pub Serv Comm*, 269 Mich App 473, 479; 713 NW2d 290 (2006).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

This Court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give deference to the PSC's interpretation of its own Code of Conduct; however, we apply principles of statutory construction in our review of that code and its statutory underpinnings. See *In re Complaint of Consumers Energy Co*, 255 Mich App 496, 503-504; 660 NW2d 785 (2003). If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute or the PSC's Code of Conduct by the PSC is not binding on us. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90,

103-109; 754 NW2d 259 (2008). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. CODE OF CONDUCT

On appeal, MEC argues that the PSC erred by finding that Edison's REF project complied with the Code of Conduct. We disagree.

The purpose of the PSC's Code of Conduct is to "promote fair competition by establishing measures to prevent cross-subsidization, information sharing, and preferential treatment between the regulated and unregulated operations of electric utilities, alternative electric suppliers, and their affiliates." Code of Conduct, preface.

Section II of the Code of Conduct, entitled "Separation," provides in part:

> An electric utility or alternative electric supplier that offers, itself or through its affiliates, both regulated and unregulated services shall do so with the structural or functional separation needed to prevent cross-subsidization, information sharing, and preferential treatment between the regulated and unregulated services. This includes, but is not limited to, the following:
>
> * * *
>
> B. An electric utility's or alternative electric supplier's regulated services shall not subsidize in any manner, directly or indirectly, the unregulated business of its affiliates or other separate entities.

Section III of the Code of Conduct, entitled "Discrimination," provides in part:

> An electric utility or alternative supplier that offers, itself or through its affiliates, both regulated and unregulated services shall not unduly discriminate in favor of or against any party, including its affiliates. This includes, but is not limited to, the following:
>
> * * *
>
> C. If an electric utility or alternative electric supplier offering regulated service in Michigan provides services, products, or property to any affiliate or other entity within the corporate structure, compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the corporate structure provides services, products, or property to an electric utility or alternative electric supplier offering regulated service in Michigan, compensation for services and supplies shall be at the lower of market price or 10% over fully allocated embedded cost and transfers of assets shall be based upon the lower of fully allocated embedded cost or market price.

MEC argues that (1) Edison's sale of coal to the fuels companies, and the repurchase of treated coal at the same price from them, violates the Code of Conduct in that the sale subsidizes the fuels companies because the companies are able to receive favorable tax treatment as a result of the transactions and (2) Edison's sale of the coal at the fully allocated embedded cost and repurchase of the coal at the same price violates the pricing provision of the Code of Conduct.

MEC cites no authority to support its arguments. An appellant's failure to properly address the merits of an argument constitutes the abandonment of an issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). At any rate, we find that MEC's argument is without merit. The Code of Conduct prohibits acts that result in cross-subsidization and preferential treatment between a

regulated utility and an unregulated affiliate. Code of Conduct, preface. A "subsidy" is defined as "any grant or contribution of money." *Random House Webster's College Dictionary* (1997), p 1284. Nothing in the code prevents an unregulated affiliate from making a profit from a project with a regulated utility. The fuels companies gained tax benefits from selling treated coal to Edison. The undisputed evidence showed that Edison could not have obtained those same tax benefits. There is no evidence establishing that, had Edison done business with an unaffiliated company rather than with its affiliates, that company would not have also obtained the same tax benefits. Edison did not give or grant money to the fuels companies, and did not subsidize the companies in any indirect way.

In addition, MEC presents no evidence to support its assertion that Edison's sale of coal to the fuels companies at the fully allocated embedded cost, which is the same as the market price at which Edison bought the coal, and Edison's repurchase of the coal from the fuels companies at the same price, violates the pricing provisions of the Code of Conduct. MEC asserts that the value added to the coal from the treatment by the fuels companies should have factored into the repurchase price, but does not indicate how that could have been done or if Edison could have done so effectively without violating § III(C) of the Code of Conduct.

Further, MEC's assertion that the PSC should have required Edison to submit the actual contracts with the fuels companies rather than simply describing the contracts is without merit. MCL 460.6j(3) states that a PSCR plan "shall describe all major contracts and power supply arrangements entered into by the utility . . . ." The PSC did not indicate that it was unable to resolve the issue without examining the actual contracts.

Finally, we reject MEC's assertion that the PSC's finding that Edison investigated the possibility of entering into contracts with unaffiliated companies was not supported by the evidence. Edison's witness testified that other Edison employees had investigated the possibility of contracting with unaffiliated companies but that no such arrangements were made. The ALJ described the witness's testimony as not credible, but the PSC found to the contrary. The PSC was entitled to accept the testimony from Edison's witness even if the record contained evidence that contradicted that testimony. See *Great Lakes Steel Div of Nat'l Steel Corp v Mich Pub Serv Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983).

MEC obviously disagrees with the PSC's conclusion regarding subsidization, but has offered no direct evidence to establish that Edison's arrangement with the fuels companies violated the Code of Conduct. MEC has not established that the PSC's order is unlawful or unreasonable. See MCL 462.26(8).

IV. FUELS COMPANIES' TAX CREDIT REVENUE

Next, MEC argues that the PSC erred by holding that the revenue generated for the fuels companies from tax credits was irrelevant to determining whether Edison took all appropriate steps to minimize its costs. We disagree.

MCL 460.6j(6) provides:

> In its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan,

> the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly power supply cost recovery factors requested by the utility in its power supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per units of electricity, but may include specific amounts contingent on future events.

The PSC has only that authority granted to it by statute. *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 148-150; 428 NW2d 322 (1988). The Legislature must grant authority by "clear and unmistakable" statutory language. *Mich Electric Coop Ass'n v Pub Serv Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005).

The gravamen of MEC's argument is that the PSC erred by failing to consider the fact that the fuels companies received favorable tax treatment by dealing with Edison, and that Edison should have negotiated more advantageous arrangements with the fuels companies to account for the fact that the companies were able to obtain tax credits for selling treated coal to Edison. However, MEC points to no statutory authority that allows the PSC to consider another party's tax benefits when determining whether a utility's decisions underlying its PSCR plan were reasonable and prudent. These tax advantages were not available to Edison, and Edison had no apparent control over the

amount of the credit each company would receive. In addition, MEC fails to explain how Edison could determine what amounts to account for when negotiating the contracts, i.e., how much in tax credits the fuels companies would obtain, and whether Edison could account for these amounts and still comply with § III(C) of the Code of Conduct.

The PSC had no clear authority to consider the fuels companies' tax credits when determining whether Edison's PSCR decisions were reasonable and prudent. Therefore, the PSC did not err by failing to consider the tax credits. The PSC's decision was not unlawful or unreasonable. MCL 462.26(8).

Finally, MEC argues that the PSC's order was not supported by competent, material, and substantial evidence on the whole record. We disagree. MEC waived this issue by failing to raise it before the PSC. See *Shaw v Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009). Nevertheless, we find that the issue is without merit. MEC's argument in this regard is simply a restatement of the unpersuasive arguments that we have already rejected.

V. CONCLUSION

For the reasons stated in this opinion, we hold that the PSC's order granting Edison's application to implement a PSCR plan in its rate schedules for the 2012 metered jurisdictional sales of electricity and for approval of Edison's five-year forecast is lawful and reasonable. See MCL 462.26(8).

Affirmed.

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

MAIER v MAIER

Docket No. 322109. Submitted December 3, 2014, at Lansing. Decided June 25, 2015, at 9:00 a.m. Leave to appeal denied 498 Mich 882.

Cindy Kay Maier (plaintiff) and Daniel C. Maier (defendant) were divorced in the Clinton Circuit Court in 2012. They had one child, JM, and were awarded joint legal custody, with plaintiff having physical custody and defendant having parenting time primarily on the weekends and holidays. Numerous show-cause hearings followed, and plaintiff reported to Children's Protective Services on several occasions that defendant had abused JM. Following an extensive evidentiary hearing on a custody petition, the court, Lisa Sullivan, J., granted defendant sole legal and physical custody of JM and granted plaintiff unsupervised visitation. After a tumultuous initial visitation between JM and plaintiff and an emergency hearing, the court modified its order to require that plaintiff's visitation be supervised unless a psychological evaluation recommended otherwise. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court fulfilled its statutory duty to consider JM's reasonable preference regarding custody. MCL 722.23(i), part of the Child Custody Act, MCL 722.21 *et seq*., requires a court determining custody to consider the reasonable preference of the child, if the child has one. Plaintiff claimed that the trial court had erred by failing to consider JM's reasonable preference because it did not interview him, contending that *Kubicki v Sharpe*, 306 Mich App 525 (2014), requires trial courts to interview the child in all but the most extraordinary circumstances. *Kubicki*, however, merely highlighted the longstanding principle that a court may not abrogate its responsibility to consider each of the best-interest factors enumerated in MCL 722.23 for child custody cases by using a stipulation in the case. The right to consideration of a reasonable preference attaches to the best interests of the child, not to the rights of the contestants in the custody battle. A preliminary question is always whether the child has the capacity to form a reasonable preference and, if so, has the child actually formed one. A child over the age of six is presumed to be capable of forming a reasonable preference,

but not every child over that age actually has the necessary capacity. A child's presumed capacity might be compromised by circumstances peculiar to that child's life. Additionally, an interview is merely one avenue from which to adduce a child's capacity to form a preference and the preference itself, and not the sine qua non from which that determination may be made. Noting that JM suffered from anxiety and adjustment disorder and attention deficit/hyperactivity disorder, had been subjected to various evaluations and counseling appointments, had been exposed to inappropriate and inaccurate information, and might have been coached, the trial court declined to interview him, finding that while JM was of sufficient age to be able to form and express a preference, his fragile emotional state, coupled with significant efforts to influence his preference, rendered him unable at that time to form a reasonable preference.

2. The trial court did not abuse its discretion by reaching a custody decision without considering plaintiff's psychological evaluation. A psychological evaluation cannot be the sole basis for overturning a trial court's custody decision.

3. The trial court did err by determining that plaintiff's repeated failure to abide by the court's orders to obtain a psychological evaluation weighed against her on two best-interest factors: Factor (g), MCL 722.23(g) (mental and physical health of the parties), and Factor (*l*), MCL 722.23(*l*) (any other factor relevant to the dispute). Disputes regarding visitation and contempt are not a proper basis for changing custody. The error, however, was harmless. Four other best-interest factors under MCL 722.23 favored defendant without any indication of error in their consideration, and none favored plaintiff. For plaintiff to have shown that she should be awarded custody, it was not only necessary for her to show that the trial court erred in its consideration of some of the factors that favored defendant, but also that some factors favored her.

4. Plaintiff did not show that the trial court's actions rose to the level of bias.

5. The trial court's grant of parenting time was in accordance with JM's best interests, as required by MCL 722.27a(1). A trial court should grant parenting time in a frequency and of a duration and type reasonably calculated to promote a strong relationship between the child and the parent granted the parenting time. The court may consider several factors listed in MCL 722.27a(6). The court must consider the best interests of the child, however, even if it does not explicitly address the statutory factors. The parenting-time order in this case was modified after

an emergency hearing and only a week after the court's initial ruling granting plaintiff unsupervised visitation. While the court did not explicitly go through all the factors in MCL 722.27a(6), it did state that it had reviewed and considered them.

Affirmed.

CHILD CUSTODY — BEST INTERESTS OF CHILD — FACTORS — REASONABLE PREFERENCE OF THE CHILD — INTERVIEWING THE CHILD.

MCL 722.23(i), part of the Child Custody Act, MCL 722.21 *et seq*., requires a trial court determining custody to consider the reasonable preference of the child, if the child has one; a preliminary question is whether the child has the capacity to form a reasonable preference and, if so, has the child actually formed one; a child over the age of six is presumed capable of forming a reasonable preference, but not every child over that age actually has the necessary capacity because his or her presumed capacity might have been compromised by circumstances peculiar to that child's life; the statute does not require the court to interview the child in all cases, however, because an interview is merely one avenue from which to adduce a child's capacity to form a preference and the preference itself, not the sine qua non from which that determination may be made.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for Cindy Kay Maier.

Bailey, Smith & Bailey, PC (by *Amy H. Bailey*), for Daniel C. Maier.

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order awarding defendant sole physical and legal custody of the parties' son, JM. We affirm.

I. FACTUAL BACKGROUND

Plaintiff and defendant married in 2002, and JM was born three years later. A little more than a year after JM was born the parties separated, but they did

not finally divorce until 2012. Custody issues arose during the pendency of the divorce proceedings and resumed within months of the entry of a divorce judgment. In addition to the multiple motions for a show-cause hearing filed with the court, the parties were also involved in several Children's Protective Services (CPS) investigations instigated by plaintiff. CPS found each report to be unsubstantiated. In 2013, a petition to change custody was filed in conjunction with a motion to show cause. The trial court conducted an evidentiary hearing on the custody petition that spanned four months and included seven days of testimony and argument. At the close of those proceedings, the court entered an order granting defendant sole legal and physical custody of JM and granting plaintiff unsupervised visitation with a standard visitation schedule. After an acrimonious initial visitation between JM and plaintiff, the court modified its order on May 22, 2014, to require that plaintiff's visitation be supervised unless a psychological evaluation recommended otherwise. It is that order that plaintiff appeals.

II. STANDARD OF REVIEW

We review a trial court's fact-finding to determine if it is against the great weight of the evidence. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). A trial court's determination on the issue of custody is reviewed for an abuse of discretion. *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). In child custody cases, an abuse of discretion occurs if " 'the result [is] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Id*. at 324 (citation omitted).

Plaintiff asks this Court to reconsider our decision in *Shulick*, in which we determined that this articulation of the "abuse of discretion" standard remained the proper standard in child custody cases in light of the Supreme Court's decision in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), that a different articulation, the "principled outcomes" standard, was the "default abuse of discretion standard." *Shulick*, 273 Mich App at 323-325. We decline. This Court's definition of "abuse of discretion" derives from the Supreme Court's ruling in another child custody case, *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). *Shulick*, 273 Mich App at 324-325. While *Maldonado* articulated a general "default" definition of "abuse of discretion," it was *Spalding* that addressed the term within the specific context of child custody. "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . ." MCR 7.215(J)(1).

In *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994), the Supreme Court stated that because the Legislature used the word "palpable" in the Child Custody Act, MCL 722.21 *et seq*.,[1] the same word the Court had used in *Spalding*, it must have meant to adopt the definition of "abuse of discretion" articulated in *Spalding*. This Court is bound to follow

[1] Section 8 of the Child Custody Act, MCL 722.28, states:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

the precedent of the Supreme Court. See *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009).

III. ANALYSIS

A. THE TRIAL COURT'S CUSTODY DETERMINATION

Plaintiff argues that the trial court's custody determination was erroneous for numerous reasons. She argues that the court erred by failing to consider the reasonable preference of the child. She asserts that the court erred by both deciding custody before the completion of her psychological evaluation and using her failure to obtain such an evaluation as evidence in the court's custody decision. Finally, she contends that the court was biased against her.

1. REASONABLE PREFERENCE OF THE CHILD

Plaintiff's first claim of error is that the trial court failed to consider JM's reasonable preference because it did not interview him. Plaintiff asks this Court to hold that the recent case of *Kubicki v Sharpe*, 306 Mich App 525; 858 NW2d 57 (2014), requires that a trial court conduct an interview of the child in all but the most extraordinary of circumstances. In *Kubicki*, the Court stated, "Regardless whether the parties wished for an interview, the court was affirmatively required to consider the child's preference." *Id*. at 544-545. In the instant case, the trial court declined to interview the child. In doing so, the court stated:

> The reasonable preference of the child if the Court considers the child to be of sufficient age to express a preference. [JM] turned nine during these proceedings. Neither party asked that he be interviewed. He suffers from anxiety and adjustment disorder and has been subjected to various

> evaluations and counseling appointments. There is a concern he struggles with ADHD. He has been exposed to inappropriate and inaccurate information and there are concerns which I will expand on later that [JM] has been coached. It is unlikely even if he were interviewed that he would be able to express a reasonable preference . . . .

Kubicki did not announce a new legal mandate that every child over a certain age be interviewed to ascertain a reasonable preference. Following a long line of cases, *Kubicki* highlighted the standing principle that a court may not abrogate its responsibility to consider each of the enumerated best-interest child custody factors on the basis of a stipulation of the adults in a case.[2] The right to have a reasonable preference considered attaches to the best interests of the child, not to the rights of the contestants in the custody battle. The term "reasonable preference" has been defined by this Court as a standard that "exclude[s] those preferences that are arbitrary or inherently indefensible." *Pierron v Pierron*, 282 Mich App 222, 259; 765 NW2d 345 (2009), aff'd by and quoted in *Pierron*, 486 Mich at 92. The Child Custody Act requires that the court consider the reasonable preference of the child, if one exists. MCL 722.23(i). A preliminary question is always whether the child has the capacity to form a reasonable preference and, if so, whether the child has actually formed a preference. A child over the age of six is presumed to be capable of forming a reasonable preference. *Bowers v*

[2] See *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001); *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 394 (1991); *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988); *Arndt v Kasem*, 135 Mich App 252, 255; 353 NW2d 497 (1984); *Speers v Speers*, 108 Mich App 543, 545; 310 NW2d 455 (1981); *Dowd v Dowd*, 97 Mich App 276, 278-279; 293 NW2d 797 (1980); *Troxler v Troxler*, 87 Mich App 520, 523; 274 NW2d 835 (1978).

Bowers, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). Undoubtedly, "an expression of preference by an intelligent, unbiased child might be the determining factor in deciding what the 'best interests' of the child are." *In re Custody of James B*, 66 Mich App 133, 134; 238 NW2d 550 (1975); see also *Lewis v Lewis*, 73 Mich App 563, 566; 252 NW2d 237 (1977), and *Bowers*, 190 Mich App at 56. However, no court has ruled that every child over the age of six actually has the capacity to form a preference. Just as adults may lack the capacity to give competent testimony because of infirmity, disability, or other circumstances, so may a child's presumed capacity be compromised by circumstances peculiar to that child's life. Additionally, an interview is merely one avenue from which to adduce a child's capacity to form a preference and the preference itself, and not the sine qua non from which that determination must be made. Trial judges, learned in the law, are not necessarily the best persons to approach a child on this issue. Just as a protocol has been developed for interviewing child assault victims, this issue might well be best addressed with the development of an evidence-based protocol for interviewers seeking to ascertain a child's preference for custody. Additionally, it is not uncommon for children in the midst of family reorganization to be under the care of trained mental health care professionals from whom the trial court can seek input on many of the best-interest factors, including preference.

In this case the trial court did not interview JM, but did make an implicit fact-finding that this particular child could not formulate or express a reasonable preference, one that was not based on the inherently indefensible basis of coaching and emotional distress. In making this fact-finding, the court had before it a

record that included JM's diagnosis of both depressive disorder and ADHD. Additionally, the record contained evidence of four unsubstantiated CPS complaints, testimony from therapists who opined that JM was being coached, and a traumatic visitation exchange that JM perceived to be a kidnapping. Additionally, more than one witness also testified that plaintiff voiced concerns and criticisms of defendant in the child's presence. Accordingly, the court found that while JM was of sufficient age to be able to form and express a preference, his fragile emotional state, coupled with significant efforts to influence his preference, rendered him unable at the time to form a reasonable preference. Clearly, the court fulfilled its statutory duty. The court's fact-finding was supported by the record and is affirmed.

2. PSYCHOLOGICAL EVALUATION

Next, plaintiff argues that the trial court abused its discretion by reaching a custody decision without considering her psychological evaluation. We disagree. Our decision in *McIntosh v McIntosh*, 282 Mich App 471, 472; 768 NW2d 325 (2009), makes it clear that the failure to consider a psychological evaluation cannot be the sole basis for overturning a trial court's decision on custody. In *McIntosh*, this Court held that psychological evaluations "are but one piece of evidence amongst many, and are not by themselves dispositive in determining custody . . . ." *Id*. We explained that "psychological evaluations are not conclusive on any one issue or child custody factor" and that "[t]he ultimate resolution of any child custody dispute rests with the trial court." *Id*. at 475. Moreover, in evaluating the child custody factors, the trial court may consider the relative weight of the factors and is not required to give

them equal weight. *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

3. FAILURE TO ABIDE BY COURT ORDERS

Plaintiff also argues that the trial court erred by considering her repeated failure to abide by court orders to obtain a psychological evaluation. The trial court determined that plaintiff's inability to have a psychological evaluation as ordered weighed against her on two best-interest factors: Factor (g), MCL 722.23(g) (mental and physical health of the parties) and Factor (*l*), MCL 722.23(*l*) (any other factor relevant to the dispute). The trial court erred in its evaluation of these two factors according to our holding in *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980) ("Disputes regarding visitation and contempt are not a proper basis for changing custody."). However, the error is harmless. Four other factors favored defendant without any indication of error in their consideration, and none favored plaintiff. In order for plaintiff to show that she should have been awarded custody, it is not only necessary for her to show that the trial court erred in its consideration of some of the factors that favored defendant, but also that some of the factors favored her. See *Dempsey v Dempsey*, 409 Mich 495, 498-499; 296 NW2d 813 (1980).

4. BIAS

Plaintiff also argues that the trial court treated her unfairly by precluding hearsay testimony from her witnesses, but not from defendant's witnesses. In support of this argument, plaintiff cites several instances in which the court allowed defendant to testify about out-of-court statements by plaintiff that

she erroneously refers to as inadmissible hearsay. These statements were not hearsay. MRE 801(d)(2). She also relies on a single instance in which the trial court allowed defendant to testify about a statement JM made that was hearsay. Even assuming that admission of this statement was erroneous, plaintiff has not shown that the actions of the trial court rose to a level of bias.

B. THE TRIAL COURT'S PARENTING-TIME DETERMINATION

"Parenting time shall be granted in accordance with the best interests of the child." MCL 722.27a(1). A trial court should grant parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." *Id*. The following factors may be considered:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.

> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. . . .
>
> (i) Any other relevant factors. [MCL 722.27a(6).]

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010) (quotation marks and citation omitted). The trial court must consider the best interests of the child even if it does not explicitly address the statutory factors. *Id*. at 31-32. The parenting-time order here was changed after an emergency hearing and only a week after the court's initial ruling granting unsupervised visitation. While the trial court did not explicitly go through all the factors in MCL 722.27a(6), it did state that it had reviewed and considered them.

The trial court was reasonably concerned about the status of JM's mental and emotional health when around plaintiff. In addition to the dense record that the court had from the protracted custody hearing, the court received testimony at the emergency hearing regarding plaintiff's behavior since JM had moved to defendant's home. Plaintiff admitted sending texts to defendant threatening to terminate all insurance for the benefit of JM. Plaintiff also admitted sending a letter to JM telling him that defendant's home was a temporary place for him. There was evidence that plaintiff told the wife of JM's coach that defendant had physically abused JM, similar to her four previous claims of abuse to CPS. The court stated, "[P]laintiff cannot separate her own emotional distress and anxiety from her son's, cannot act in a manner that's in his

best interest, at this time, and is, clearly, trying to undermine the defendant as a parent." The record supports this conclusion. The trial court's grant of parenting time was in accordance with JM's best interests.

Affirmed.

RONAYNE KRAUSE, P.J., and K. F. KELLY and STEPHENS, JJ., concurred.

FIELDS v SUBURBAN MOBILITY AUTHORITY
FOR REGIONAL TRANSPORTATION

Docket No. 318235. Submitted December 4, 2014, at Detroit. Decided June 25, 2015, at 9:05 a.m.

Debra Fields brought an action in the Wayne Circuit Court against the Suburban Mobility Authority for Regional Transportation (SMART) (a regional transportation authority) and David E. Gibson (one of its bus drivers). Plaintiff alleged that she had been injured in a collision between her car and a bus negligently driven by Gibson. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff had not complied with the notice requirements of MCL 124.419. The court, Daniel P. Ryan, J., agreed and granted defendants' motion. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting summary disposition in defendants' favor. The Metropolitan Transportation Authorities Act, MCL 124.401 *et seq*., describes in what manner liability may be imposed on a transportation authority for situations involving the operation of a common carrier for hire. MCL 124.419 requires that all claims arising in connection with the transportation authority must be presented as ordinary claims against a common carrier of passengers for hire. It further requires that written notice of any claim based on injury to persons or property be served on the authority no later than 60 days after the occurrence that led to the injury. While service of the notice within the meaning of the statute does not require strict compliance with the court rules governing service, some kind of formal delivery is nonetheless required. A plaintiff cannot rely on the internal documents of a defendant transportation authority. A party cannot deliver something to itself; delivery must be to another party. Consequently, a party's internal creation and handling of its own documents cannot constitute a delivery or service under MCL 124.419. SMART's possession of police reports and reports prepared by SMART's employees that related to the accident did not constitute a formal delivery of notice of her claim by plaintiff to SMART and did not satisfy the statutory notice requirement. Because plaintiff provided no evi-

dence that she or anyone else formally delivered or served written notice of her claim on SMART within 60 days of the accident, she failed to establish that the statutory notice requirement was satisfied.

2. Plaintiff's phone call to SMART's insurer within three weeks of the accident also did not constitute notice under MCL 124.419 because the statute requires written notice. Moreover, even if the document labeling plaintiff as a "claimant" that she relied on had not been a SMART internal document, it would have been insufficient under MCL 124.419 because it did not give notice that an ordinary claim was being pursued. While plaintiff's name was listed in the area reserved for claimant information, the document did not disclose that plaintiff actually intended to pursue any claim, let alone an ordinary claim as opposed to a no-fault claim. The word "claimant," with nothing more, did not give notice of what type of claim a plaintiff might be pursuing. Notice must be somewhat specific, at least with respect to the type of claim, and notice for one type of claim is insufficient to be notice for another type of claim.

3. Plaintiff also argued that even if she had not met the statutory notice requirements, summary disposition was not warranted because defendants were not prejudiced. When the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, however, no saving construction (such as requiring a defendant to prove actual prejudice, for instance), is allowed. Accordingly, a showing of prejudice was not required.

Affirmed.

SHAPIRO, J., concurred in affirming the trial court's ruling, concluding that there were two questions at issue: whether plaintiff complied with the notice requirements of MCL 124.419 and, if she did not, whether the text of the statute mandated dismissal as the sanction. Judge SHAPIRO agreed that plaintiff did not comply with MCL 124.419. A document prepared by SMART itself cannot satisfy the statute's requirement that it be served, i.e., formally delivered, to SMART. He would, however, have more clearly delineated the precise demands of MCL 124.419, believing that the judiciary should provide sufficient guidance about how to preserve and litigate these cases in the future, and identified several issues that needed to be addressed. With respect to dismissal as the only sanction available, Judge SHAPIRO acknowledged that *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707 (2012), required that conclusion, but urged the

Supreme Court to revisit the question. The plain language of MCL 124.419 allows the possibility of other sanctions for violating the notice requirement, including limitations on recovery, greater proof requirements, and qualified discovery.

Christopher Trainor & Associates (by *Christopher J. Trainor*, *Amy J. Derouin*, and *Shawn C. Cabot*) for plaintiff.

Vandeveer Garzia, PC (by *John J. Lynch*, *Christian E. Hildebrandt*, and *Timothy J. Connaughton*), for defendants.

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

DONOFRIO, P.J. This case arises out of a bus-automobile crash that occurred on April 17, 2010. Plaintiff was operating the automobile, and the bus was owned by defendant Suburban Mobility Authority for Regional Transportation (SMART), a regional transportation authority, and driven by defendant David Gibson. Plaintiff filed suit, alleging that the SMART driver's negligence caused her injuries. The trial court granted summary disposition in favor of defendants on the basis of plaintiff not having met the notice requirements of MCL 124.419, and plaintiff appeals as of right. Because SMART was not provided with written notice of plaintiff's claim within 60 days of the accident, we affirm.

I. STANDARDS OF REVIEW

The grant or denial of summary disposition is reviewed de novo to determine whether the moving party is entitled to judgment as a matter of law. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310; 732 NW2d 164 (2007). "MCR 2.116(C)(7) tests whether a claim is

barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Haliw v Sterling Hts*, 464 Mich 297, 301-302; 627 NW2d 581 (2001) (quotation marks and citation omitted). When deciding a motion for summary disposition under MCR 2.116(C)(7), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). " 'If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.' " *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012), quoting *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Moraccini*, 296 Mich App at 391. To the extent that questions of statutory interpretation are present, we review those de novo. *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003).

II. NOTICE UNDER MCL 124.419

Plaintiff contends that the trial court erred by granting defendants' motion for summary disposition because she provided the requisite notice under MCL 124.419.

> Generally, governmental agencies in Michigan are statutorily immune from tort liability. However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. Statutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities. It is well

> established that statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate. [*Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714-715; 822 NW2d 522 (2012) (citations omitted).]

"The Metropolitan Transportation Authorities Act [MCL 124.401 *et seq*.] describes in what manner liability may be imposed on a transportation authority for situations involving the operation of a common carrier for hire." *Id*. at 715. In this act, MCL 124.419 contains the following notice provision:

> All claims that may arise in connection with the transportation authority *shall be presented as ordinary claims* against a common carrier of passengers for hire: Provided, That *written notice* of any claim based upon injury to persons or property *shall be served* upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . . [Emphasis added.]

Hence, in order to bring claims in derogation of governmental immunity, this statute requires that those claims "be presented as 'ordinary claims' against the common carrier involved." *Atkins*, 492 Mich at 715. Further, if the claim involves injury to a person or property, written notice of the claim must be served on the authority within 60 days of the injury. *Id*.; *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010).

In *Nuculovic*, this Court rejected the plaintiff's claim that proper notice was given because SMART received a copy of the police report and accident reports prepared by the operator of the bus and his supervisor. *Nuculovic*, 287 Mich App at 66. The Court concluded that even though SMART had possession of police reports and reports prepared by SMART's employees, the plaintiff failed to formally deliver (serve)

notice of her claim to SMART and, therefore, the statutory notice requirement was not satisfied. *Id*. at 68. While the Court did refer to the court rules when analyzing what it meant to "serve," we do not believe it was requiring strict compliance with those rules as the only way to comply with MCL 124.419. Instead, it used those rules as examples of how formal delivery could occur. *Id*. at 66-67. As a result, while strict compliance with the court rules may not necessarily be required, some kind of "formal delivery" nonetheless is required. *Id*. at 67-68; see also *Atkins*, 492 Mich at 721.

The rule announced in *Nuculovic* that a plaintiff cannot rely on the internal documents of a defendant transportation authority is sound. The relevant definition of "deliver" in the context of "to serve" is "to give into *another's* possession or keeping." *Random House Webster's College Dictionary* (1997) (emphasis added). Thus, it is clear that a party cannot deliver something to itself; it must deliver to another party. Consequently, a party's internal creation and handling of its own documents cannot constitute a "delivery" or "service" under MCL 124.419. *Nuculovic*, 287 Mich App at 68; see also *Atkins*, 492 Mich at 721 (stating that not requiring a plaintiff to provide the written notice subverts the intent of the Legislature because it would require SMART to anticipate and divine when an injured person is likely to file a suit and then notify itself of this determination).

As a result, plaintiff's claim similarly fails because there is no evidence that the documents she relied on in opposing defendants' motion for summary disposition were anything other than SMART's internal documents or police reports. In the trial court, plaintiff claimed in her response to defendants' motion for

summary disposition that the following demonstrated that she had complied with MCL 124.419:

> In addition to the report that is dated May 10, 2010 and presumed to be in the possession of Defendant SMART, SMART employees Otis Daniel and Jacqueline Owens both responded to the accident scene and completed an accident report detailing their findings. **(Ex. C).** Moreover, and more importantly, an additional SMART accident report was taken, which was time-stamped May 10, 2010, well within the 60-day statutory requirement. **(Ex. D).**

Plaintiff's Exhibit C to that response, indeed, is a "Road Supervisor's Accident Investigation Report" and is the type of internal report that this Court has expressly rejected as being able to constitute written notice under MCL 124.419. *Nuculovic*, 287 Mich App at 66, 68. The first page of Exhibit D is titled "SMART Transit Accident Report," and the second page has the heading "SMART Claimant and Injured Report." Thus, it appears that these also are internal documents and cannot be used to serve written notice of a claim under MCL 124.419. *Id*.

Plaintiff also argued at the trial court that her phone call to SMART's insurer within three weeks of the accident constituted notice under the statute. However, because the statute requires *written* notice, clearly a conversation over a phone call cannot satisfy the notice requirement. Plaintiff then avers that

> [t]his telephone conversation was presumably memorialized in some written form by Defendant SMART's employee giving Defendant SMART notice that Plaintiff intended to file a claim and what that claim would be.

Importantly, plaintiff provided no evidence that any document was generated from this phone call. " '[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet

their burden of providing evidentiary proof establishing a genuine issue of material fact.' " *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (alteration in original).

Because plaintiff provided no evidence that she (or anyone else) formally delivered or served written notice of her claim on SMART within 60 days of the accident, she failed to establish that the statutory notice requirement was satisfied. See *Nuculovic*, 287 Mich App at 68. This case is also analogous to *Smith v Suburban Mobility Auth for Regional Transp*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 294311), rev'd 493 Mich 906 (2012). In reversing the Court of Appeals in *Smith*, our Supreme Court adopted the dissenting opinion of Judge METER, who would have held that the plaintiff's claims were barred because he admitted that he never sent written notice to SMART. *Smith*, unpub op at 2 (METER, J., dissenting). Just like in *Smith*, plaintiff in the instant case admitted that she never sent any written notice of any claim to SMART within 60 days of the accident.

We also note that the Exhibit D that plaintiff relied on, which was a form that labeled plaintiff as a "claimant," would have been insufficient under MCL 124.419 even if the document had not been a SMART internal document because it did not give notice that an "ordinary claim" was being pursued. While plaintiff's name is listed in the area for "claimant information," the document does not disclose that plaintiff is intending to pursue any actual claim, let alone an "ordinary claim," as opposed to a no-fault claim. See *Atkins*, 492 Mich at 717-718 (noting the differences between ordinary claims

and first-party no-fault claims). In other words, the word "claimant," *with nothing more*, does not give notice of what type of claim a plaintiff may be pursuing. The concurrence's suggestion that the statute does not require *any* specifics in the notice has been rejected by our Supreme Court. In *Atkins*, the plaintiff provided written notice that he was seeking first-party no-fault benefits. This Court held that this written notice, along with all the aggregate information available to SMART, was sufficient to allow SMART to have notice that an ordinary tort claim also could be pursued and reasoned that MCL 124.419 "only requires notice of 'a' claim, which it defined as the aggregate of operative facts giving rise to an enforceable right. As a result, reasoned the Court of Appeals, the statute only requires notice without any additional specific requirements of what information must be included." *Atkins*, 492 Mich at 712-713, citing *Atkins v Suburban Mobility Auth for Regional Transp*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2009 (Docket No. 288461), pp 2-3. But the Supreme Court reversed and held that written notice of a no-fault claim was insufficient to provide notice of a tort or "ordinary" claim. *Atkins*, 492 Mich at 718-720. Thus, the logical import from *Atkins* is that notice must be somewhat specific, at least with respect to the type of claim, and notice for one type of claim is insufficient to be notice for another type of claim. Here, looking past the fact that the document at issue was never delivered to SMART, the word "claimant," with nothing more, does not provide sufficient detail regarding what type of claim, if any, plaintiff is pursuing, and it is therefore insufficient to provide notice under MCL 124.419.[1]

[1] We note that our holding does not require a plaintiff to use any particular magic words such as "ordinary tort claim," "ordinary claim,"

III. PREJUDICE

Next, plaintiff argues that even if the statutory notice requirements were not met, summary disposition was not warranted because defendants were not prejudiced. This argument, however, is without merit. In *Trent v Suburban Mobility Auth for Regional Transp*, 252 Mich App 247, 253; 651 NW2d 171 (2002), overruled in part *sub silentio* by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 213; 731 NW2d 41 (2007), and by *McCahan v Brennan*, 492 Mich 730, 733, 746-747; 822 NW2d 747 (2012), this Court held that a governmental agency asserting a deficiency in compliance with a statutory notice provision must show actual prejudice. However, the Michigan Supreme Court disavowed this holding, noting that the Court had "since held that when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed" and also noting that the cases on which *Trent* relied had been overruled. *Atkins*, 492 Mich at 719 n 21. Because "statutory notice requirements must be interpreted and enforced as plainly written," *id*. at 714-715, a showing of prejudice is not required, and the trial court properly granted defendants' motion for summary disposition.

IV. CONCLUSION

In sum, in responding to defendants' motion for summary disposition, plaintiff argued that the statute

or "tort claim." Instead, the written notice simply must, somehow, convey to the defendant authority the nature of the claim.

was satisfied by relying solely on police reports and SMART's internal documents. As these types of documents are inadequate to constitute a served, written notice of a claim, the trial court properly granted defendants' motion for summary disposition. See *Nuculovic*, 287 Mich App at 68. Since no evidence was provided that someone other than SMART created the documents at issue, we need not address whether a writing from someone other than plaintiff or SMART, such as SMART's insurer, would have satisfied the statute.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

FORT HOOD, J., concurred with DONOFRIO, P.J.

SHAPIRO, J. (*concurring*). I concur in affirming the trial court's ruling.

There are two questions at issue in this case. First, did plaintiff comply with the presuit notice requirements set forth in MCL 124.419? Second, if plaintiff did not comply, does the text of the statute mandate the sanction of dismissal?

I. WHAT CONSTITUTES "WRITTEN NOTICE OF ANY CLAIM BASED UPON INJURY TO PERSONS" UNDER MCL 124.419?

I agree with the majority that plaintiff has not complied with MCL 124.419 as interpreted by the Supreme Court in *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707; 822 NW2d 522 (2012). In that case, the Supreme Court held that a regional transportation authority such as SMART cannot deliver or serve documents to itself. *Id*. at 721. Thus, a document prepared by SMART itself cannot satisfy the statute's requirement that it be served,

i.e., formally delivered, to SMART. *Id*.[1] Given that plaintiff concedes that the relevant document was prepared by SMART, she cannot satisfy *Atkins*.

While I join with the majority in this conclusion, I believe that it is incumbent on us to more clearly delineate the precise demands of MCL 124.419. Though the statute has been the subject of several cases over recent years in which writings were held insufficient, the judiciary has failed to provide the bench and bar with sufficient guidance as to how to preserve and litigate these cases in the future.

The statute provides in pertinent part:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . . [MCL 124.419.]

First, as the majority notes, in light of plaintiff's concession we do not reach the question whether, for purposes of MCL 124.419, SMART's insurer is deemed to be SMART itself. No published cases have yet addressed that question, and it is a significant one. If SMART's insurer is deemed to be SMART for purposes of the statute, then delivery of written notice to SMART's insurer would satisfy the statute because it would constitute delivery to SMART. If SMART's in-

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[1] As noted below, *Atkins* also held that a claim for no-fault benefits does not provide notice of a claim for liability or tort-based damages. *Atkins*, 492 Mich at 716. The Court noted that a claimant seeking no-fault benefits was not required to meet the 60-day notice requirement of MCL 124.419 because that statute did not apply to no-fault benefits. *Id*. at 717-720. Accordingly, a claim for no-fault benefits, even if made within 60 days of the incident, could not satisfy MCL 124.419. *Id*.

surer is deemed to be separate from SMART for purposes of the statute, then sending written notice to the insurer would not satisfy the statute, but delivery of a written notice from the insurer to SMART advising it of a claim by a plaintiff would satisfy the statute because SMART would not be delivering the document to itself. In those circumstances, SMART would be receiving notice from the insurer, who, if not legally SMART itself, can deliver a document to SMART. The legal status of SMART's insurer for purposes of this single statute cannot vary from case to case. Either delivery of the notice to SMART's insurer satisfies the statute or delivery by SMART's insurer to SMART satisfies the statute.

Second, the plain text of the statute does not require that the party responsible for the written notice be the plaintiff. The operative phrase requiring provision of the notice is written in the passive voice, i.e., it does not require that any particular person provide the written notice, only that it be provided within 60 days and that the recipient be the defendant-authority.[2] In other contexts, the Legislature has proved itself capable of specifying who must act to provide the notice. MCL 691.1404(1) provides that in cases of defective highways, "*the injured person* . . . shall serve a notice on the governmental agency . . . ." (Emphasis added.) The same language is used in MCL 691.1406 with respect to claims for injury in a public building. Given

[2] Indeed, while sentences written in the passive voice can contain a prepositional phrase identifying who will perform the action, the Legislature pointedly did not do so here. For example, the statement "the ball will be caught by the center fielder" is written in the passive voice, but has an explanatory prepositional phrase identifying who will perform the action. The statement "the ball will be caught" does not contain the explanatory prepositional phrase and means only that the ball will be caught by *someone* who is not identified.

its use of the active construction in many other statutes requiring notice, we must conclude that the Legislature's decision not to do so in MCL 124.419 was intentional. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003) ("[T]his Court should assume that an omission [by the Legislature] was intentional.").

Third, the statute contains no content requirements for the written notice beyond the existence of a claim by a plaintiff. The fact that the words of MCL 124.419 contain no specific requirements about content must mean that the Legislature intended that none apply beyond communicating that a "claim based upon injury to persons or property" exists. "It is well established that statutory notice requirements must be interpreted and enforced as plainly written . . . ." *Atkins*, 492 Mich at 714-715. "[T]he common carrier must simply be told of the claim within 60 days and through service of a [written] notice." *Id*. at 721. In this case, but for the failure of delivery (since SMART cannot deliver notice to itself), the document would have been sufficient because it identified plaintiff by name on two occasions as "CLAIMANT."[3] It further lists extensive information regarding, among other things, the nature, timing, and conditions of the crash, the extent of vehicular damage, and the transport of injured persons to the hospital. A "claim" has been defined by our Supreme Court as " '[t]he aggregate of operative facts giving rise to a right enforceable by a court[.]' " *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549,

[3] The majority opinion seems to conclude that the written identification of plaintiff as the "claimant" is insufficient. It is difficult to understand why referring to plaintiff as "claimant" would not inform SMART that she is making a claim. What else could it mean? Why would a textualist reading of the word "claimant" define it as disconnected from the concept of a "claim"?

554; 640 NW2d 256 (2002), quoting *Black's Law Dictionary* (7th ed). Thus, the document at issue identifies a "*claim* based upon *injury to persons or property*."

The Legislature has adopted pretrial notice requirements in several settings and has repeatedly demonstrated its ability to establish particularized elements or specify the form that a notice must take. For example, in the medical malpractice setting, MCL 600.2912b(4) contains six subdivisions, each explaining in detail what a notice must contain.[4] Similarly, MCL 691.1406 requires notice of a claim arising out of a defect in a public building and includes the provision that "[t]he notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant."

The statute we consider here, by contrast, requires only that a defendant-authority receive "written notice

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[4] MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

of [a] claim." Given that the Legislature has demonstrated its ability to place specific requirements on the content of presuit notices, we must conclude that the absence of requirements in MCL 124.419 was intentional. *Houghton Lake*, 255 Mich App at 135. *Atkins* held that a claim specifically designated as one for no-fault personal protection insurance benefits did not constitute notice of a claim other than for those statutory benefits.[5] *Atkins*, 492 Mich at 716. It did not require that a notice of claim that is not specified as a no-fault claim must otherwise state that it is for an "ordinary claim" or a "tort claim."

Fourth, I agree with the majority's rejection of defendant's argument that the requirement of formal delivery or service can only be satisfied by undertaking "service" as defined in the court rules, specifically MCR 2.105. As the majority correctly notes, *Nuculovic v Hill*, 287 Mich App 58, 67-68; 783 NW2d 124 (2010), did not require compliance with the court rules pertaining to service, but only suggested that action in conformity with them is one possible means of formal delivery, not that it is required under MCL 124.419.[6]

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[5] The *Atkins* Court was careful to state that the question before it was "whether an application for no-fault benefits can suffice as the notice of a separate tort claim that MCL 124.419 requires." *Atkins*, 492 Mich at 716.

[6] By its own terms, MCR 2.105 applies only to service of "process." "Process" is "a summons or writ, [especially] to appear or respond in court[.]" *Black's Law Dictionary* (10th ed). *Black's* goes on to offer the following discussion:

> "*Process* is so denominated because it *proceeds* or issues forth in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writs or judicial means by which he is brought to answer."

* * *

II. IS DISMISSAL REQUIRED FOR FAILURE TO COMPLY WITH MCL 124.419?

Having determined that plaintiff failed to comply with the statutory requirement of written notice under MCL 124.419, the remaining question is whether the statute mandates dismissal of the case or whether the trial court has discretion to impose a lesser sanction.

I am constrained by Supreme Court precedent to reject plaintiff's argument that dismissal is not required when the notice was not provided as set forth in the statute. In *Atkins*, the Supreme Court stated, "The Legislature has determined that it will waive governmental immunity in cases of personal injury or property damage that occur in connection with a common carrier of passengers for hire only when written notice of the claim is served on the transportation authority within 60 days." *Atkins*, 492 Mich at 722.[7]

" 'Process' and 'writ' or 'writs' are synonymous, in the sense that every writ is a process, and in a narrow sense of the term 'process' is limited to judicial writs in an action, or at least to writs or writings *issued from or out of a court, under the seal thereof* and returnable thereto . . . ." [*Id.* (emphasis added in second paragraph and citations omitted).]

There is no basis to apply court rules to matters that are not yet in court. Had the Legislature wished to make the requirements of the court rule applicable, it could have readily done so by direct reference. Moreover, MCR 1.103 provides in part that "[t]he Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan." The provision of a notice of claim, such as that required by MCL 124.419, is by definition not a matter of procedure "in [a] court." The notice *may* later be followed by a suit in court, but it does not and cannot initiate a cause of action. It is not a complaint. It does not require an answer. It does not entitle the claimant to any discovery, to trial, or to any sort of adjudication. The requirements for legal service in the court rules are inapplicable to the instant question.

[7] *Atkins* did not address whether these requirements comport with due process either facially or as applied under particular circumstances, e.g., when a claimant is incompetent.

As an intermediate court of appeals, we are required to follow this ruling. See *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). However, I respectfully suggest that the Supreme Court revisit this question. First, MCL 124.419 makes no mention of governmental immunity or its waiver. Second, there are significant differences in the text used in MCL 124.419 and the statutes the Supreme Court found comparable, namely MCL 691.1404 and MCL 600.6431. MCL 600.6431(1) contains explicit language not present in the statute we now consider: "No claim may be maintained against the state unless the claimant . . . ." Its command is clear; if the notice requirements are not met, the claim "may [not] be maintained." Similarly, MCL 691.1404(1) states that provision of notice is "a condition to any recovery for injuries . . . ." If the condition is not met, no recovery may lie.

The text of MCL 124.419 does not contain the word "dismissal" or phrases such as "no claim shall be maintained" or "as a condition of recovery." Instead, the statute reads:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . .

The statute's words are what they are. Claims arising in connection with a regional transportation authority are to be addressed in the same manner as a similar suit against any other common carrier, "Provided, That written notice" is given. Considering only the text, the mandate of the statute is that if

written notice is not provided, the claim shall not be litigated "as ordinary claims against a common carrier." However, there are many ways other than dismissal that a case can be treated differently from that of an ordinary claim against a common carrier. Limitations on recovery, greater proof requirements, and qualified discovery are only three ways in which failure to comply with this provision may be sanctioned in a manner fully in accordance with the plain language of the statute.

One may fairly argue that dismissal must be the remedy the Legislature intended as the sanction for a failure of notice. Such a reading is certainly not *inconsistent* with the text of the statute. However, textualism is a demanding and restricting approach to judging. It is always tempting for a court to conclude that even though the Legislature did not explicitly say something, "it must be what the Legislature meant." However, textualism does not allow that conclusion to be drawn. The only meaning of the statute is that clearly and literally imposed by the words it employs. Once the door is opened to going beyond the very words of the text, there is no end to it. One judge's reasonable determination of the meaning of statutory language is another judge's impermissible application of policy preferences beyond the text itself.[8] While the Supreme

[8] In contrast to our Supreme Court, many scholars and judges reject strict textualism as inconsistent with the very function of the judiciary. Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has written:

> A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text. Ignoring the limitations of foresight, and also the fact that a statute is a collective product that often leaves many questions of interpretation to be answered by the courts because the legislators cannot agree on the answers, the textual originalist demands that the

Court's *interpretation* of MCL 124.419 requires dismissal (and is a reasonable one), it is not based in what the words actually say and is not the only reasonable interpretation. Indeed, the words "reasonable interpretation" seem so subjective as to have little, if any, place in textualist analysis.[9]

> legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. [Posner, *The Spirit Killeth, But the Letter Giveth Life*, The New Republic (September 13, 2012), p 18, reviewing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West, 2012).]

[9] Imposing "reasonable interpretations" on statutory language can lead even the most dedicated textualists astray. See, e.g., *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) (concluding that a medical malpractice complaint filed without an affidavit of merit does not toll the statute of limitations, contrary to MCL 600.5856, which states that "[t]he statutes of limitations or repose are tolled . . . [a]t the time the complaint is filed"); *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007) (holding that the provision in MCL 324.1701(1) establishing the right of "any person [to bring suit] for the protection of the air, water, and other natural resources and the public trust in these resources" does not give standing to "any person"); *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (concluding that the Michigan Consumer Protection Act does not apply to fraudulent transactions as long as a nonfraudulent version of that transaction is permitted by law); *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004) ("deduc[ing]" several requirements to meet the threshold for a third-party automobile claim not present in the statutory text), overruled by *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010); *Fairley v Dep't of Corrections*, 497 Mich 290, 297-299 & n 15; 871 NW2d 129 (2015) (requiring that a complaint shown to have been "signed and verified . . . before an officer authorized to administer oaths" under MCL 600.6431 be dismissed unless the signed verification statement contains proof on its face of the name and credentials of the officer because "common sense counsels in favor of this outcome" despite the fact that the text of the statute provides no such requirement); *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000) (limiting suits against governmental agents because the phrase "the proximate cause" as used in the governmental-employee provision of the governmental immunity act, MCL 691.1407(2), "means the one most imme-

diate, efficient, and direct cause" of the injuries). Contra *Shinholster v Annapolis Hosp*, 471 Mich 540, 551-552; 685 NW2d 275 (2004) (concluding that the plaintiff's damages could be reduced by comparative negligence that long preceded the claims of malpractice in the case because "[t]he proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space") (quotation marks and citations omitted).

GREAT LAKES SHORES, INC v BARTLEY

Docket No. 320913. Submitted May 8, 2015, at Detroit. Decided May 14, 2015. Approved for publication July 2, 2015, at 9:00 a.m.

Great Lakes Shores, Inc., brought an action in the Sanilac Circuit Court against Jennifer M. Bartley for failing to pay several years' worth of the annual dues and assessments she owed as a lot owner at the summer resort plaintiff managed. Defendant claimed that she had not received a bill from plaintiff in more than eight years, but plaintiff's president averred that invoices had been sent to defendant for the dues and assessments, and plaintiff had recorded a lien for the unpaid amount. Plaintiff moved for summary disposition and indicated that it was seeking $400 in unpaid dues and assessments, $40 in late fees, $574.40 in court costs, and more than $6,000 in attorney fees. The court, Donald A. Teeple, J., granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) and entered a judgment of $974.40, which included the unpaid dues and costs but not the late fees or attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by denying plaintiff's motion for attorney fees. Although attorney fees are generally not recoverable from a losing party unless authorized by a statute or court rule, there are exceptions, including when attorney fees are recoverable under a contract between the parties. In this case, plaintiff's bylaws provided that attorney fees and costs associated with unpaid dues and assessments became part of the lien on the property, and defendant, as a lot owner, was a shareholder in plaintiff corporation. Accordingly, the bylaws were a contract between plaintiff and defendant, and attorney fees were thus authorized.

2. Although the proposed order plaintiff filed under MCR 2.602(B)(3) did not include an award for late fees, the bylaws provided for a $10 late fee and defendant had failed to pay her dues for four years. Therefore, $40 in late fees was appropriate, and the trial court was ordered to correct the failure to award this amount on remand.

Reversed and remanded for further proceedings.

The Meisner Law Group, PC (by *Robert M. Meisner* and *Lindsay James*), for plaintiff.

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

PER CURIAM. Plaintiff Great Lakes Shores, Inc., brought an action against Jennifer M. Bartley for failing to pay the annual dues she owed as a lot owner at plaintiff's resort. The trial court granted plaintiff's motion for summary disposition but denied plaintiff's request for attorney fees. Plaintiff appeals as of right. We reverse and remand.

According to its brief, plaintiff is a nonprofit corporation that is "designated to administer the affairs of Great Lakes Shores," which is a summer resort in Worth Township. Plaintiff is organized under the summer resort owners corporation act, MCL 455.201 *et seq*. Lot owners are required to pay yearly dues and assessments, which are used to maintain the resort property and to pay for taxes and insurance. Plaintiff alleges that defendant paid her dues and assessments from 2004 through 2009, but that she thereafter failed to pay. According to plaintiff, the amount of dues and assessments owed was $400. In December 2012, plaintiff recorded a lien for the unpaid dues and assessments.

Plaintiff thereafter filed suit, asserting one count for "foreclosure of association lien" and one count for "collection of unpaid assessments." Plaintiff also alleged that it was entitled to recover attorney fees pursuant to its bylaws. In her answer to plaintiff's complaint, defendant alleged that she had not received any bills from plaintiff for more than eight years.

Plaintiff subsequently moved for summary disposition. In an attached affidavit, plaintiff's president

averred that invoices had been sent to defendant for her dues and assessments. Plaintiff contended that in view of this fact and the fact that defendant had paid her dues and assessments from 2004 through 2009, her allegation that she had not received a bill from plaintiff in more than eight years was not an adequate defense. Plaintiff sought $400 in unpaid dues and assessments, $40 in late fees, $574.40 in court costs, and $6,007.29 in attorney fees. In its motion, plaintiff did not seek to foreclose its lien, but it argued in its brief that it was entitled to seek foreclosure. In response, defendant did not provide any evidentiary materials, but contended that there remained material questions of fact regarding whether plaintiff had billed defendant for dues and assessments. Defendant further argued that according to the bylaws, plaintiff did not have authority under the bylaws to sue for money damages. Defendant argued that plaintiff only had "authority to place a lien upon the property and enforce that lien through Court action."

The trial court granted summary disposition for plaintiff, because defendant had failed to provide any evidentiary materials to contradict plaintiff's evidence showing that defendant had indeed received the invoices. It did not address defendant's argument that plaintiff was only entitled to foreclose its lien. However, the court declined to award plaintiff attorney fees. Plaintiff moved for reconsideration regarding the denial of attorney fees, which the trial court denied without elaboration.

Plaintiff argues that the trial court erred by declining to award its attorney fees. This Court reviews a trial court's determination whether to award attorney fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A

trial court's findings of fact are reviewed for clear error. *Id*. Underlying questions of law are reviewed de novo. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012).

As a general rule, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 217; 818 NW2d 478 (2012). One such other exception is when attorney fees are recoverable pursuant to a contract between the parties. *Fleet Bus Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). Such contractual provisions are enforceable. *Id*. The bylaws of a corporation constitute a contract between a corporation and its shareholders. *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 315; 206 NW2d 490 (1973). In the present case, it seems clear that defendant, as a lot owner in the resort, was a shareholder in plaintiff corporation.[1] Therefore, if the bylaws provide for attorney fees in this case, the trial court should have awarded them.

Turning to the bylaws, they state in pertinent part as follows:

> All annual dues and/or special assessments levied against any or all members not paid by August 31st each year shall become a lien upon the property of the delinquent member and such delinquencies may be enforced by Court action. All costs of such action shall be assessed to the member and become part of said lien, including by [sic] not limited to actual attorney fees.

Defendant argued below that attorney fees are only recoverable if plaintiff foreclosed its lien. However, the

[1] *Black's Law Dictionary* (10th ed) defines "shareholder" as "[s]omeone who owns or holds a share or shares in a company, esp. a corporation."

above provision clearly contemplates permitting both a lien and a separate action to collect delinquent dues. The provision identifies a lien and an action to collect unpaid dues as separate and distinct avenues of relief for plaintiff. Therefore, because the bylaws, a contract between plaintiff and defendant, permitted plaintiff to seek attorney fees that it incurred to recover unpaid dues and assessments, the trial court should have awarded such fees.

Finally, plaintiff also argues that the trial court erred by failing to award $40 in late fees. The bylaws provide for a $10 late fee if a member's dues are not paid on time. Because defendant failed to pay her dues for four years, $40 in late fees was appropriate.

Following the hearing on plaintiff's motion for summary disposition, plaintiff filed a proposed order under the seven-day rule. MCR 2.602(B)(3). Plaintiff's proposed order did not contain an award for $40 in late fees. Defendant did not object to the proposed order, and the trial court adopted plaintiff's proposed order apparently without alteration. Accordingly, the failure to account for the late fees is attributable to plaintiff. Nevertheless, because reversal is required to address attorney fees, we direct the trial court to correct this as well on remand.

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

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

PEOPLE v DANIELS

Docket No. 320499. Submitted June 2, 2015, at Detroit. Decided July 2, 2015, at 9:05 a.m. Leave to appeal sought.

Daniel G. Daniels was convicted following a jury trial in the Macomb Circuit Court, James M. Biernat, Jr., J., of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); three counts of second-degree child abuse, MCL 750.136b(3); and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for abuse perpetrated against two of his children. Defendant appealed.

The Court of Appeals *held*:

1. On the day before trial was scheduled to begin, defendant moved to adjourn the case because his expert witness was not available to testify. The trial court denied the motion. Under MCR 2.503, a request for adjournment because of the absence of a witness must be based on good cause, must be made as soon as possible, and may only be granted if diligent efforts were made to produce the witness. Even if good cause and diligence are established, a trial court's denial of a request for adjournment does not provide a basis for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. In this case, the trial court did not abuse its discretion or deprive defendant of the opportunity to present a defense by refusing his request for an adjournment. Defendant did not attempt to secure the testimony of an expert until shortly before his trial was scheduled to begin, failed to offer any proof that the expert he intended to call would testify on his behalf in manner that would be helpful to the jury, and had already caused a several-month delay of the trial in order to, among other things, secure the testimony of an expert. Defendant, therefore, failed to establish good cause for further delay and diligence in attempting to secure the testimony of the witness.

2. Both federal and state law guarantee a defendant the right of self-representation, although this right is subject to the trial court's discretion. Under MRE 611(a), the trial court may limit the defendant's cross-examination to protect a witness from harassment or undue embarrassment. MRE 611(a) allows the trial court to prohibit a defendant from personally cross-

examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault. In this case, the trial court prohibited defendant, who represented himself at trial, from personally cross-examining three of his children. Instead, the court instructed defendant to formulate questions for his children, which his advisory attorney then used to cross-examine them. This process did not interfere with defendant's right to represent himself. The trial court made its decision to prohibit defendant from personally cross-examining two of the children after a motion hearing at which it heard considerable evidence that defendant's personal cross-examination would cause them significant trauma and emotional stress. The trial court's decision to prohibit defendant from personally cross-examining the third child was equally sensible. The court made the decision after it witnessed the testimony of the first two children during the trial, at which time they both expressed great fear of their father. Defendant did not have a constitutional right to personally cross-examine the children, and the court properly prevented defendant from cross-examining them under MRE 611(a) so that they would not suffer harassment or undue embarrassment.

3. Under MCL 768.27b, generally, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, including to prove the character of the accused, if it is not otherwise excluded under MRE 403. Under MRE 403, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In this case, defendant argued that the trial court abused its discretion when it admitted testimony from defendant's other children concerning acts of violence that he had committed against them. But MCL 768.27b required the trial court to admit this testimony because (1) it was relevant, (2) it described acts of "domestic violence" under the statute, and (3) its probative value was not outweighed by the risk of unfair prejudice under MRE 403.

Affirmed.

CRIMINAL LAW — RIGHT TO SELF-REPRESENTATION — LIMITATIONS.

Both federal and state law guarantee a defendant the right of self-representation, but under MRE 611(a), a trial court may limit

> the defendant's cross-examination of a witness to protect the witness from harassment or undue embarrassment; in accordance with MRE 611(a), a trial court may prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault (US Const, Am VI; Const 1963, art 1, § 13).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kristin E. Lavoy* and *Michael Mittlestat*) for defendant.

Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

SAAD, P.J. Defendant appeals his jury trial convictions of child molestation and abuse. Because defendant's arguments lack merit, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case stems from defendant's physical and sexual abuse of two of his daughters, AD and OD. After employees at Care House interviewed AD and OD in July 2012,[1] the prosecution charged defendant with (1) two counts of first-degree criminal sexual conduct,

[1] AD and OD were also interviewed at Care House in 2010 after AD made comments that compared male genitalia to female genitalia, and claimed that her brother, ND, had "showed me his." No charges resulted against ND. At trial, AD told the jury that her statements actually related to defendant's abuse, but that he effectively convinced her to blame ND for the incident. According to defendant's wife and the forensic interviewer who spoke with AD and OD in 2012, defendant disparaged Care House employees after the 2010 interview, referring to them as "scary people," and confronted the girls about what information they had disclosed in their conversations.

MCL 750.520b(1)(a); (2) three counts of second-degree child abuse, MCL 750.136b(3); and (3) one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The charges related exclusively to defendant's abuse of AD and OD.

A. DEFENDANT'S REQUEST FOR AN EXPERT WITNESS

Over a year before trial, defendant's initial trial attorney requested the appointment of an expert witness to testify on forensic interviewing techniques used to interview victims of child molestation. The trial court awarded $1,500 in public funds to defendant for this purpose in April 2013 and suggested that defendant's trial should be scheduled for June 2013. Defendant requested additional time to locate an expert, which the trial court permitted, and the court rescheduled trial for December 2013.

By October 2013, defendant chose to represent himself, albeit with advisory counsel. At this time, his advisory attorney told the court that defendant was in the process of finding an expert to testify on forensic interviewing techniques. Though defendant and advisory counsel promised to contact two prospective expert witnesses within the week, it is unclear whether they contacted one of the potential witnesses, and the other witness told them that he no longer testified in court. Defendant then attempted to secure Dr. Katherine Okla as his expert witness, and, on the day before trial, moved to adjourn the case until she was available to testify, which would not be until at least January 10, 2014. The prosecution objected to the motion and noted that defendant could cross-examine the forensic interviewer—who had actually interviewed AD and OD—on the subject of proper interviewing techniques.

The trial court concurred with the prosecution and denied defendant's motion. In so doing, the trial court stated that defendant had (1) delayed trial "for a very long time," (2) failed to explain how the lack of an expert witness would prejudice him, and (3) failed to provide sufficient information regarding Okla's testimony—which raised the possibility that Okla would actually "testify against the interest of the defendant."

During trial, defendant again raised the issue of procuring an expert witness to testify on forensic interviewing, and at defendant's request, the trial court increased the public allotment for an expert witness to $2,000. Despite the trial court's extensive accommodation of his demands, defendant failed to call Okla or any other expert in forensic interviewing.

B. TRIAL

At trial, which took place in December 2013, the jury heard testimony from five of defendant's children, including AD and OD, defendant's wife, a neighbor, police officers, the Care House employees who had interviewed AD and OD, and defendant himself. The testimony of these witnesses demonstrated that defendant committed multiple acts of child molestation and domestic violence over a period of years.

During the 2000s, defendant and his family lived in a two-bedroom home. Defendant is the father of six children, three daughters and three sons. After his younger son, ND, moved out of the house, defendant stopped sleeping in the marital bedroom and began to sleep on a twin bed in his daughters' room. Defendant also bathed naked with his children, was often alone with them in the bathroom, and instructed his wife to leave the bathroom if she entered it when he was with the children. In general, defendant's wife and children

testified that defendant's demeanor was generally unpleasant and abusive—he frequently had outbursts of anger, regularly used expletives to refer to the children in place of their names, and committed other acts of physical[2] and sexual abuse.

OD testified that defendant touched and digitally penetrated her vagina on multiple occasions. Specifically, defendant molested her in two contexts: (1) in her bed, when he would touch her vagina, and (2) while she bathed, when he would touch and digitally penetrate her vagina. Defendant's abuse of OD was not limited to molestation—he also physically abused her. In an apparent attempt to discipline OD for misbehaving at dinner, defendant grabbed her and threw her across the room. AD testified that defendant "flung [OD] and she landed sprawled out on the floor like maybe three or four feet away from her chair." When AD looked at defendant "in awe" after he

[2] The trial court permitted the admission of defendant's other acts of physical and sexual abuse pursuant to, respectively, MCL 768.27b and MCL 768.27a. Three of defendant's other children, KD, CD, and ND, testified that defendant physically abused them when he (1) pulled KD down the stairs, causing a rug burn, and spanked her hard on the buttocks, (2) spanked and threw CD into a wall, slapped and knocked over CD on a camping trip, and told personnel at a hospital that CD was suicidal when he actually had attempted to run away from home to escape defendant's abuse, and (3) threw a garbage can and shovel at ND.

Two of these children, KD and CD, also testified that defendant sexually abused them. KD stated that defendant reached inside her pajama pants and underwear and touched her buttocks cheek. CD testified that, when he was between five and nine years old, defendant would sit behind CD in the bathtub and rub his genitalia against CD's back. CD reported these allegations to the police in 2010, which did not result in criminal charges. Though the trial court had initially ruled CD could not testify on defendant's sexual abuse of him, because it had allegedly occurred long before the crimes with which defendant was charged, defendant opened the door to the testimony by questioning a police detective about the nature of the allegations CD made against him in 2010.

abused OD, defendant told her "don't look at me like that. [OD] was ruining our dinner." Defendant's wife also stated that the girls relayed this incident to her, but defendant assured her that the children were "blowing [the incident] out of proportion."

Defendant's sexual abuse of AD was more extensive. According to AD, defendant bathed with her until she was in third grade and continued to "assist" with her baths for a year after. If AD attempted to sit away from defendant in the bathtub, defendant would lift her up and pull her toward his genitalia. In addition to this general abuse, AD told the jury of three specific episodes of molestation. Two of these took place in the bathroom: in one instance, defendant purported to instruct AD on how to properly wash her vagina, by rubbing his hand on her vagina; in the other, he punished her for "sassing back" by locking her in the bathroom and forcing her to put his penis in her mouth and lick it. After the latter molestation, defendant pushed AD out of the bathroom, which caused her to hit her head on the hallway wall.

AD also testified that defendant molested her in a fashion similar to the way in which he molested OD, by digitally penetrating her while she lay undressed in defendant's bed. AD stated that this penetration physically hurt her and that defendant also rubbed his penis on her unclothed thighs and stomach. When AD confronted defendant about his actions, he replied, "remember daddy loves you."

In his testimony, defendant stated that he occasionally called his children names, but denied physically or sexually abusing any of his children. Defendant's stand-by counsel cross-examined AD, OD, and KD[3] because the trial court barred defendant from per-

[3] At the time of trial, AD, OD, and KD were, respectively, 12, 9, and 11 years old. CD and ND were both over 18.

sonally conducting the cross-examination of these three child witnesses. It initially prohibited defendant only from cross-examining AD and OD in an order issued after a motion hearing in July 2013. Considering the testimony of AD, OD, and defendant's wife, which had been given at defendant's preliminary examination, the trial court found that permitting defendant to cross-examine the girls would allow him to victimize them yet again. The court also observed that defendant had previously attempted to silence his daughters by badgering them about their interview with Care House in 2010 and making incendiary remarks to his family about Care House employees. The trial court expanded its order to include KD after witnessing AD and OD's testimony at trial, in which both girls expressed great fear of their father. During trial, defendant confronted the girls, but did not cross-examine them—instead, he wrote questions for the girls and gave the questions to his advisory attorney, who then cross-examined the girls using the questions provided by defendant.

After 10 days of proceedings, the jury convicted defendant as charged. On appeal, defendant argues that the trial court violated his constitutional rights to (1) present a defense, when the court denied his request to adjourn the trial so he could secure an expert witness, and (2) represent himself, when the court barred him from personally cross-examining AD, OD, and KD. Defendant also says that the trial court erred when it admitted evidence that he committed other acts of physical abuse separate from the charged crimes. The prosecution asks us to affirm the rulings of the trial court and defendant's convictions.

II. STANDARD OF REVIEW

The decision whether to allow a party to add an

expert witness or grant a motion for an adjournment is reviewed for an abuse of discretion, *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992), as is the court's decision whether to admit or exclude evidence, *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Duenaz*, 306 Mich App 85, 90; 854 NW2d 531 (2014).

Constitutional questions are matters of law that we review de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This Court reviews a trial court's ultimate decision regarding a limitation on cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). We also review a trial court's decision on a defendant's request to represent himself for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). Findings of fact are reviewed for clear error. *People v Gaines*, 306 Mich App 289, 304; 856 NW2d 222 (2014).

III. ANALYSIS

A. PRESENTATION OF A DEFENSE

A criminal defendant has a state and federal constitutional right to present a defense, which includes the right to call witnesses, but this right is not absolute. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A defendant must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (citations and quotation marks omitted).

MCR 2.503 is the established rule of procedure that governs adjournments, particularly to secure the testimony of a witness. In relevant part, it states:

(B) Motion or Stipulation for Adjournment.

(1) Unless the court allows otherwise, a request for an adjournment must be by motion or stipulation made in writing or orally in open court based on good cause.

* * *

(C) Absence of Witness or Evidence.

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

Under Michigan law, if a defendant seeks an adjournment based on the absence of an expert witness, he must show both "good cause and diligence" in pursuit of that expert witness. *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). " 'Good cause' factors include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003) (citation and quotation marks omitted). "Even with good cause and due diligence, the trial court's denial of a request for an adjournment . . . is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id*. at 18-19.

Here, defendant unconvincingly claims that the trial court deprived him of his right to present a defense when it denied his request for an adjournment to secure Okla's testimony on forensic interviewing. Despite the fact that his first attorney raised the issue of

hiring an expert witness to testify on forensic interviewing *over a year* before trial, defendant admits that he did not attempt to locate and secure potential expert witnesses until soon before the trial began. And despite learning that the witnesses he contacted could not testify, he did not move for an adjournment until the *day before trial*. At that time, Okla had not yet reviewed the record, and defendant failed to offer any proof that (1) she would testify on his behalf or (2) her expertise would be relevant or helpful to the jury. See *People v Bynum*, 496 Mich 610, 623-624; 852 NW2d 570 (2014).

Moreover, defendant had already caused his trial to be delayed for several months—not only so that he could secure an expert witness, but also so that defendant could file and respond to motions, obtain discovery, and request an evaluation of his competency. The trial court accommodated defendant in each of these prior instances, yet defendant continued to persist in his attempts to delay trial. Therefore, he has failed to show good cause for further delay in pursuit of an expert witness. See *Taylor*, 159 Mich App at 489. In fact, he was negligent, not diligent, in pursuit of an expert witness and did not make use of the generous time and monetary allotments the trial court gave him so he could secure a witness. The trial court accordingly did not violate his right to present a defense when it denied his request for an adjournment. See *Yost*, 278 Mich App at 379.

Were we nonetheless to assume that defendant had shown good cause and diligence in pursuit of an expert witness, the trial court's refusal to adjourn the trial would not warrant reversal because defendant fails to show that the absence of Okla prejudiced him in any significant way. Though defendant describes in his

brief on appeal the general subjects to which Okla would have testified, there is no indication that Okla's testimony would have materially benefited defendant's case. See *Coy*, 258 Mich App at 18-19.

B. MRE 611(a)

"Both federal and state law . . . guarantee a defendant the right of self-representation, although this right is subject to the trial court's discretion." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005) (citations omitted). For example, the trial court may bar a defendant's self-representation if it finds that the defendant's "self-representation will . . . disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004).

In its management of the self-representing defendant's cross-examination of witnesses, the trial court, as in all instances, may limit the defendant's cross-examination to protect the witness from "harassment or undue embarrassment." MRE 611(a). This is because "[t]he right of cross-examination . . . may bow to accommodate other legitimate interests of the trial process or of society." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Accordingly, we find persuasive the reasoning of *People v Doolittle*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2008 (Docket No. 271739), p 1, in which another panel of our Court concluded that "a trial court, in certain circumstances, may prohibit a defendant who is exercising his right to self-representation from personally questioning the victim."[4]

[4] Unpublished opinions are not binding, but may be persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). See also *Fields v Murray*, 49 F3d 1024, 1036-1037 (CA

Stated another way, MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault. The court must balance the criminal defendant's right to self-representation with "the State's important interest in protecting child sexual abuse victims from further trauma." *Fields v Murray*, 49 F3d 1024, 1037 (CA 4, 1995).

Here, defendant's assertions that the trial court violated his right to self-representation are particularly unconvincing.[5] Again, the trial court prohibited

4, 1995) (affirming the trial court's denial of the defendant's request to represent himself for the sole purpose of personally cross-examining child witnesses, whom he had molested); *Partin v Commonwealth*, 168 SW3d 23, 27-29 (Ky, 2005) (holding that right of self-representation does not "mean that [the defendant has] a constitutional right to personally cross-examine the victim(s) of his crimes"); *Applegate v Commonwealth*, 299 SW3d 266, 273 (Ky, 2009) ("Even if a defendant is granted the right to cross-examine witnesses, there is no constitutional right to personally cross-examine the victim of his crimes."). Cases from foreign jurisdictions are not binding, but may be persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

[5] Defendant conflates the constitutional *right to confront witnesses* with the *right to self-representation*. The trial court never prevented defendant from confronting AD, KD, and OD—it merely required defendant's attorney to perform the cross-examination of these witnesses, as opposed to permitting defendant to question them himself. For this reason, defendant's extensive citation of *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990)—a case in which a Maryland court had permitted a 6-year-old victim of sexual abuse to testify *out of court*, via closed-circuit television—is inapposite and unavailing. In the instant action, the trial court was not required to follow the procedures of *Craig* because it *did not* prohibit defendant from confronting the witnesses against him, which is the only circumstance in which *Craig*'s procedural mandates apply. Instead, the trial court properly managed the presentation of witnesses under MRE 611(a). *Adamski*, 198 Mich App at 138. Defendant cites no relevant authority to support his claim that the trial court was not permitted to take the actions that it did under this applicable rule of evidence. "An appellant may not merely announce his

defendant, who represented himself, from personally cross-examining AD, OD, and KD. Instead, the court instructed defendant to formulate questions for his daughters, which his advisory attorney then used to cross-examine them. In no way did this decision interfere with defendant's right to represent himself. At all times in this case, defendant maintained autonomy in presenting his defense, and was able to control the direction of the cross-examination of his daughters by writing the relevant questions for his advisory attorney. The record also demonstrates that advisory counsel conferred with defendant and received assistance from him in coordinating the exhibits during those examinations. See *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

To repeat, the trial court made its decision to prohibit defendant from personally cross-examining AD and OD (who were, respectively, 12 and 9 years old at the time) after a motion hearing at which it heard considerable evidence that defendant's personal cross-examination would cause them significant trauma and emotional stress. At defendant's preliminary examination, AD testified that defendant repeatedly attempted to frighten her. OD broke down in tears on multiple occasions, paused for great lengths, and fell asleep on the witness stand while testifying, indicating great

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position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

And, in any event, despite defendant's assertions to the contrary, the trial court, in a surfeit of thoroughness and caution, essentially satisfied *Craig*'s procedural mandates—which it was not required to do. Again, the trial court made its decision to prohibit defendant from personally cross-examining AD and OD *after* it heard extensive evidence that allowing defendant to do so would traumatize AD and OD. See *Craig*, 497 US at 855-856; *People v Rose*, 289 Mich App 499, 516; 808 NW2d 301 (2010); *People v Buie*, 285 Mich App 401, 408-410; 775 NW2d 817 (2009).

emotional discomfort. Furthermore, as the prosecution argued at the July 2013 motion hearing, defendant succeeded in silencing his daughters after the 2010 interview at Care House, by demanding to know what they had told the social workers and telling his daughters that the Care House employees were "scary people." The trial court properly inferred that his interrogation during trial could have a similar intimidating effect on his daughters. The trial court's decision to prohibit defendant from personally cross-examining KD was equally sensible. It did so after it witnessed the testimony of AD and OD at trial, in which both girls expressed great fear of their father.

Therefore, it is clear that the trial court wisely and properly prevented defendant from personally cross-examining AD, OD, and KD to stop the children from suffering "harassment or undue embarrassment." MRE 611(a); see also *Adamski*, 198 Mich App at 138. In no way did this violate defendant's right to self-representation because a criminal defendant has "no constitutional right to personally cross-examine the victim of his crimes." *Applegate v Commonwealth*, 299 SW3d 266, 273 (Ky, 2009). Defendant's arguments to the contrary are unsupported and without merit.

C. OTHER ACTS EVIDENCE UNDER MCL 768.27b[6]

A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). MCL 768.27b(1) provides:

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[6] As described in note 2 of this opinion, the court permitted KD and CD to testify that defendant committed other acts of sexual abuse against them. The trial court admitted this evidence pursuant to MCL 768.27a. Defendant does not challenge the admission of this evidence on appeal.

> Except as provided in subsection (4) [concerning acts occurring more than 10 years before the charged offense], in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible *for any purpose for which it is relevant*, if it is not otherwise excluded under Michigan rule of evidence 403. [Emphasis added.]

In turn, MCL 768.27b(5)(a) defines "domestic violence" and "offense involving domestic violence" to mean

> an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:
>
> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

"The language of MCL 768.27b clearly indicates that trial courts have discretion 'to admit relevant evidence of other domestic assaults *to prove any issue, even the character of the accused*, if the evidence meets the standard of MRE 403.' " *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (citation omitted; emphasis added). This evidence "can be admitted at trial because 'a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed.' " *Id*.

at 610, quoting *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007) (alteration in original).

MRE 403, which is "used sparingly" to exclude evidence, *People v Uribe*, 310 Mich App 467, 472; 872 NW2d 511 (2015), provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

When it determines whether the probative value of evidence is substantially outweighed by unfair prejudice under MRE 403, a court performs a balancing test that looks to these factors, among others:

> [T]he time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).]

Here, defendant wrongly contends that the trial court abused its discretion when it permitted the admission of testimony from KD, CD, and ND, pursuant to MCL 768.27b, that defendant committed other acts of physical violence against them. Again, KD, CD, and ND testified that defendant physically abused them when he (1) pulled KD down the stairs, causing a rug burn, and spanked her hard on the buttocks, (2) spanked and threw CD into a wall, slapped and knocked over CD on a camping trip, and told personnel at a hospital that CD was suicidal when he actually had attempted to run away from home to escape

defendant's abuse, and (3) threw a garbage can and shovel at ND. MCL 768.27b *required* the trial court to admit this testimony because (1) it is relevant, (2) it describes acts of "domestic violence" under the statute, and (3) its probative value is not outweighed by the risk of unfair prejudice under MRE 403.

Each of the acts of physical violence to which KD, CD, and ND testified are relevant because they tend to make "a material fact at issue"—i.e., whether defendant physically abused AD and OD—"more probable or less probable than [the material fact] would be" without the testimony. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The testimony also involves acts of "domestic violence" under MCL 768.27b because the children described instances in which defendant either "caus[ed] or attempt[ed] to cause physical or mental harm to a family or household member" through actual physical abuse. MCL 768.27b(5)(a)(*i*).

Nor is the probative value of the testimony outweighed by the risk of unfair prejudice to defendant under MRE 403. The testimony is highly probative because it demonstrates defendant's violent and aggressive tendencies, as well as his repeated history of committing physical abuse of all his children—not just AD and OD. In other words, it gave the jury " 'a full and complete picture of a defendant's history [and] tend[s] to shed light on the likelihood that a given crime was committed.' " *Cameron*, 291 Mich App at 610, quoting *Pattison*, 276 Mich App at 620 (second alteration in original). And none of the factors that would indicate this probative value is outweighed by a danger of "unfair prejudice"—e.g., delay of defendant's trial, a cumulative nature, a potential to mislead or confuse the jury—is present. See *Blackston*, 481 Mich at 462.

Accordingly, the trial court ruled properly under MCL 768.27b when it admitted the testimony of KD, CD, and ND regarding the physical violence defendant committed against them.

Affirmed.

M. J. KELLY and SHAPIRO, JJ., concurred with SAAD, P.J.

WILLIAMSTOWN TOWNSHIP v HUDSON

Docket No. 321306. Submitted May 5, 2015, at Lansing. Decided May 19, 2015. Approved for publication July 2, 2015, at 9:10 a.m.

Williamstown Township brought a nuisance action in the Ingham Circuit Court against Jeremiah Hudson for operating a commercial farm on his residential property in violation of local zoning ordinances. The court, Rosemarie E. Aquilina, J., issued an order for defendant to show cause that an injunction should not be issued. In response, defendant moved for summary disposition under MCR 2.116(C)(8), arguing that the local ordinances at issue were preempted by the Right to Farm Act (RTFA), MCL 286.471 *et seq*., which shielded his farm from plaintiff's lawsuit. Plaintiff also moved for summary disposition on the grounds that the RTFA was inapplicable and that the farm was not complying with generally accepted agricultural and management practices (GAAMPs). Defendant responded, arguing in part that the farm had received tentative approval of its operations under the Michigan Agricultural Environmental Assurance Program (MAEAP), which he alleged was equivalent to the GAAMPs. Before the hearing on these motions, plaintiff lodged a complaint with the Michigan Department of Agriculture and Rural Development (MDARD), alleging that defendant's farm was a source of noise, odor, potential manure runoff, and water pollution. An MDARD investigation indicated several concerns related to manure discharges, manure runoff, and erosion, and the investigator directed defendant to develop a manure management system plan. Although defendant did submit a plan, MDARD deemed it insufficient. At the hearing on the motion for summary disposition, defendant and his wife testified that after making several changes to their farm, their manure removal system was in compliance with the GAAMPs. Plaintiff moved for a directed verdict under MCR 2.516 or for involuntary dismissal under MCR 2.504(B)(2). In its opinion and order, the court granted plaintiff's motions under MCR 2.116(C)(9) and (10), MCR 2.504(B)(2), and MCR 2.517, and denied defendant's motion under MCR 2.116(C)(8). The court confirmed that the farm was a commercial farming operation under the RTFA, but rejected defendant's contention that GAAMP verification was unnecessary if MAEAP

certification was obtained, ruling instead that defendant had failed to satisfy all applicable GAAMPs, that the testimony of defendant's wife that the farm had done so lacked credibility, and that defendant had therefore failed to establish an affirmative defense under the RTFA. The court also ruled that plaintiff had proved a nuisance per se, and it enjoined defendant's farming activities. Defendant's motion for reconsideration was denied. Defendant appealed.

The Court of Appeals *held*:

1. The trial court properly granted plaintiff's motions under MCR 2.504(B)(2). In reaching its conclusions, the court cited MCR 2.116(C)(8), (9), and (10); MCR 2.504(B)(2); and MCR 2.517. Motions for summary disposition under either MCR 2.116(C)(8) or (C)(9) test the legal support for a claim, either on the pleadings alone under (C)(8) or on the sufficiency of a party's defense under (C)(9). In contrast, motions for summary disposition under MCR 2.116(C)(10) and those for directed verdict under MCR 2.516 or involuntary dismissal under MCR 2.504(B)(2) test the factual support for a claim. In the case of motions for a directed verdict and motions for summary disposition under MCR 2.116(C)(10), all factual disputes are resolved in favor of the nonmoving party. Credibility determinations are inappropriate, and the motions may be granted only if no factual disputes exist. In contrast, a motion for involuntary dismissal calls upon the trial court to exercise its function as trier of fact, weigh the evidence, pass upon the credibility of witnesses, and select between conflicting inferences, and the plaintiff is not given the advantage of the most favorable interpretation of the evidence. Although the trial court cited all these rules in reaching its conclusion, its opinion clearly looked beyond the pleadings, and the court made not only factual findings but also credibility determinations. Accordingly, the only applicable rule supporting the court's holding was MCR 2.504(B)(2). This was consistent with the trial court's explanation on the record that it would treat, and grant, plaintiff's motion for directed verdict as a motion for involuntary dismissal. Further, when a trial court's opinion does not invoke the proper court rule supporting its ruling, the appellate court may look to the substance of the holding to determine which rule governs. Because the trial court conducted an evidentiary hearing and made findings of fact after defendant presented his evidence and after plaintiff's motion for involuntary dismissal, MCR 2.504(B)(2) was clearly the applicable rule. Therefore, although the issuance of the injunction and the applicability of the RTFA were reviewed de novo, the

trial court's factual findings—appropriately made under MCR 2.504(B)(2)—were reviewed for clear error, and the court was not required to view the evidence in the light most favorable to defendant, to resolve all conflicts of evidence in his favor, or to determine whether there was a genuine issue of material fact.

2. The trial court did not err by concluding that defendant had failed to establish an affirmative defense under the RTFA. The RTFA exempts farms or farm operations from the enforcement of nuisance laws provided, among other things, that the farm adheres to the applicable GAAMPs. The RTFA also expressly preempts local laws, including zoning ordinances, that conflict with the RTFA or applicable GAAMPs. The party asserting RTFA protection bears the burden of proving that the challenged condition or activity constitutes a farm or farm operation and that the farm or farm operation conforms to the applicable GAAMPs. The MDARD investigation indicated that defendant's farm did not comply with GAAMPs manure manual, and the only evidence defendant presented to the contrary was that of his wife. Under MCR 2.504(B)(2), the trial court was not required to resolve factual disputes in defendant's favor, but rather was empowered to make its own factual findings and credibility determinations. Because the court did not clearly err in this regard, its decision was affirmed.

Affirmed.

Murphy & Spagnuolo, PC (by *Gary L. Bender*), for plaintiff.

David G. Cox and *Stephen Bemis* for defendant.

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

PER CURIAM. Defendant, Jeremiah Hudson, appeals as of right the trial court's order holding that his family farm constitutes a nuisance per se and enjoining his farming operations, Sweet Peas Farms. On appeal, Hudson argues that the Right to Farm Act (RTFA), MCL 286.471 *et seq*., shielded his family farm from conflicting local zoning ordinances and that the trial

court erroneously evaluated the credibility of his evidence in determining otherwise. For the reasons explained below, we affirm.

I. BACKGROUND

The facts of this case stretch back to August 2012 when Hudson and his family moved into their current home in Williamstown Township (the Township). To the east and north of Hudson's property is Williamston High School's property line.[1] A path to the high school's athletic fields lies immediately north of Hudson's land.

From the time his family moved in, Hudson kept farm animals on his property. Through May 2013, these animals included rabbits, pigs, chickens, goats, quail, and ducks. It is undisputed that local zoning ordinances do not permit these animals on residential property such as Hudson's. Towards the end of 2012, the Township began receiving complaints about Hudson's farm animals, so the Township took action. On December 11 of that year, the Township informed Hudson that his keeping those animals violated certain zoning ordinances because his property was located within a One Family Residential, or R-1, District. Nine days later, Hudson responded that the farm animals were there to facilitate his children's participation in 4-H. Hudson's wife then sent the Township a letter of her own explaining that the animals were necessary to feed her children because of their many food allergies and that her children participated in 4-H for the animals' proper care. Adamant that the Township had previously granted her family permission to keep the animals, Mrs.

[1] Although the name of the Township is "Williamstown," the largest nearby city is Williamston.

Hudson also made several attempts to amend the ordinances. None proved successful.

In the meantime, Hudson continued farming, so, on April 5, 2013, the Township filed this lawsuit. In its complaint, the Township alleged a nuisance per se based on Hudson's violation of local ordinances (1) prohibiting farming on residential property, and (2) setting forth standards for operating home businesses. The Township also requested injunctive relief. In lieu of answering, Hudson moved for summary disposition under MCR 2.116(C)(8). He argued that the RTFA preempted conflicting zoning ordinances such as the Township's.

The Township countered with its own motion for summary disposition under MCR 2.116(C)(9) and (10) on May 29, 2013. The Township maintained that the RTFA was inapplicable since the zoning ordinances predated Hudson's farm, and that the farm otherwise did not comply with the generally accepted agricultural and management practices (GAAMPs). The Township additionally contended that Hudson's farming activities were not commercial as evidenced by Hudson's changing explanations of those activities.

Hudson responded that the farm was commercial based on its sale of products, that the Township's permit process conflicted with the RTFA, and that no GAAMPs were applicable because the farm had fewer than 250 animals. Alternatively, Hudson noted that even if certain GAAMPs applied, the farm had received tentative approval under the Michigan Agricultural Environmental Assurance Program (MAEAP), which he alleged is the equivalent of the GAAMPs.

In addition to moving for summary disposition, the Township also lodged a complaint with the Michigan Department of Agriculture and Rural Development

(MDARD) on May 9, 2013. This complaint pertained to noise, odor, potential manure runoff, and water pollution from Hudson's farm. A Right to Farm investigation on Hudson's property ensued on May 17, 2013. Wayne Whitman, an MDARD Environmental Manager, led the investigation, after which he noted several concerns. They included (1) the potential for direct discharge from a surface grate outlet on the property, (2) an area of bare soil with potential for erosion, (3) areas where manure could run off onto neighboring properties, and (4) the need for soil testing where manure would be applied to the property. Whitman elaborated that Hudson needed to address these concerns before MDARD could determine whether his farming practices conformed to the GAAMPs' Manure Management and Utilization Manual (Manure Manual).

After his investigation, Whitman sent four letters to Hudson as work progressed on the property over the summer. The first, sent June 3, 2013, instructed Hudson to control polluted runoff from the property and to prevent manure discharge from the drainage system. Whitman's letter additionally directed Hudson to work with Jennifer Silveri and the Ingham Conservation District to develop a Manure Management System Plan (MMSP). That plan was required to include provisions to revegetate the bare soil in the area of concentrated flow across the backyard, manure management practices to prevent polluted water and manure from discharging into the grate and drainage structure, and soil test reports for areas where manure might be applied. Hudson's MMSP (or letter of intent to develop one) was due by July 16, 2013.

The second letter, dated June 14, 2013, confirmed receipt of Hudson's MMSP, which he had apparently

completed. Whitman still saw problems, however. Specifically, the area tested in the soil sample was for limited manure application in broad areas rather than the specific areas where manure would be applied. Additionally, Whitman reiterated the need to revegetate the bare soil in the area of concentrated flow to prevent manure runoff and to institute manure management practices to prevent polluted water and manure from discharging into the grate and drainage structure. Again, Hudson had until July 16, 2013, to submit a revised MMSP.

In the interim, on June 19, 2013, Whitman averred that Hudson still had not complied with the Manure Manual. Whitman was likewise clear that compliance with this and all applicable GAAMPs (and other conservation practices) was necessary for MAEAP approval since merely satisfying the GAAMPs under the RTFA was not equivalent.

A month later, Whitman sent a third letter. This one, dated July 17, 2013, indicated that Whitman had reviewed Hudson's e-mails indicating Hudson's implementation of the MMSP. However, that plan was apparently deficient since Whitman instructed Hudson to provide a revised MMSP and a current soil test report from soil samples where manure would be applied. If Hudson did not do this, Whitman warned, the Michigan Department of Environmental Quality would have to investigate.

On August 23, 2013, Whitman sent Hudson his last letter. This one alleged that Hudson had not complied with the GAAMP Manure Manual or submitted the appropriate MMSPs. Whitman reiterated the property's environmental risks resulting from potential erosion from the bare soil as well as manure runoff onto neighboring properties. Additionally, the storm grate

located near the shed that was used as a poultry shelter created the potential for manure discharge onto neighboring properties. Significantly, Whitman noted MDARD had yet to receive any documentation from Hudson regarding the potential pollution on his property.

In the midst of these communications, the parties' summary disposition motion hearing, slated for June 19, 2013, was adjourned when the trial court granted Hudson's request to present proofs. The ensuing evidentiary hearing commenced over three months later, on October 2, 2013. During that hearing, Hudson's evidence consisted predominantly of his wife's testimony; the Township's consisted of Whitman's letters noted previously.

Regarding the former, Mrs. Hudson testified about her family's efforts to comply with the GAAMPs (she claimed the farm was in compliance) and her interaction with the various governmental agencies and Whitman (who, she claimed, did not think the Hudsons' efforts to comply were "good enough"). Specifically, Mrs. Hudson asserted that by January 2013 the Hudsons had contacted the MAEAP to commence its verification process. In response to Whitman's investigation, letters, and even his deposition testimony,[2] the Hudsons moved their animals to a different location on the property, tested the storm grate to determine whether it discharged water, sealed that grate with concrete, submitted soil samples where manure would be applied, stored manure in plastic bags and removed it every one to two months, and, in September 2013, installed a rain garden, grass, and berm to control water runoff. As for Whitman, Mrs. Hudson

[2] Whitman was deposed September 4, 2013. His deposition testimony was not before the trial court in ruling on this motion.

denied—contrary to her affidavit—that there was standing water or water runoff when Whitman investigated in May. This was impossible, she claimed, since their neighbor's property to the south was at a higher elevation. Mrs. Hudson added that the demands in Whitman's letters, which were difficult to decipher, required only submitting a manure management plan and addressing the drain and runoff problems since Whitman—who had not visited the property since the May investigation—mentioned no GAAMP other than manure management. Finally, Mrs. Hudson indicated that although the farm had not received MAEAP certification or GAAMP verification because "no one" would verify the Hudsons' remedial measures, she believed the Hudsons' manure removal was GAAMP compliant. Hudson, who also testified briefly, agreed with his wife's assessment on GAAMP compliance. He also asserted that his neighbor's property to the south of his own lies at a higher elevation.

When the hearing continued February 22, 2014, the Township moved for a directed verdict, MCR 2.516, or for involuntary dismissal, MCR 2.504(B)(2). The trial court granted this motion on the record and subsequently issued a 25-page opinion and order. In its opinion, the court initially confirmed that the farm was a commercial farming operation under the RTFA. However, based on Whitman's affidavit, the court rejected Hudson's contention that GAAMP verification was unnecessary if MAEAP certification was obtained. Instead, the court held that Hudson's failure to satisfy all applicable GAAMPs—including those in the Manure Management, Site Selection, and Animal Care Manuals—precluded application of the RTFA.

Regarding the Site Selection Manual, the court ruled that the farm could satisfy neither the 250-foot property-line setback requirement (prohibiting livestock production facilities within 250 feet of the property line) given the property's dimensions nor the requirement prohibiting the construction of livestock production facilities within 1,500 feet of residential zones given the farm's proximity to Williamston High School's athletic fields. As for the Manure Manual, the court noted that Whitman's investigation and letters repeatedly required Hudson to alleviate standing water and runoff issues, but, based on Whitman's August 23, 2013 letter, MDARD had received no documentation of potential pollution from Hudson. This failure likewise precluded compliance with the Animal Care Manual. In reaching these determinations, the court expressly discounted Mrs. Hudson's testimony as lacking credibility since it was inconsistent and she otherwise admitted knowingly moving into a residential zone and not seeking a variance.

Accordingly, the court ruled that Hudson had failed to establish an affirmative defense under the RTFA and that the Township had proved a nuisance per se. On February 26, 2014, the court enjoined Hudson's farming activities as conflicting with the Township's zoning ordinances. Hudson's subsequent motion for reconsideration was denied.

Hudson appealed, but continued to farm in defiance of the injunction. He finally stopped over three months later, on June 11, 2014, i.e., the date set for hearing on the Township's motion to show cause for refusal to comply with the court's order. Although the court ultimately found Hudson in contempt for his

continuing to farm, the sanctions hearing was adjourned pending our resolution of this appeal.

II. ANALYSIS

Hudson's appeal is straightforward. He claims that the RTFA protects his farm from the Township's zoning ordinances. Our review of the record reveals that it does not.

A. STANDARD OF REVIEW

In rejecting Hudson's argument and enjoining his farming operations, the trial court's opinion and order cites five different rules and subrules as governing its conclusion—specifically, MCR 2.116(C)(8), (9), and (10); MCR 2.504(B)(2); and MCR 2.517. The standard of review differs for each, however, since each is, by nature, distinct from the other. See *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664; 593 NW2d 578 (1999) (noting the differing standards between MCR 2.116(C)(8) and (10)); *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, 223 Mich App 559, 564 n 3; 567 NW2d 456 (1997) ("While grants of summary disposition motions under MCR 2.116(C)(8) are often generically referred to as 'dismissals,' they are, by their nature, distinct from dismissals under such provisions of the rules as MCR 2.504 . . . ."); *Willoughby v Lehrbass*, 150 Mich App 319, 329; 388 NW2d 688 (1986) ("The standard of review differs depending on whether the court's action was an involuntary dismissal under MCR 2.504(B), formerly GCR 1963, 504.2, a directed verdict granted under MCR 2.515, formerly GCR 1963, 515.1, a grant of summary [disposition] under MCR 2.116(C)(10), formerly GCR 1963, 117.2(3), or a denial of a motion to amend pleadings.").

Motions for summary disposition under either MCR 2.116(C)(8) or (9) test the legal support for a claim—either on the pleadings alone under (C)(8), *McManamon v Redford Charter Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003), or on the sufficiency of a party's defense under (C)(9), *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). In contrast, motions for summary disposition under MCR 2.116(C)(10) and those for directed verdict, MCR 2.516, or involuntary dismissal, MCR 2.504(B)(2), test the factual support for a claim. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995) (motions for involuntary dismissal test the factual support for a claim); *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994) (motions for summary disposition under (C)(10) and those for directed verdict test the factual support for a claim).

The standards for the motions testing the factual support for a claim differ even further. In the case of motions for a directed verdict and motions for summary disposition under MCR 2.116(C)(10), all factual disputes are resolved in favor of the nonmoving party. *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). Credibility determinations are inappropriate, and the motions may be granted only if no factual disputes exist. *Id*. In contrast, "a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences. Plaintiff is not given the advantage of the most favorable interpretation of the evidence." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983), citing 2 Honigman & Hawkins, Michigan Court Rules Anno-

tated (2d ed), pp 332-333.[3]

Here, although the trial court cited all of these rules in reaching its conclusion, its opinion clearly looked beyond the pleadings. Indeed, the court not only made factual findings but also made credibility determinations. All of this was done after Hudson presented his proofs at the evidentiary hearing *that he requested*. Accordingly, the only applicable rule supporting the court's holding is MCR 2.504(B)(2).[4] This is consistent with the trial court's explanation on the record that it would treat (and grant) the Township's motion for directed verdict as a motion for involuntary dismissal. This was wholly proper. *Armoudlian v Zadeh*, 116 Mich App 659, 671; 323 NW2d 502 (1982).

But even setting this explanation aside, where a court's opinion does not invoke the proper court rule supporting its ruling, we may look to the substance of the holding to determine which rule governs. See *Shields v Grandstaff*, 161 Mich App 175, 179; 410 NW2d 308 (1987) ("Although the trial court's ruling was somewhat . . . confusing, the substance of the holding was correct."), aff'd sub nom *Shields v Reddo*, 432 Mich 761;

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[3] Although *Marderosian* pertained to MCR 2.504(B)(2)'s predecessor, GCR 1963, 504, the 1985 Staff Comment to MCR 2.504 expressly notes that the current rule is based on the prior one.

[4] MCR 2.504(B)(2) provides:

> In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

443 NW2d 145 (1989); see also *Krass*, 233 Mich App at 664-665 (reviewing the appeal under the standard for MCR 2.116(C)(10) based on the substance of the court's ruling even though motions were filed under (C)(8) and (10) and the trial court did not specify under which standard it ruled); *Armoudlian*, 116 Mich App at 671 (reviewing an order granting directed verdict as one granting involuntary dismissal).

Accordingly, because the court conducted an evidentiary hearing and made findings of fact after Hudson presented his evidence and after the Township's motion for involuntary dismissal, MCR 2.504(B)(2) is clearly the applicable rule. This means that although we review de novo the issuance of the injunction, *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994), and the applicability of the RTFA, we review the trial court's factual findings—appropriately made under MCR 2.504(B)(2)—for clear error, *id*. "A trial court's findings are considered clearly erroneous where we are left with a definite and firm conviction that a mistake has been made." *Id*. We review de novo issues of statutory interpretation. *Scholma v Ottawa Co Rd Comm*, 303 Mich App 12, 16; 840 NW2d 186 (2013).

Moreover, because MCR 2.504(B)(2) is the applicable rule, Hudson is incorrect that the court was required to view the evidence in the light most favorable to him, to resolve all conflicts of evidence in his favor, or to determine whether there was a genuine issue of material fact. *Willoughby*, 150 Mich App at 329. Those standards are applicable under MCR 2.116(C)(10) and MCR 2.516, but they do not apply here.[5] Mindful of the applicable standard, then, we now turn to the merits of Hudson's appeal.

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[5] Although not fatal to its case, the Township incorrectly argues that the trial court properly drew permissible inferences from the evidence

B. RTFA

"The RTFA was enacted to protect farmers from nuisance lawsuits." *Scholma*, 303 Mich App at 22. To this end, the statute exempts farms or farm operations from the enforcement of nuisance laws provided, among other things, the farm or farm operation adheres to the applicable GAAMPs. MCL 286.473(1); *Scholma*, 303 Mich App at 23-24. As the RTFA provides in relevant part:

> A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. [MCL 286.473(1).][6]

The RTFA also expressly preempts local laws, including zoning ordinances, that conflict with the RTFA or applicable GAAMPs:

> [T]his act preempt[s] any local ordinances, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. [MCL 286.474(6).]

The protections of the RTFA constitute an affirmative defense; accordingly, the party asserting RTFA protection bears the burden of proving the following: (1) that the challenged condition or activity constitutes a "farm" or "farm operation" and (2) that the farm or farm operation conforms to the applicable GAAMPs. *Lima*

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under MCR 2.116(C)(10). Again, the court properly made factual findings on a motion for involuntary dismissal, not inferences under MCR 2.116(C)(10).

[6] The parties agree that MCL 286.473(2) (providing that a farm is not a public or private nuisance if the farm existed before a change in land use within a mile of its boundaries) does not apply.

Twp v Bateson, 302 Mich App 483, 494; 838 NW2d 898 (2013). Only the second element is at issue here.[7]

In rejecting Hudson's RTFA defense, the trial court initially held that three GAAMPs applied to Hudson's farm. However, the record contains no evidence that the farm was under investigation for compliance with any GAAMP except the Manure Manual. Indeed, contrary to the court's holding (and as Hudson points out on appeal), Hudson never admitted that either the Site Selection or Animal Care Manuals applied. Likewise, Whitman's letters and investigation pertained *only* to the farm's manure management practices. The court's rulings that Hudson failed to comply with the Site Selection and Animal Care Manuals are therefore unsupported. Compliance with the Manure Manual is a different story, however.

Regarding the farm's manure practices, Whitman's investigation clearly outlined problems concerning direct discharge from a surface grate, as well as issues concerning a bare soil area, manure runoff, and necessary soil testing. His subsequent letters reiterated those concerns. Despite Hudson's submission of two MMSPs, Whitman indicated on August 23, 2013, that the farm was still not compliant with the Manure Manual. Even worse, as of that date, MDARD still had not received *any* documentation from Hudson regarding the potential pollution on his property.

Hudson does not contest the Manure Manual's applicability on appeal.[8] Instead, he claims the farm

[7] The trial court held that Hudson operated a commercial farming operation, and therefore his property satisfied the RTFA's definition of "farm." See MCL 286.472(2)(a). The Township does not challenge that conclusion.

[8] The Manure Manual expressly includes provisions regarding runoff control, wastewater management, and manure application to land.

complied with it. In support, Hudson cites his wife's testimony that the farm complied with all applicable GAAMPs and that the necessary corrective action occurred *after* Whitman's most recent letter of August 23, 2013. Accordingly, Hudson maintains that Whitman's letters—which constituted the Township's only evidence at the hearing—are moot, and the trial court therefore erred, minimally, by failing to hold that a genuine issue of material fact existed.

The problem for Hudson is that the substance of the trial court's ruling fell under MCR 2.504(B)(2), not MCR 2.116(C)(10) (or any of the other rules previously analyzed). Accordingly, the trial court was not required to resolve factual disputes in Hudson's favor. Rather, MCR 2.504(B)(2) empowered the court to make its own factual findings and credibility determinations, which it did. On this score the court found Mrs. Hudson's testimony incredible based upon her contradictory statements regarding the number of animals on the farm and her understanding about how the property was zoned at the time the Hudsons moved onto their land. It was on these grounds that the court apparently discounted Mrs. Hudson's conclusion that their remedial measures (conducted after Whitman's last letter) satisfied the Manure Manual's requirements.

Because Mrs. Hudson's testimony is convoluted at best on these points,[9] we are certainly in no position to disturb the trial court's decision to discount her testimony. Indeed, inconsistent statements are important determinants of credibility, especially where the only supporting evidence is a witness's testimony and there are no "externally analyzable indicia of truth." *Wil-*

[9] Mrs. Hudson testified equivocally as to the number of animals on the farm and as to whether she believed the property was zoned as residential when her family initially moved there.

liams v Williams, 214 Mich App 391, 399; 542 NW2d 892 (1995). And in any event, Mrs. Hudson admitted that the farm had never formally received GAAMP verification. She claimed the reason for this was that "no one will come to verify that I've done everything they've asked." But the alleged remedial measures Mrs. Hudson described did not occur (and a new MMSP was apparently not written) until well after the deadlines in Whitman's letters. Moreover, while Mrs. Hudson claimed to rely on information from Whitman's September 4, 2013 deposition in deciphering the GAAMP requirements, that transcript was not before the court when ruling on this motion. Thus, the *only* evidence Hudson presented concerning the farm's compliance with the Manure Manual was his wife's own *ipse dixit*.[10] Again, it is this evidence whose credibility the trial court found lacking. Absent more, then, we must defer to the trial's court determination on this point and affirm the decision that Hudson failed to shoulder his burden.[11]

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[10] Although Hudson provided additional evidence with his motion for reconsideration and in his reply to the opposition of his motion for stay (including a consultant's report that the farm was GAAMP compliant), that evidence was not before the court when it ruled on the motion for involuntary dismissal. Similarly, the offer of proof Hudson's attorney presented (which allegedly summarized the consultant's report) was in the context of his requesting reconsideration. But Hudson should have provided this evidence in his initial briefing or during the portion of the hearing addressing the motion for involuntary dismissal. Because he did not, we will not consider it now. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000) ("[W]e can find no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued.").

[11] The Township claims that Hudson's farm is otherwise not compliant with certain changes to the Site Selection Manual approved in early 2014. That argument is moot, however, since Hudson failed to properly establish compliance with the Manure Manual, which has been applicable throughout the entirety of these proceedings.

Hudson accuses the court of going beyond the "permissible evidence" in rendering its decision. He bases this on the court's so-called findings that (1) Hudson admitted the applicability of the Site Selection and Animal Care Manuals, (2) the Hudsons blogged about this matter, (3) the Hudsons were defending this action on behalf of others, (4) there is a war between the residential and farming communities, (5) the Hudsons received donations for their defense, (6) the Hudsons' farm stank, and (7) rainfall would cause surface runoff. Hudson claims these findings "quite possibly had an influence" on the court's decision. The problem is—with the exception of the Site Selection and Animal Care Manuals (which we have already addressed)—none of those appears in the court's opinion and order granting involuntary dismissal. Instead, the court made those references at the show-cause hearing. Even still, Hudson's claim is, on its face, purely speculative given his conclusion that these issues "quite possibly had an influence" on the court's ruling.

Finally, we reject Hudson's challenge to the injunction since he premises this argument entirely on the wrong standard. Again, MCR 2.504(B)(2) permitted the court to make credibility evaluations and factual findings in determining whether Hudson proved his RTFA defense. Those findings were not clearly erroneous and the trial court's decision must stand.[12]

Affirmed.

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[12] Although it appears the Hudsons may otherwise face difficulty satisfying the amendments to the Site Selection Manual as the Township notes, the appropriate forum to litigate that issue in the first instance is the trial court, not here. Regardless, the Township's argument is moot in light of our conclusion that the trial court did not err.

No costs, a public question being involved. MCR 7.219.

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

PEOPLE v POOLE (ON REMAND)

Docket No. 315982. Submitted June 11, 2015, at Lansing. Decided July 7, 2015, at 9:00 a.m. Leave to appeal denied, 498 Mich 922.

Gilbert L. Poole, Jr., was convicted in the Oakland Circuit Court of first-degree murder, MCL 750.316, in 1989 with respect to the death of Robert Mejia. Defendant appealed his conviction, and the Court of Appeals affirmed in an unpublished opinion per curiam issued January 21, 1993 (Docket No. 120955). The Michigan Supreme Court thereafter denied defendant's application for leave to appeal. *People v Poole*, 442 Mich 933 (1993). In 2005, defendant moved for a new trial, relying in part on MCL 770.16, which permits convicted felons to petition for DNA testing in certain circumstances. The circuit court denied defendant's motion. Defendant filed a delayed application for leave to appeal and moved the Court of Appeals to remand for DNA testing. The Court of Appeals denied defendant's application for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D) and also denied the motion to remand in an unpublished order entered October 23, 2007 (Docket No. 276973). The Supreme Court denied defendant's application for leave to appeal. 480 Mich 1186 (2008). In 2012, defendant petitioned the circuit court for an order for DNA testing under MCL 770.16. The court, Rae Lee Chabot, J., denied the petition. The Court of Appeals MURPHY, C.J., and WHITBECK and TALBOT, JJ., held that the law of the case doctrine precluded defendant from obtaining relief under MCL 770.16 in an unpublished opinion per curiam issued September 2, 2014 (Docket No. 315982). Defendant sought leave to appeal. In lieu of granting leave to appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals, holding, in part, that the law of the case doctrine did not apply because the prior orders denying leave to appeal were not rulings on the merits. The Supreme Court remanded the case to the Court of Appeals for consideration of the issues raised by defendant but not addressed by the Court of Appeals in its initial review of the case. *People v Poole*, 497 Mich 1022 (2015).

On remand, the Court of Appeals *held*:

Under MCL 770.16, a defendant convicted of a felony at trial before January 8, 2001, who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction. Of the factors subject to consideration under MCL 770.16(1) through (4), the only point of contention in this case concerned MCL 770.16(4)(a) and whether the blood samples sought to be tested were material to the issue of defendant's identity as the perpetrator of the murder. In this case, blood was found on stones and grass at the crime scene. All the blood was consistent with the victim's blood type, none of the blood matched defendant's blood type, and one blood sample matched neither defendant's nor the victim's blood type. That evidence was presented to the jury. If one removed from consideration the fact that blood-type testing was performed on the evidence and that the results were submitted to the jury, there would have been no dispute that the blood samples were material to defendant's identity as the perpetrator. The difficulty in this case was whether materiality under MCL 770.16(4)(a) was affected by the fact that the jury was presented with blood-type evidence that excluded defendant as the source of the blood samples. To the extent the circuit court held that the blood samples were immaterial under MCL 770.16(4)(a) given the blood-type evidence submitted to the jury, the court erred. The materiality of the blood samples to the issue of identity was not affected by the fact that blood-type evidence excluding defendant as a donor was already presented at trial; all this scientific evidence was material to defendant's identity as the perpetrator. Rather, the somewhat cumulative nature of the evidence might have played a role in deciding a future motion for new trial. Furthermore, the blood identified as being consistent with the victim's blood type may or may not have been his blood, leaving open the possibility that another individual was involved in the crime. The blood identified as being inconsistent with both the victim's and defendant's blood type also suggested the possibility that another individual was involved in the crime. Although it was true that both the blood-type results and the prospective DNA results might equally exclude defendant as being the donor of the blood samples found at the crime scene, the fact is that DNA evidence and blood-type evidence are not typically of equal value. In this case, there was a distinction between the jury knowing in a broad general sense that the blood of an unknown person was present at the crime scene and the jury potentially learning through DNA testing that the blood of a particular

person, perhaps an acquaintance of the victim or a person who was with him the night he died, could be linked to the crime scene. Reasonable doubt would more likely flow from the identification of a specific individual, especially if the person was present in the area at the time of the murder, as opposed to a wholly unknown figure. DNA testing was justified because, under the circumstances, there was prima facie proof that the blood samples were material to defendant's identity as the perpetrator given that the DNA testing could point to another specific individual as the perpetrator. The circuit court also erred to the extent that it denied defendant's motion under MCL 770.16(8). If, after a court has ordered DNA testing, the results of that testing show that the defendant is not the source of the biological materials, MCL 770.16(8) only allows for a new trial upon a hearing and the presentation of clear and convincing evidence showing that only the perpetrator could have been the source of the identified biological material, showing that the biological material was not contaminated or seriously degraded, and showing that the defendant's purported exclusion, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial. The trial court's ruling here may have reflected its conclusion that, assuming the expected exclusion of defendant as a donor upon any DNA testing, no new trial would be warranted or justified, because defendant already had a trial in which the jury knew that defendant had been excluded. To the extent the court jumped ahead and contemplated defendant's entitlement to a new trial, the court erred. MCL 770.16 envisions two main phases of analysis; the first phase involves the court assessing whether DNA testing should be ordered and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted. The circuit court here should have been solely concerned with the first phase of the analysis. If a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, the court must order DNA testing under MCL 770.16(4). Accordingly, it would be improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing.

Reversed and remanded for entry of an order directing DNA testing.

CRIMINAL LAW — FELONY CONVICTIONS BEFORE JANUARY 8, 2001 — DNA TESTING OF BIOLOGICAL MATERIAL — ENTITLEMENT TO TESTING.

Under MCL 770.16, a defendant convicted of a felony at trial before January 8, 2001, who is serving a prison sentence for the felony

conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction; if a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, the court must order DNA testing; MCL 770.16 envisions two main phases of analysis; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing is ordered, whether a motion for new trial should be granted; it is improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing.

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 Thomas M. Cooley Innocence Project (by *Marla Mitchell-Cichon*, *Donna McKneelen*, and *Cassandra M. Babel*) for defendant.

ON REMAND

Before: MURPHY, P.J., TALBOT, C.J., and SAWYER, J.

MURPHY, P.J. Defendant petitioned the trial court under MCL 770.16 for an order directing DNA testing of biological material obtained by the police in their investigation of a 1988 murder for which defendant was convicted. The trial court denied the petition, concluding that simple blood-type evidence presented to the jury at defendant's criminal trial in 1989 had already excluded defendant as the source of collected blood samples, with one sample even producing a blood-type result unlinked to either defendant or the victim, yet defendant was still convicted by the jury. Therefore, according to the trial court, DNA testing

would add nothing new for purposes of a retrial and simply confirm that defendant's blood was not present at the crime scene. We affirmed the trial court's decision, not on the merits, but on the basis of the law of the case doctrine in light of the case's procedural history in which prior comparable claims raised by defendant had been rejected in orders issued by this Court and the Michigan Supreme Court. Our Supreme Court then reversed our holding in an order, ruling that the law of the case doctrine did not apply, given that the previous appellate orders did not constitute decisions on the merits. *People v Poole*, 497 Mich 1022 (2015). The Supreme Court remanded the case to us for consideration of issues raised by defendant that were not addressed in our original opinion. We now reverse the trial court's ruling and remand for DNA testing.

The extensive history of this case was set forth in our prior opinion and, for ease of reference, we now quote that background here:

> Defendant was convicted of first-degree murder, MCL 750.316, in 1989 with respect to the slaying of Robert Mejia, whose body was found in a field in Pontiac on June 7, 1988. There was blood covering Mejia's shirt and pants. An autopsy revealed that he sustained eight stab wounds to the face, neck, and upper chest area. The depth of the wounds ranged from one-half inch to four inches. Mejia also sustained multiple superficial cuts and incised wounds, and he had abrasions and contusions on his arms and back, indicating that there had been a struggle. There was also a bite mark to his right arm. The coroner opined that Mejia had died approximately 48 hours before his body was discovered, plus or minus 12 hours.
>
> Witnesses identified defendant as leaving a bar with Mejia on the night of June 5, 1988. The case went unsolved for five months until defendant's then-girlfriend reported to authorities that he had confessed the killing to her. According to the girlfriend, on a Sunday evening in early June

1988, she and defendant had a fight about money, after which defendant said he was "going out to get some money" and then left. Defendant did not return until between 1:00 and 4:00 a.m. At that time, she noticed that defendant was "all scratched up and red in the face." When his girlfriend asked defendant what happened, he told her that he had been in a fight. At some point, defendant randomly stated to his girlfriend, "I killed somebody." He then explained that he had gone to the bar where witnesses had placed defendant and Mejia together. Defendant told his girlfriend that he talked with "a guy" in the bar and eventually left with him. According to the girlfriend, defendant recounted how he and the man went for a walk in the woods, where defendant "pulled a knife on the guy and told him to give him all of his money." A fight ensued "with a lot of biting and scratching, and pulling of hair." The girlfriend testified that defendant informed her that he then "held [the other man] down with his left hand and slit his throat and watched him drown in his own blood." Defendant's girlfriend did not initially believe defendant, but he "proved it" to her by retrieving a watch from his vehicle that was covered in dried blood.

At trial, Melinda Jackson, an expert in forensic serology, testified that blood found on Mejia's clothing was type O, which matched Mejia's blood type. There was also evidence that some blood found on stones and grass connected to the crime scene was type O blood. Further, there was testimony presented at trial reflecting that defendant's blood type was AB, a type shared with only three percent of the population, and that none of the testable blood samples collected in relationship to the offense matched defendant's blood type. Additionally, a stone found in Mejia's pants had type A blood on it, which blood type matched neither Mejia nor defendant's blood.

Defendant appealed the conviction as of right, and this Court affirmed. *People v Poole*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 1993 (Docket No. 120955). Our Supreme Court thereafter denied defendant's application for leave to appeal. *People v Poole*, 442 Mich 933 (1993).

On November 21, 2005, defendant filed a motion for new trial in the circuit court, relying, in part, on MCL 770.16. He also filed an accompanying motion for DNA testing pursuant to MCL 770.16. In the motions, defendant requested the DNA testing of biological material. The appeal currently before the panel also concerns DNA testing under MCL 770.16, which provided back in 2005 and still provides today that "a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction[.]" MCL 770.16(1); 2005 PA 4; 2008 PA 410; 2011 PA 212.

In response to the 2005 motions filed by defendant in the circuit court, the prosecutor argued that the request for DNA testing did not satisfy the statutory requirements of MCL 770.16. MCL 770.16(3)(a) required a defendant to "[p]resent[] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." The language today is identical, except that it is found instead in MCL 770.16(4)(a) as a result of an amendment enacted pursuant to 2008 PA 410. MCL 770.16(3)(b)(*i*) provided that a defendant also had to establish, by clear and convincing evidence, that a "sample of identified biological material . . . is available for testing." The identical language is currently found in MCL 770.16(4)(b)(*i*). See 2008 PA 410. The prosecutor argued that defendant failed to establish that biological material was available for testing and that, even if available, defendant could not show that such evidence was material to defendant's identity as the perpetrator, as the blood-typing evidence presented at trial already established that defendant's blood was not found in connection with the criminal investigation. In a supplement to the prosecutor's response brief to defendant's 2005 motions, the prosecution stated that it had now been "informed by Ms. Melinda Jackson of the Michigan State Police that some blood sample evidence involved

in the Defendant's case has been preserved. The People instructed Ms. Jackson to continue to preserve those samples." The prosecution, however, still maintained that defendant was not entitled to relief under MCL 770.16.

On August 1, 2006, the circuit court, the Honorable Edward Sosnick presiding, treated defendant's motions as motions brought under MCR 6.501 *et seq*. (post-appeal relief), denied defendant's DNA-related requests, and found that defendant failed to establish that biological material was available for testing. Moreover, the circuit court ruled:

> Even if the defendant established that such biological material existed, the defendant could not meet the requirements of MCL 770.16(3)(a) [now § 16(4)(a)] that such evidence was material to the defendant's identity as the perpetrator of the murder of Robert Mejia. Evidence presented during this defendant's trial already established that the defendant's blood [type] was not found on the victim. There is no other suspect to attempt to match with DNA testing. The defendant has not, therefore, satisfied the requirements of MCL 770.16(3).

Defendant then filed with this Court in Docket No. 276973 a delayed application for leave to appeal, along with an accompanying motion to remand for DNA testing pursuant to MCL 770.16. In the application, defendant argued that, as acknowledged by the prosecutor below, biological material was available for DNA testing. Defendant also argued to this Court that, pursuant to MCL 770.16, he was entitled to DNA testing of all biological evidence presented at the trial, given that DNA testing could significantly undermine the prosecutor's theory relative to defendant's guilt. In the motion to remand for DNA testing, defendant referenced the following evidence collected by police: blood on the victim's fingernails; blood from a sample of the shirt worn by the victim; blood on a stone recovered from the victim's clothing; loose hair found on the victim; and blood on the console of defen-

dant's car. The motion stated, "The Cooley Law School has discovered that there is DNA biological material available for testing. Exhibit G."

This Court denied defendant's delayed application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v Poole*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 276973). In that same order, the panel denied defendant's motion to remand for DNA testing. *Id*. The Michigan Supreme Court then denied defendant's application for leave to appeal, ruling that "defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v Poole*, 480 Mich 1186 (2008). The Court also denied the motion for DNA testing. *Id*. On July 10, 2008, defendant filed a petition for a writ of *habeas corpus* in federal court, seeking in part DNA testing pursuant to 18 USC 3600. The petition was denied. *Poole v Woods*, unreported opinion of the United States District Court for the Eastern District of Michigan, issued September 28, 2011 (Docket No. 08-12955). The case was then unsuccessfully appealed to the Sixth Circuit and eventually to the United States Supreme Court, which denied certiorari. *Poole v Mackie*, ___ US ___; 134 S Ct 945; 187 L Ed 2d 811 (2014).

While the federal effort was pending in the Sixth Circuit, defendant, on November 2, 2012, filed the instant petition in the circuit court, seeking an order, once again, to test for biological evidence pursuant to MCL 770.16. In the petition, defendant stated that the police had confirmed that they held "bloody stones and known samples from the victim and [defendant]." We note that documents in the record dating back to 1988 reflected that stones bearing suspected blood had been collected from the crime scene. Defendant asserted that while the stones and other samples were subjected to blood-type testing, they had not been subjected to DNA testing. Defendant also maintained that the evidence was material to establishing the identity of the perpetrator. Further, defendant requested DNA testing of other biological evidence previously collected by police. There is no indication that the facts had changed or

> that any new evidence had been located or discovered since the earlier failed attempt to obtain an order for DNA testing. The circuit court, the Honorable Rae Lee Chabot presiding, rejected the petition, finding, much like Judge Sosnick had several years earlier, that the jury had been fully aware that defendant was not the source of any crime-scene blood, given the blood-type evidence, yet the jury still convicted defendant. DNA testing excluding defendant as a donor would therefore add nothing of relevance if a new trial took place. This Court then granted defendant's application for leave to appeal. *People v Poole*, unpublished order of the Court of Appeals, entered November 25, 2013 (Docket No. 315982). [*People v Poole*, unpublished opinion per curiam of the Court of Appeals, issued September 2, 2014 (Docket No. 315982), pp 1-4 (alterations in original).]

We proceeded to hold that the law of the case doctrine precluded consideration of defendant's latest efforts under MCL 770.16. *Id*. at 4-5. However, our Supreme Court concluded that the earlier orders issued by this Court and the Supreme Court, which provided that defendant had failed "to meet the burden of establishing entitlement to relief,"[1] and which denied his request for any DNA testing, did not constitute "law of the case," because the orders "were not rulings on the merits of the issues presented." *Poole*, 497 Mich at 1022.

Given the Supreme Court's directives in the remand order that "no provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material" and that we are to address "the issues raised by the defendant," *id*., we will set aside our concerns that, perhaps, MCL 770.16 does not allow for multiple petitions regarding

[1] *Poole*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 276973); *Poole*, 480 Mich 1186.

the same evidence or that the court rules regarding motions under Subchapter 6.500 (concerning postappeal relief) might be applicable and bar relief. See MCL 770.16(8) (referring to MCR 6.505); MCR 6.501 ("Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter."); MCR 6.502(G)(1) and (2) (stating that only one motion for relief from judgment may be filed except for situations involving certain retroactive changes in the law or newly discovered evidence); MCR 6.508(D)(2) (stating that a court generally cannot grant relief if the defendant's motion alleges grounds that were previously rejected in an MCR 6.500 proceeding).[2]

Turning to the substance or merits of defendant's petition under MCL 770.16, we conclude (1) that, in satisfaction of § 16(1), defendant was convicted of a felony at trial before January 8, 2001, and is currently serving a prison sentence for the conviction; (2) that, in satisfaction of § 16(2), defendant's petition was filed in the sentencing court before January 1, 2016; (3) that, in satisfaction of § 16(3), biological material was collected and identified during the police investigation of defendant's case; (4) that, in satisfaction of § 16(4)(a), defendant presented prima facie proof that the biological evidence sought to be tested was material to the question of defendant's identity as the perpetrator of the murder; (5) that, in satisfaction of § 16(4)(b)(*i*), there is clear and convincing evidence that a sample of

[2] As reflected in the quoted language from our previous opinion, defendant's earlier efforts to obtain DNA testing of the same biological material under MCL 770.16 were addressed by the trial court, this Court, and our Supreme Court in the context of Subchapter 6.500.

biological material is indeed available for DNA testing; (6) that, in satisfaction of § 16(4)(b)(*ii*), there is clear and convincing evidence that the biological material was not previously subjected to DNA testing; and (7) that, in satisfaction of § 16(4)(b)(*iii*), there is clear and convincing evidence that defendant's identity as the perpetrator was at issue during his trial. When all these factors are satisfied, as we have concluded, "[t]he court *shall* order DNA testing[.]" MCL 770.16(4) (emphasis added). Of the factors subject to consideration, the only point of contention below and on appeal concerns § 16(4)(a) and whether the blood samples sought to be tested are material to the issue of defendant's identity as the perpetrator of Mejia's murder.[3]

In *People v Barrera*, 278 Mich App 730, 737; 752 NW2d 485 (2008), this Court construed the language in § 16(4)(a), which at that time was found in § 16(3)(a),[4] holding that biological evidence "must be of some consequence to the issue of identity" or, stated differently, that there must be "some logical relationship between the evidence sought to be tested and the issue of identity." According to the *Barrera* panel, the language in § 16(4)(a) "requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality . . . ." *Id*. at 740.

In this case, at issue is blood found on stones and grass located at the crime scene.[5] With respect to blood

[3] Section 16(4)(a) requires a defendant to "[p]resent[] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." MCL 770.16(4)(a).

[4] See 2000 PA 402, 2005 PA 4, and 2008 PA 410.

[5] We note that defendant had also requested an order directing authorities to search for and collect other evidence containing or possibly containing biological material that could be subjected to DNA

typing, all that is known is that nearly all of the blood was consistent with the victim's blood type, none of the blood matched defendant's blood type, and that one blood sample—a bloodstain on a stone found in the victim's pants—matched neither defendant's nor the victim's blood type.[6] If one removes from consideration the fact that blood-type testing was performed on the evidence and that the results were submitted to the jury, there would appear to be no dispute whatsoever that the blood samples would be material to defendant's identity as the perpetrator. The "materiality" would be established from the evidence showing a violent physical attack involving a knife and an ensuing struggle that could have easily resulted in the perpetrator being cut or scratched, thereby spilling some of the perpetrator's own blood in the process of the killing.[7] A finding of "materiality" would further be supported by the evidence showing the nature, location, and extent of the victim's injuries and that the blood samples were found all about the crime scene and in the victim's pocket.

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testing, e.g., a cigarette butt, the victim's fingernail clippings, a blood-stained car console. This issue formed the basis of defendant's second argument on appeal; however, after the appeal was filed the parties entered into a stipulation "that there is no additional biological evidence to be located in this case and that the second issue . . . is moot." Accordingly, our focus is solely on the blood samples found on the stones and grass at the crime scene.

[6] Expert Melinda Jackson did testify that there were inconclusive results in regard to some of the blood samples because they did not contain sufficient quantities of material for testing.

[7] There was evidence that the victim had sustained multiple superficial cuts and incised wounds, along with abrasions and contusions on his arms and back, as well as a bite mark to the back of his right arm, which all suggested that the victim and the perpetrator had engaged in a violent physical struggle before the victim was finally incapacitated and died.

Under our scenario,[8] DNA testing could be inconclusive, could point to defendant as being a donor, or could exclude defendant as the source of any blood samples, along with potentially identifying another specific individual as the donor, thereby clearly satisfying MCL 770.16(4)(a). Because DNA testing of a blood sample could possibly connect another person to the crime scene or exclude defendant, the sample would be of some consequence or have a logical relationship to the issue of identity and would be linked to both the crime and the criminal. In other words, the blood samples would necessarily be material to defendant's identity as the perpetrator.

The difficulty that arises in this case concerns whether the question of materiality under § 16(4)(a) is affected by the fact that a trial was conducted in which the jury was presented with blood-type evidence that effectively excluded defendant as the source of the blood samples. The prosecution argues that the crime-scene blood samples, for purposes of DNA testing, are not material to the issue of defendant's identity as the perpetrator, considering that blood typing already excluded defendant as the donor of the blood samples. Similarly, the trial court noted that the jury had been fully aware that defendant was not the source of any of the blood, with one sample even producing a blood-type result unlinked to either defendant or the victim, yet the jury still convicted defendant. The court therefore opined that any DNA testing that excluded defendant as a donor would add nothing of relevance in a new trial.

Because the trial court was a bit vague in its statements, we are not quite certain regarding the

[8] Again, for the moment, we are assuming that there was no blood-type testing performed or blood-type results presented to the jury.

court's underlying reasoning within the context of § 16. On one hand, the trial court may have been concluding that, in regard to the analysis under § 16(4)(a), any "materiality" of the blood samples at this stage had been entirely undercut or lost in light of the history of the case and the prior presentation of blood-type evidence to the jury. Stated otherwise, perhaps the trial court found that the blood samples, for purposes of DNA testing, are immaterial under § 16(4)(a), considering the blood-type evidence submitted at trial that already excluded defendant. On the other hand, or in conjunction with the preceding observation, the trial court may have jumped ahead in the analysis under MCL 770.16(7) and (8), as we shall now explain. If a trial court orders DNA testing, MCL 770.16(7) and (8) contemplate two broad possible results. When "the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material," the trial court is required to "deny the motion for new trial." MCL 770.16(7). MCL 770.16(8) controls when "the results of the DNA testing show that the defendant is not the source of the identified biological material . . . ." Absent a mistake with respect to the blood typing, any DNA testing done in this case should result in the application of Subsection (8). But Subsection (8), even when implicated, only allows for a new trial upon a hearing and the presentation of clear and convincing evidence showing that only the perpetrator could have been the source of the identified biological material, showing that the biological material was not contaminated or seriously degraded, and showing "[t]hat the defendant's purported exclusion . . . . , balanced against the other evidence in the case, is sufficient to justify the grant of a new trial." MCL 770.16(8)(a) through (c). The trial court's ruling here may have simply reflected its conclusion that,

assuming the expected exclusion of defendant as a donor upon any DNA testing, no new trial would be warranted or justified, because defendant already had a trial in which the jury knew that defendant had been excluded.

To the extent that the trial court took the latter approach, jumping ahead and contemplating § 16(7) and (8), this was error. MCL 770.16 envisions two main phases; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted. Here, we are solely concerned with the first phase. As indicated earlier, if a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, "[t]he court *shall* order DNA testing[.]" MCL 770.16(4) (emphasis added). Accordingly, it would be improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing. A court is not statutorily permitted to conflate the two phases of analysis.

To the extent that the trial court found that the blood samples, for purposes of DNA testing, are immaterial under § 16(4)(a), given the blood-type evidence submitted to the jury at trial, the trial court also erred. We initially conclude that the materiality of the blood samples to the issue of identity is not affected or lessened by the fact that blood-type evidence excluding defendant as a donor was already presented at trial; all of this scientific evidence is material or relevant to defendant's identity as the perpetrator. Rather, the somewhat cumulative nature of the evidence may possibly play a role in deciding a future motion for new trial. Furthermore, if accu-

rately tested, the blood identified as being consistent with the victim's blood type may or may not have been his blood, considering that other people have type O blood, and it was not defendant's blood, leaving open the possibility that another individual was involved in the crime. The blood identified as being inconsistent with both the victim and defendant's blood type, if accurately tested, also suggests the possibility that another individual was involved in the crime. Although it is true that both blood-type results and prospective DNA results might equally exclude defendant as being the donor of the blood samples found at the crime scene, the fact is that DNA evidence and blood-type evidence are not typically of equal value. In this case, we see a distinction between the jury knowing in a broad general sense that the blood of an unknown person was present at the crime scene and the jury potentially learning through DNA testing that the blood *of a particular person*, perhaps an acquaintance of the victim or a person who was in the bar that night, could be linked to the crime scene. Reasonable doubt would more likely flow from the identification of a specific individual, especially if the person was present in the area at the time of the murder, as opposed to a wholly unknown figure.[9] We cannot conclude that the blood samples, for purposes of DNA testing, are immaterial merely because the jury in the 1989 trial considered blood-type evidence that excluded defendant as a donor or source of the blood samples. DNA testing is justified because, under the circumstances, there exists prima facie proof that the blood samples, which will be subjected to DNA testing, are material to defendant's identity as the perpetrator,

[9] We do appreciate that DNA testing might not produce the identity of the donor.

given that the DNA testing could point to another specific individual as the perpetrator.

Finally, as relied on by the trial court and prosecution, it is necessary to address a statement in *Barrera* indicating that "where . . . biological evidence has already excluded a defendant, identity is not an issue." *Barrera*, 278 Mich App at 740. To give the proper context to the statement, the full paragraph in which the statement is embedded must be examined:

> While MCL 770.16(3)(a) [now (4)(a)] requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality, MCL 770.16(3)(b) [now (4)(b)] addresses issues regarding the availability of the biological material, prior testing of the material, and whether identity was an issue at trial. MCL 770.16(3)(b)(*i*)-(*iii*) [now (4)(b)(*i*)-(*iii*)]. By way of example, if semen found on panties was material because the victim wore the panties at the time of the rape, MCL 770.16(3)(a) would be satisfied, but if a defendant had claimed at trial that he had consensual sex with the victim, identity would not be at issue. If identity is not at issue, then MCL 770.16(3)(b)(*iii*) is not satisfied, and DNA testing would not be ordered. Similarly, when a defendant's theory of the case is self-defense *or where the biological evidence has already excluded a defendant, identity is not an issue*. Although a defendant may satisfy the materiality requirement of MCL 770.16(3)(a), a defendant would not satisfy the "clear and convincing evidence" requirement of MCL 770.16(3)(b) on the issue of identity. [*Id*. at 740 (emphasis added).]

As gleaned from this passage, the emphasized statement at issue, which is indisputably dicta and unconfined by specific facts, was being discussed in the context of § 16(3)(b)(*iii*), now § 16(4)(b)(*iii*), and not the materiality provision in § 16(4)(a) that we have been discussing at length in this opinion. MCL 770.16(4)(b)(*iii*) requires clear and convincing evidence

that "[t]he identity of the defendant as the perpetrator of the crime was at issue during his or her trial." Accordingly, in the examples given by this Court—consensual sex, self-defense, and the existence of exclusionary evidence—the underlying implicit premise was that identity was not at issue or disputed by the parties at trial. Therefore, with respect to the hypothetical scenario in which the biological evidence had already excluded a defendant, the *Barrera* panel was necessarily envisioning circumstances in which there was exclusionary evidence *and in light of this evidence the parties did not dispute identity*. Such was not the case here, considering that the whole trial focused on the disputed issue of the identity of the perpetrator, alleged by the prosecutor to be defendant, notwithstanding the blood-type evidence excluding defendant as a source of the blood. The *Barrera* dicta has no bearing on our analysis.

Reversed and remanded for entry of an order directing DNA testing under MCL 770.16(6). We do not retain jurisdiction.

TALBOT, C.J., and SAWYER, J., concurred with MURPHY, P.J.

WHITMAN v CITY OF BURTON (ON SECOND REMAND)

Docket No. 294703. Submitted December 15, 2014, at Lansing. Decided July 9, 2015, at 9:00 a.m. Vacated in part 499 Mich ___.

Bruce Whitman sued the City of Burton and Mayor Charles Smiley in the Genesee Circuit Court for wrongful termination in violation of the Whistleblowers' Protection Act (WPA). MCL 15.361 *et seq*. Whitman claimed he was not reappointed to his position as chief of police for the city of Burton because he challenged an agreement made by city department heads to forgo payment for unused leave time in order to reduce the city of Burton's budget deficit. According to Whitman, this agreement violated Burton Ordinance 68-C, which provided city employees with the benefit of being paid for the unused leave time they had accumulated. Whitman demanded, and ultimately received, payment for his unused leave time. After a trial, a jury found in favor of Whitman. The trial court, Geoffrey L. Neithercut, J., denied defendants' motion for judgment notwithstanding the verdict (JNOV). Defendants appealed in the Court of Appeals, and SAAD, P.J., and O'CONNELL, J., (BECKERING, J., dissenting), reversed the trial court's denial of defendants' motion for JNOV because Whitman admittedly sought payment for his unused leave time for personal reasons. 293 Mich App 220 (2011). The Supreme Court reversed the Court of Appeals' decision and remanded the case to the Court of Appeals for consideration of the remaining issues on which the Court of Appeals did not rule, including whether Whitman satisfied the causation requirement for a claim under the WPA. 493 Mich 303 (2013). On remand, the Court of Appeals, SAAD, J. (O'CONNELL, P.J., concurring, and BECKERING, J., dissenting), again reversed the trial court's denial of defendants' motion for JNOV because Whitman's alleged whistleblowing activity did not further the public interest. The majority ruled that Whitman's conduct actually ran contrary to the public interest. The Court of Appeals further held that the mayor's refusal to reappoint Whitman to the position of chief of police was unrelated to Whitman's alleged whistleblowing, but was instead based on Whitman's repeated misconduct while in the position of police chief. 305 Mich App 16 (2014). The day after the Court of Appeals issued its second decision, the Supreme Court issued *Wurtz v Beecher Metro*

Dist, 495 Mich 242 (2014), which held that WPA protections do not apply to job applicants and prospective employees. On application for leave to appeal, the Supreme Court vacated the Court of Appeals' second decision and instructed it to review its ruling in light of *Wurtz*. 497 Mich 896 (2014).

On second remand, the Court of Appeals *held*:

1. Whitman was not entitled to WPA protections because he was merely a prospective employee after the mayor was reelected. The city of Burton's charter required the mayor to reaffirm or appoint his chief of police after reelection, and at that point, according to *Wurtz*, Whitman was only a candidate for the position, and the WPA does not apply to job candidates. Whitman emphasized that he was appointed to an indefinite term as police chief, and that he was terminated in violation of the WPA for reporting an ordinance violation. *Wurtz* requires that an individual claiming the protections of the WPA be an employee at the time of the alleged WPA violation. Whitman's four-year term as police chief concluded when the mayor was reelected. At that time, Whitman was simply a political appointee seeking reappointment—the equivalent of a prospective employee—and the WPA did not apply.

2. Whitman's alleged whistleblowing conduct, viewed objectively, did not advance the public interest; instead, his conduct ran contrary to the public interest. With the exception of Whitman, and in response to the city of Burton's budget crisis, the city administrators agreed to forgo payment for unused leave time and instituted a "use it or lose it" policy. Whitman demanded payment for his unused leave time and claimed that the agreement to forgo payment violated the ordinance that provided the benefit of payment for unused leave time to nonunionized city employees. The Court disagreed with Whitman that reporting this ordinance "violation" served the public interest because the Court concluded that the ordinance itself did not promote the public interest—that section of the ordinance simply established an employment perk. The Court also noted that the administrators' agreement to forgo payment for leave time would prevent layoffs that would result in reduced services to the public. The public interest would certainly not be promoted if the city was forced to operate with a fewer number of employees. Therefore, Whitman's demand for payment, and his refusal to abide by an agreement that would ease the city's budget deficit, worked against the public interest.

3. The mayor did not reappoint Whitman to the position of police chief because of Whitman's misconduct while in office during the four years he held the position before the mayor's

reelection. The mayor's decision was not based on Whitman's alleged whistleblowing that occurred long before the mayor's reelection. The length of time between an alleged act of whistleblowing and an adverse employment decision is not dispositive of retaliation, but a significant span of time between the whistleblowing and the adverse employment action weighs against finding a causal connection between the two. Whitman's adverse employment action occurred approximately four years after he reported the alleged ordinance violation. There was no temporal proximity between the alleged whistleblowing and the adverse employment action. The lack of temporal proximity, coupled with the mayor's claim that he decided against reappointing Whitman as police chief due to Whitman's misconduct while in office, clearly indicates that the mayor's refusal to reappoint Whitman was unrelated to Whitman's alleged whistleblowing.

Reversed and remanded.

BECKERING, J., dissenting, concluded that the WPA's protections did apply to Whitman because at the time of the mayor's reelection, Whitman qualified as an at-will employee with an indefinite term of employment, that is, an employee covered by the WPA. *Wurtz* clearly stated that prospective employees are not covered by the WPA for adverse employment actions, but it made no judgment about employees who are not fixed-term employees, and whose term of employment was indefinite and did not expire under a contract. Judge BECKERING noted that Whitman's indefinite term of employment carried with it the express option of being continued by reaffirmation—much like a contract with a renewal clause. Because of that, any decision to terminate Whitman's employment, if motivated by protected activity, violated the WPA. Judge BECKERING also concluded that there was enough evidence to justify having a jury decide the question of causation. In addition, Judge BECKERING disagreed with the majority's consideration of Whitman's motive for insisting that the city of Burton comply with the ordinance granting the benefit of being paid for unused leave time. According to Judge BECKERING, the Supreme Court has expressly and repeatedly admonished courts not to consider a plaintiff's motives when determining whether a plaintiff has engaged in protected activity under the WPA because a plaintiff's motive is irrelevant, other than as it pertains to causation. And even if the majority's new requirement for a successful WPA claim were valid—that the law or regulation or rule serve the public interest—Judge BECKERING asserted that the ordinance at issue was not unquestionably and objectively contrary to the public interest, as alleged by the majority.

1. WHISTLEBLOWERS' PROTECTION ACT — APPLICATION — PROSPECTIVE EMPLOYEES.

The Whistleblowers' Protection Act (WPA) does not apply to prospective employees or candidates for hire; an individual must be employed at the time of the adverse employment decision to benefit from the protections of the act.

2. WHISTLEBLOWERS' PROTECTION ACT — PLAINTIFF'S CONDUCT — ADVANCING THE PUBLIC INTEREST.

To qualify for the protections offered by the WPA, an individual's whistleblowing conduct must promote the public interest.

3. WHISTLEBLOWERS' PROTECTION ACT — PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT DECISION — CAUSATION — TEMPORAL PROXIMITY.

Temporal proximity between an adverse employment decision and the conduct protected by the WPA is a factor to consider when determining whether there is a causal connection between the two events, but temporal proximity is not dispositive of such a determination.

Tom R. Pabst for plaintiff.

Plunkett Cooney (by *Ernest R. Bazzana*, *Audrey Forbush*, and *Mary Massaron*) for defendants.

ON SECOND REMAND

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

SAAD, J.

I. PROCEDURAL HISTORY[1]

This is the third time we have addressed this case on appeal. Our Court originally adjudicated this alleged Whistleblowers' Protection Act[2] (WPA) claim in 2011,

[1] A summary of the facts relevant to this opinion can be found at *Whitman v City of Burton*, 293 Mich App 220, 222-228; 810 NW2d 71 (2011) (*Whitman I*), and at *Whitman v City of Burton*, 493 Mich 303, 306-311; 831 NW2d 223 (2013) (*Whitman II*).

[2] MCL 15.361 *et seq*.

and our opinion[3] reversed the jury award in Whitman's favor. We held that the Michigan Supreme Court's decision in *Shallal*[4] barred Whitman from claiming protection under the WPA, because he admitted that his motivation for asserting his entitlement to accumulated, unused sick-leave pay under a city ordinance was entirely personal and selfish.[5] We reasoned that, under *Shallal*, Whitman's private motivations for asserting defendants' noncompliance with the city ordinance disqualified him from WPA protections, because he did not act as a whistleblower under the meaning of the WPA. We dismissed his case on this narrow ground, and further held in a footnote that "overwhelming evidence of plaintiff's misconduct in office . . . more than justified the mayor's decision not to reappoint plaintiff as police chief."[6]

The Michigan Supreme Court reversed, and disavowed what we thought was the principle articulated in *Shallal* on the dispositive nature of Whitman's private motivations.[7] It remanded the case and instructed us to address "all remaining issues on which [we] did not formally rule, including whether the causation element of the [WPA] has been met."[8]

Because our narrow 2011 ruling regarding Whitman's private motivation meant that we did not look at

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[3] *Whitman I*, 293 Mich App 220.

[4] *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997).

[5] Specifically, Whitman first voiced his opposition to modification of the city ordinance at issue by stating that "[m]y current life style revolves around these very things [i.e., the benefit of receiving payment for accumulated leave time] that have been negotiated for me . . . ." See *Whitman I*, 293 Mich App at 225.

[6] *Id*. at 232 n 1.

[7] *Whitman II*, 493 Mich at 306.

[8] *Id*. at 321.

the larger—and, to our minds, more important—question of whether Whitman's conduct objectively promoted the public interest, we addressed and decided this issue on remand in 2014.[9] We held that the purpose of the WPA is to advance the public interest, and thus the statute protects only those plaintiffs whose actions, irrespective of their personal motivations, objectively advance the public interest. And because Whitman's conduct ran contrary to the public interest, rather than advancing the public interest, we held that Whitman was not protected by the WPA.

We further held, once again, but with fuller explanation, that Whitman's alleged whistleblowing activity was clearly not the reason the mayor refused to renew his four-year term as chief of police. Instead, the mayor's refusal to renew Whitman's four-year political appointment was a direct result of Whitman's misconduct during his previous term—misconduct that only came to the mayor's knowledge during his postelection review of his team of political appointees. It was this review, and the information it revealed, that motivated the mayor to refuse to reappoint Whitman to another four-year term as chief of police.

The day after we issued our second decision on appeal, the Michigan Supreme Court issued *Wurtz v Beecher Metro Dist*,[10] which held that WPA protections do not apply to "job applicants and prospective employees."[11] Then, on November 19, 2014, the Michigan Supreme Court vacated our 2014 decision and asked us to review our ruling in light of *Wurtz*.[12] After our review of

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[9] See *Whitman v City of Burton (On Remand)*, 305 Mich App 16; 850 NW2d 621 (2014) (*Whitman III*).

[10] *Wurtz v Beecher Metro Dist*, 495 Mich 242; 848 NW2d 121 (2014).

[11] *Id*. at 253.

[12] *Whitman v City of Burton*, 497 Mich 896 (2014) (*Whitman IV*).

Wurtz, we conclude that Whitman's claim must be dismissed under the holding and reasoning in that case.

Therefore, we now hold that Whitman's claim must be dismissed for any one or combination of the following reasons: (1) *Wurtz* requires its dismissal, (2) objectively, Whitman's conduct did not advance the public interest, but instead, it ran contrary to the public interest, and (3) the mayor's refusal to reappoint Whitman, a political appointee, to another four-year term as police chief was because of Whitman's misconduct in office, not the whistleblowing activity that allegedly took place long before his four-year term as chief had ended.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for judgment notwithstanding the verdict (JNOV) is reviewed de novo on appeal. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646 (2005). "When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law." *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

III. ANALYSIS

A. PLAINTIFF IS NOT ENTITLED TO WPA PROTECTION

1. DEFENDANTS' ALLEGED WPA VIOLATION OCCURRED AFTER THE CONCLUSION OF PLAINTIFF'S TENURE AS POLICE CHIEF

a. LEGAL STANDARDS

MCL 15.362, the provision of the WPA under which plaintiff brought suit, states:

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

In *Wurtz*, the Michigan Supreme Court clarified that these protections do not apply to job applicants and prospective employees,[13] because a job applicant or prospective employee cannot be "discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment"[14]—only a *current* employee can suffer such mistreatment.[15] In other words, the WPA applies to an employer's improper actions regarding an individual's protected conduct only when the conduct occurs *during the course of his employment*.[16]

Accordingly, when it adjudicates a claim under the WPA, *Wurtz* emphasizes the plaintiff's employment status at the time the alleged WPA violation occurred.[17]

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[13] *Wurtz*, 495 Mich at 253.

[14] *Id*. at 251.

[15] *Id*. at 253.

[16] *Id*. at 252 ("[A]s gleaned from the WPA's express language, the statute only applies to individuals who currently have the status of an 'employee.' ").

[17] *Id*. at 252. See also *id*. at 252 n 16:

> We recognize that plaintiff was an employee at the time he engaged in protected activity. Significantly, however, plaintiff

If a defendant committed the alleged WPA violation during the course of a plaintiff's employment, the plaintiff's claim may proceed. If the defendant committed the alleged WPA violation when the plaintiff was not employed by the defendant, or when the plaintiff was a job applicant or prospective employee, the plaintiff's claim must fail.[18] Under *Wurtz*, this classification—employed versus not employed (as a job applicant, prospective employee, or former employee)—is the *only* classification a court may use to assess whether the WPA provides protection to a plaintiff.[19] For purposes of this determination, it is inconsequential whether the plaintiff was an at-will employee, contract employee, or just-cause employee—the plaintiff is protected by the WPA only if the alleged WPA violation occurred during the course of his employment.[20]

The Michigan Supreme Court applied these principles to Wurtz, a contract employee who worked for a local water and sewage district under a fixed term.[21] Wurtz wished to continue in his position after termination of his contract term, but the district declined to

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> makes no claim that his employment contract was in any way breached or that he was subject to a specific adverse employment action enumerated by the WPA during his contract term. Rather, plaintiff maintains that because he engaged in protected activity during his contract term, he has a right under the WPA to renewal of his contract.

[18] *Id*. at 253.

[19] Of course, as the Michigan Supreme Court stated, at-will employees—like any other kind of employee—are protected under the WPA against WPA violations allegedly committed by their employer *during the course of their employment*. See *id*. at 256-257. However, at-will employees—like any other kind of employee—are not protected under the WPA against WPA violations allegedly committed by their employer *after they are no longer employed*. See *id*. at 253.

[20] *Id*.

[21] *Id*. at 244-245.

renew his contract.[22] Wurtz then sued the district and alleged that it violated the WPA when it refused to renew his contract, because it supposedly did so in retaliation for actions he took during his employment.[23] The Michigan Supreme Court rejected Wurtz's claim because the WPA violation he claimed the district committed—its decision to not renew his contract—occurred *after* the conclusion of his contract term, when Wurtz was a job applicant or prospective employee.[24] Stated another way, because the WPA violation alleged by Wurtz did not take place during the course of his employment, Wurtz had no claim against the district under the WPA.[25]

In sum, *Wurtz* holds that when a plaintiff alleges that a defendant violated the WPA, a court must assess the claim by ascertaining whether the alleged WPA violation occurred *during the course of the plaintiff's employment* with the defendant. If the plaintiff was employed at the time of the alleged WPA violation, the plaintiff's case may proceed. If the plaintiff was not employed at the time of the alleged WPA violation, or was a job applicant or prospective employee at the time of the alleged WPA violation, the plaintiff's case must fail.[26] The plaintiff's classification while he was employed—i.e., as a contract, at-will, or just-cause employee—is irrelevant to the court's determination. The court's focus must be on whether the plaintiff, regardless of his classification, was employed by the defendant at the time the alleged WPA violation occurred.

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[22] *Id*. at 246-247.

[23] *Id*. at 247.

[24] *Id*. at 258-259.

[25] *Id*.

[26] See *id*. at 253.

b. APPLICATION

The charter of the city of Burton provides that:

> [t]he Mayor shall appoint all administrative officers of the city, except the City Attorney and City Auditor. The Mayor's appointments shall be subject to approval by an affirmative vote of four or more members of the Council. The Council shall act within thirty (30) days from the date of submission upon any appointments submitted by the Mayor for approval. [Burton Charter § 4.5(g), available at <http://www.mml.org/resources/information/charter/pdf/68.pdf> (accessed June 30, 2015) [http://perma.cc/U654-49A8].]

The chief of police is among the city's administrative officers. Burton Charter § 6.1(a). Most administrative officers, including the chief of police,

> shall be appointed by the Mayor subject to the approval of the Council, and shall serve at the pleasure of the Mayor for indefinte [sic] terms, except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same. [Burton Charter § 6.2(b).]

Accordingly, for the chief of police to continue his employment after a mayoral election, he must be reappointed or reaffirmed to the position by the mayor, within 30 days of the mayor's election. This reappointment mechanism effectively means that a chief of police serves a four-year term, albeit "at the pleasure of the Mayor."[27]

Here, Whitman alleges that he engaged in protected activity under the WPA—his purported whistleblowing regarding the city's initial refusal to compensate him for unused sick leave—during the course of his four-

[27] Mayoral elections take place every four years. Burton Charter § 4.2(b).

year appointment as police chief. He says that the mayor retaliated against him for this whistleblowing, in violation of the WPA, *when the mayor declined to reappoint him as police chief after the mayor's reelection in November 2007*.

Under the express holding of *Wurtz*, Whitman may not bring a claim under the WPA.[28] Like Wurtz, Whitman alleges that defendants violated the WPA *after* the conclusion of his employment—i.e., after the conclusion of his four-year appointment as police chief.[29] He *does not* claim that he was "subject to a specific adverse employment action enumerated by the WPA" *during the course of his employment*.[30] As a candidate for reappointment to the office of police chief, Whitman was essentially a job applicant. His suit is premised on an alleged WPA violation committed by defendants *after* the termination of his four-year term as police chief.

Accordingly, Whitman, as a political appointee seeking reappointment, was not subject to the protections of the WPA at the time of the alleged WPA violation. Thus, his suit under the WPA has no merit. We therefore reverse the trial court's denial of defendants' request for JNOV.

2. PLAINTIFF DID NOT OBJECTIVELY ADVANCE THE PUBLIC INTEREST

Whitman is not entitled to protection under the WPA for an additional reason: his conduct, as an

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[28] *Wurtz*, 495 Mich at 252.

[29] As discussed in note 19 of this opinion, we recognize that if the mayor had terminated Whitman for whistleblowing activity *during* the course of Whitman's four-year term as police chief, Whitman's WPA claim might be valid. The reason Whitman's claim is not valid is because he alleges a WPA violation committed by defendants *after* the conclusion of his four-year term.

[30] *Wurtz*, 495 Mich at 252 n 16.

objective matter, did not advance the public interest.[31] Because the WPA protects those who protect the public interest by blowing the whistle on illegality, and because laws in general are an expression of public policy for the benefit of the public, there is typically no question that reporting a violation of law advances the public interest. But this is not always true, and is certainly not true here.

In this case, Whitman's actions are unquestionably and objectively contrary to the public interest. That is, regardless of his personal motivation, Whitman's whistleblowing effort sought enforcement of a law that harmed, not advanced, the public interest.

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[31] The Michigan Supreme Court did not address this aspect of the WPA in its 2013 opinion, nor did it do so in its 2014 order. Our understanding of the Supreme Court's statement that Whitman "engaged in conduct protected under the WPA," *Whitman II*, 493 Mich at 320, is that this protection is predicated on a narrow reading of the WPA—namely, one that only analyzes the relevancy of a plaintiff's personal motivations for "blowing the whistle." Our 2011 opinion, reversed by our Supreme Court, only addressed this discrete aspect of the WPA.

Because we did not analyze the overarching issue in our 2011 opinion—that is, whether the WPA only protects conduct that *objectively* advances the public interest—the Supreme Court did not address that issue in its 2013 decision. Because the Supreme Court instructed us in its 2013 remand to consider "all remaining issues on which [we] did not formally rule," we discussed this aspect of the WPA in the opinion issued, and vacated, in 2014, and do so again here. *Id*. at 321.

In any event, our Court has noted the distinction between an employee's personal motives in reporting legal violations and reporting that actually advanced the public interest. See *Phinney v Perlmutter*, 222 Mich App 513, 554; 564 NW2d 532 (1997) ("In addition, whether plaintiff sought personal gain in making her reports, rather than the public good, is legally irrelevant and need not be addressed *except to note that the reporting of misconduct in an agency receiving public money is in the public interest.*") (emphasis added). *Phinney*'s holding on an unrelated matter was abrogated by *Garg*, 472 Mich at 290. (*Garg* overruled *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), on which *Phinney* relied for its analysis of the continuing violations doctrine.)

The law in question, Burton Ordinance 68-25C, § 8(I) ("68-C"), is not a law that protects the public interest. Rather, it is an ordinance that reads much like a standard, garden-variety collective-bargaining provision for wages and benefits.[32] It is simply a recitation that sets forth the wages and benefits for administrative, nonunionized employees of the city of Burton. In many workplaces, an employee must use sick days or vacation days, or lose them. But under some collective-bargaining agreements and employment policies, employees may accumulate these days and then get paid for all days not used. This perk is generally found in collective-bargaining agreements for unionized employees. But here, this benefit—along with a statement of wages and matters like dental insurance—was codified in 68-C.

The waiver of the benefit contained in 68-C, which plaintiff characterizes as a violation of law, has its origins in a severe financial crisis that afflicted the city of Burton in the early 2000s.[33] During this time period, the city's department heads—who obviously benefited from 68-C—voted as a group not only to take a wage freeze, but to forgo the perk of payment for accumulated leave time to avoid harmful layoffs and reduced services to the public.[34] In other words, the administrative team's waiver of the perk contained in the ordinance was an illustration of shared sacrifice by the

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[32] See Burton Ordinance 68-25C, § 8(I) ("68-C"). As noted by the Supreme Court, "Burton's ordinance numbering and policy regarding unused leave time have changed since the time of the trial of this case." *Whitman II*, 493 Mich at 306 n 3. We agree with the Supreme Court: "[b]ecause those changes are not relevant to our analysis, this opinion refers to the ordinance numbering and language as it was introduced during trial." *Id*.

[33] *Whitman I*, 293 Mich App at 224.

[34] See *Whitman II*, 493 Mich at 307.

nonunionized department heads to advance the public interest of the citizens of the city of Burton at the employees' expense.

Only one department head objected to this public-spirited waiver of the perk—Whitman, then the chief of police.[35] He demanded his money as set forth in the ordinance,[36] which he received after the mayor acted on the advice of outside legal counsel. This is the "law" plaintiff (mis)uses to assert a claim under the WPA.

We say "misuses" advisedly because the WPA is designed to ferret out violations of law that injure the public, especially when applied to public-sector defendants.[37] If government officials, who are bound to serve the public, violate laws designed to protect the public from corruption, pollution, and the like, then employees who, at their own risk, blow the whistle on such illegality, necessarily serve the public interest. This is precisely why the WPA grants such employees protection from reprisal. The law in question here was not a law to protect the public, but rather was a simple listing of wages, benefits, and various perks. The very

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[35] *Id*. at 307. It appears that Whitman attended the March 2003 meeting when the department heads decided to waive 68-C, but it is unclear whether Whitman voiced an opinion on the waiver at the meeting.

[36] *Id*.

[37] "The [WPA] encourages employees to assist in law enforcement . . . with an eye toward promoting public health and safety. *The underlying purpose of the* [*WPA*] *is protection of the public*. The [WPA] meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997) (quotation marks and citations omitted; emphasis added; alteration omitted).

public servants who benefited financially from the ordinance made a personal sacrifice and waived their right to a perk to save the public badly needed funds, and to prevent layoffs and reduced public services. Any action contrary to the waiver was contrary to the public interest. Again, the waiver of the perk set forth in the ordinance at issue advanced the public interest. Opposition to that waiver—on which Whitman bases his suit—objectively disserved the public interest.

Also, whistleblowing assumes that an employee risks retaliation for uncovering the public employer's misconduct. Here, there simply was no misconduct or illegality. The only conduct of the city employees that implicated 68-C was the department heads' decision to waive the benefit provided by the ordinance, and Whitman's refusal to honor that waiver. This is an employee's insistence, plain and simple, that he get his perk—not an uncovering of corruption or illegality. And this disagreement about the legal effects of the waiver was satisfied, in Whitman's favor, after the city sought legal counsel. Accordingly, Whitman's citation of the ordinance was not whistleblowing. It was simply a disagreement regarding the proper interpretation of the city of Burton's labor laws. That is, there was a disagreement about whether the administrative team could waive the perk provided by 68-C, and whether Whitman was bound by the group's waiver. It had nothing to do with whistleblowing whatsoever.

That is why this is not the usual case. Reporting a violation of law normally constitutes conduct in the public interest.[38] Here, to the contrary, Whitman's

[38] Our sister states' jurisprudence interpreting their whistleblower statutes recognize the distinction between reported legal violations that affect the public interest (which are protected) and reported legal violations that affect solely private interests (which are not protected). Though

actions—as an objective matter—were undoubtedly against the public interest. And defendants did not actually violate any law as violations of law have been traditionally understood in whistleblowing lawsuits—i.e., revealing public corruption or malfeasance. Defendants simply refused (at first) to grant Whitman a monetary perk he demanded because all managerial employees had waived that perk. Whitman may or may not have been entitled to his perk, but he most certainly is not entitled to claim the protection of the WPA when his conduct objectively served his interest, but harmed the public's.

Because he was not a whistleblower under the WPA, no juror could have legally found in favor of Whitman on his WPA retaliation claim. The trial court's denial of defendants' request for JNOV is accordingly reversed.

B. CAUSATION[39]

We also held in our 2011 opinion, *Whitman I*, that

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the following cases involve internal corporate disputes—as opposed to reported violations of municipal statutes—we think that the reasoning is equally relevant to this case, where the ordinance violated did not advance the public interest. See *Garrity v Overland Sheepskin Co of Taos*, 917 P2d 1382, 1387 (NM, 1996) (noting that "[w]hen an employee is discharged for whistleblowing, the employee must also demonstrate that his or her actions furthered the public interest rather than served primarily a private interest"); and *Darrow v Integris Health, Inc*, 176 P3d 1204, 1214 (Okla, 2008) (concluding that "to distinguish whistleblowing claims that would support a viable common-law tort claim from those that would not, the public policy breached must truly impact public rather than the employer's private or simply proprietary interests"). Cases from foreign jurisdictions are not binding, but can be persuasive authority. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

[39] To prevail under the WPA, Whitman must "establish a causal connection between [the] protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity." *Whitman II*, 493 Mich at 320. In the absence of direct evidence of retaliation (which Whitman

Whitman's alleged whistleblowing activity from late 2003 to early 2004 was not the legal cause of the mayor's decision to not reappoint him as police chief in late 2007.[40] On closer examination of the facts pertinent to the causation issue, we are even more convinced that Whitman's alleged whistleblowing activity lacks a causal link to the mayor's decision. We so hold for several reasons.

1. TRUST, NOT WHISTLEBLOWING

As noted, in 2003, the mayor's administrative team voted to voluntarily take a wage freeze and forgo the perk of accumulated sick days to save the taxpayers money, and to avoid layoffs and reduced services.[41] This

does not present), he must show indirect evidence to demonstrate "that a causal link exists between the whistleblowing act and the employer's adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 176; 828 NW2d 634 (2013). A plaintiff's presentation of indirect evidence is analyzed under "the burden-shifting framework set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]." *Id*. Applying this standard to retaliation claims, a plaintiff must show that his "protected activity" under the WPA was "one of the reasons *which made a difference* in determining whether or not to [discharge] the plaintiff." *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986) (quotation marks and citations omitted; emphasis added; alteration in original). In other words, "[t]o establish causation, the plaintiff must show that his participation in [a protected activity] was a significant factor in the employer's adverse employment action, not just that there was a causal link between the two." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004) (quotation marks and citations omitted). Because *Debano-Griffin* uses the *McDonnell Douglas* framework, which was originally designed for employment discrimination claims, it is appropriate for the Court to use federal cases interpreting *McDonnell Douglas* as persuasive authority. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993) (stating that Michigan courts may "turn to federal precedent for guidance in reaching [a] decision" about whether a plaintiff has established a valid discrimination claim).

[40] *Whitman I*, 293 Mich App at 232 n 1.

[41] *Id*. at 230.

sacrifice spoke well of the mayor and his department heads. Whitman's refusal to abide by the department heads' agreement and subject himself to the same sacrifice raised issues of trust and caused the mayor to rightly be disappointed in Whitman. Indeed, Whitman's "evidence" of a causal connection between his whistleblowing and the mayor's decision many years later to not reappoint him, frames the issue in exactly this context.

A third party who attended Whitman's June 2004 meeting with the mayor made handwritten notes of the discussion, which state: "Mayor = No Trust—68-C (vacation)—lack of communication[.]"[42] And the mayor's alleged December 2007 statement to other senior police officers that he and Whitman "got off on the wrong foot"[43]—a statement that, if made, occurred *after* the mayor decided not to reappoint Whitman[44]—supposedly emphasized Whitman's 68-C complaints as an issue of trust, in that his failure to adhere to a voluntary agreement with his colleagues betrayed that trust. In sum, it appears the mayor viewed the 68-C issue not in the context of whistleblowing, or anger at Whitman's supposed whistleblowing, but instead as an example of how Whitman was untrustworthy. As noted, this is not a case where a "violation of law" was even remotely an issue. And it is extremely unlikely that this "lack of trust" over Whitman's failure to honor an agreement on this specific occasion had anything to do with his subsequent dismissal, for the numerous reasons discussed below.

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[42] *Whitman II*, 493 Mich at 309 (quotation marks omitted; alteration in original).

[43] *Id*.

[44] It is difficult to see how a statement the mayor allegedly made *after* he had already declined to reappoint Whitman could influence his decision not to reappoint Whitman.

2. ALLEGED RETALIATION IS TEMPORALLY REMOTE FROM ALLEGED WHISTLEBLOWING

Whitman's claim has a serious temporal problem: he alleges that he was not reappointed in late 2007 for events that took place in late 2003 and early 2004. Our courts have taken pains to stress that the length of time between an alleged whistleblowing and an adverse employment action is not dispositive on the issue of retaliation—when those two events are *close in time* (i.e., days, weeks, or a few months apart).[45] If whistleblowing and retaliation that occur close in time may not be sufficient to find causation under the WPA, then whistleblowing and retaliation that occur *far apart* in time certainly weigh against finding causation. See *Fuhr v Hazel Park Sch Dist*, 710 F3d 668, 675-676 (CA 6, 2013) (holding that in the context of a Title VII retaliation claim, a two-year gap between a plaintiff's protected activity and the claimed retaliatory act "proves fatal to [the plaintiff's] assertion that there is a causal connection").[46]

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[45] See, for example, *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (holding that to satisfy the causation requirement under the WPA, a plaintiff "must show something more than merely a coincidence in time between protected activity and adverse employment action"); *Tuttle v Metro Gov't of Nashville*, 474 F3d 307, 321 (CA 6, 2007) (stating that "[t]he law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim"); and *Shaw v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) (noting that "[a] temporal connection between protected activity and an adverse employment action does not, in and of itself, establish a causal connection").

[46] In its opinion, the United States Court of Appeals for the Sixth Circuit noted that "[o]ur review of the law shows that multiyear gaps between the protected conduct and the first retaliatory act have been insufficient to establish the requisite causal connection." *Fuhr*, 710 F3d at 676. This observation is correct; courts interpreting our sister states' whistleblower laws and jurisprudence have made similar observations. A long time span between the alleged whistleblowing and supposed retali-

Here, there is an enormous temporal gap between Whitman's alleged whistleblowing and the supposed retaliation, which belies any causal connection between the two. As noted, Whitman's demands to receive compensation under 68-C took place in 2003 and early 2004. The mayor declined to reappoint him as police chief in November 2007—almost four years after the supposed whistleblowing. Of course, the mayor, as the top executive officer of the city of Burton, *could have terminated Whitman at any time*.[47] He could have done so in March 2003, when Whitman first voiced opposition to the waiver of 68-C, or in early 2004, when he insisted on his compensation under the ordinance. In fact, the evidence demonstrates that the mayor was not concerned about Whitman's 68-C demands at all, because he reappointed him as police chief in November 2003—six months after Whitman's initial complaint regarding 68-C. And again, Whitman's term expired in November 2007, almost *four years* after those complaints.

It strains credulity to the breaking point to suggest, as Whitman does, that the mayor—who had the power to dismiss Whitman at any time, for any reason or no reason—was so upset with his alleged whistleblowing in late 2003 and early 2004 but allowed Whitman to continue as police chief for all of 2004, 2005, 2006, and into late 2007, and only then decided to "retaliate" against him. Indeed, when viewed in the context of the

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ation weighs against finding causation. See *Blake v United American Ins Co*, 37 F Supp 2d 997, 1002 (SD Ohio, 1998) (holding that alleged whistleblowing action that took place five years before plaintiff's termination was not "close enough in time . . . to support a claim of retaliation"); *Anderson v Meyer Broadcasting Co*, 630 NW2d 46, 55 (ND, 2001) (holding that a "lengthy" delay of approximately a year "between [plaintiff's] reports and her termination does not support an inference she was fired because of the protected activity").

[47] Again, Burton Charter § 6.2(b) states that the chief of police serves "at the pleasure of the mayor."

typically close working relationship between a mayor and his chief of police, and the fact that the chief of police, as a member of the mayor's executive team, serves at the *pleasure of the mayor*, Whitman's allegations take leave of reality and enter the theatre of the absurd.

3. BREAKS IN WHITMAN'S SUPPOSED CAUSAL CHAIN

The long period of time between Whitman's supposed whistleblowing and the mayor's decision not to reappoint him involves another aspect that is fatal to his claim: there are numerous breaks in the causal chain. Whitman's first complaints regarding the administrative team's waiver of 68-C in March 2003 clearly did not cause the mayor to retaliate. Indeed, the mayor reappointed Whitman as the chief of police in November of that same year. Whitman's further attempts to secure compensation in January 2004 were addressed by the mayor, who first sought the advice of city counsel, and later, outside labor counsel. The mayor complied with that legal advice by paying Whitman almost $7,000 in additional compensation. And Whitman's 2004 dispute with the mayor ended amicably—he remained chief for more than three years following that meeting, and by his own admission, he never heard mention of the 68-C dispute from the mayor and never was retaliated against during that time period. These intervening events—all positive developments for Whitman—raise serious doubts that his 68-C whistleblowing was a "determining factor" or "caus[e] in fact" of the mayor's decision to not reappoint him. *Matras*, 424 Mich at 682.

4. WHITMAN'S MISCONDUCT LED TO ADVERSE EMPLOYMENT ACTION

In any event, Whitman has provided no evidence to

refute the mayor's stated and compelling reasons for not reappointing him—Whitman engaged in serious misconduct and misused his office. After his reelection in November 2007, the mayor reevaluated his entire administrative team pursuant to the mandates of Burton Charter § 6.2(b).[48] During this period, he was advised of Whitman's serious misconduct in office by officers in Whitman's department. Among other things, these included allegations that Whitman (1) meted out inadequate discipline of subordinates who abused their power, (2) misused a city computer to exchange sexually explicit e-mail messages with a woman who was not his wife, (3) discriminated against a female officer, and (4) forged a signature on a budget memo.[49] Command officers within the police department warned the mayor of serious morale problems created by Whitman's abuse of power.[50] In the face of these troubling revelations, the mayor understandably did not reappoint Whitman to this important position of public trust, and these are the reasons the mayor gave for declining to reappoint him as police chief in November 2007. To suggest that a mayor, whose chief of police works at the mayor's pleasure, would make a reappointment decision based on an old, stale issue instead of very recent, more disturbing revelations, is simply fanciful.

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[48] Again, Burton Charter § 6.2(b) states:

> All other administrative officers shall be appointed by the Mayor subject to the approval of the Council, and shall serve at the pleasure of the Mayor for indefinte [sic] terms, except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same.

[49] See *Whitman II*, 493 Mich at 309; *Whitman I*, 293 Mich App at 227. Whitman admitted at trial that he used a city computer to exchange sexually explicit messages with a woman who was not his wife.

[50] *Whitman I*, 293 Mich App at 227.

Whitman made no specific effort before this Court to deny these allegations against him other than to state, self-servingly and without support, that they were "merely a pretext," and to assert "that his personnel file demonstrate[d] that his performance as a police chief was good, that he had received numerous awards, and that there were never any disciplinary actions against him." *Whitman II*, 493 Mich at 309-310. Whitman's only proffered "evidence" of a causal connection between his supposed whistleblowing and the mayor's decision to not reappoint him was the statement the mayor made in December 2007—after the mayor had already made his decision, but before its public announcement—in which the mayor supposedly told senior police officers that he lacked trust in Whitman. The mayor cited as one example Whitman's refusal to keep his word, and along with the entire administrative team, to waive his unused sick-day compensation under 68-C.

Whitman's assertion must be weighed against the other factors in this case: (1) the mayor's view of Whitman's 68-C demands as a trust issue, not a retaliation issue, and certainly not whistleblowing, (2) the almost four-year interval between Whitman's alleged whistleblowing and the purported retaliation, (3) the causal breaks in Whitman's claim, and (4) the allegations of Whitman's extensive misconduct. When Whitman's assertion is weighed against these factors, the evidence is overwhelming that his so-called whistleblowing had no connection to the mayor's decision to not reappoint him as the police chief. There is simply no way that a reasonable fact-finder, even when "view[ing] the evidence and all legitimate inferences . . . in the light most favorable to the nonmoving party," *Genna*, 286 Mich at 417, could find that retaliation was "one of the reasons *which made a difference*

in determining whether or not to [discharge] the plaintiff." *Matras*, 424 Mich at 682 (emphasis added; alteration in original).

IV. REPLY TO THE DISSENT

The dissent's analysis betrays a basic misunderstanding of the nature and function of executive appointments in governmental administration. Again, the mayor of the city of Burton is required by the city charter to "reaffirm or appoint . . . administrative officers" to the city administration "within thirty (30) days from his election." Burton Charter § 6.2(b). The city council is then required to confirm or deny the appointments "within thirty (30) days from the date of submission . . . ." Burton Charter § 4.5(g). Because the mayor is elected every four years, he is required by the city charter to reaffirm or appoint the city's administrative officers every four years. Within that four-year span, the mayor may dismiss an administrative officer at any time. Burton Charter § 6.2(b). As a result, an administrative officer in the city of Burton has no expectation of continued employment. An administrative officer knows that his term cannot last longer than four years, because after the mayor's election or reelection, an administrative officer must be reaffirmed to his position. And an administrative officer also knows that his term may be *much shorter* than four years—indeed, it may be ended at any time—because an administrative officer serves "at the pleasure of the mayor."

Here, as we have explained in our opinion, *Wurtz* mandates that Whitman's suit be dismissed. The mayor was reelected in November 2007. Upon the mayor's reelection, Whitman's term as police chief, which began in 2003, effectively ended. The city char-

ter required the mayor to reaffirm or appoint a police chief and to submit his suggestion to the city council for approval. Thus, at that stage, Whitman was merely a *candidate* for the position of police chief. Accordingly, Whitman cannot now use the WPA to sue the city for the mayor's ultimate decision to not reappoint him as police chief, because the WPA does not protect job applicants or prospective employees. In other words, Whitman may not bring a WPA claim against the city of Burton for the mayor's decision to not reappoint him to an office that, as a matter of law, he no longer held at the time.

The dissent attempts to escape this obvious outcome with irrelevant appeals to emotion ("[Whitman] was a full-time, 32½-year employee with the city of Burton"), misstatements of fact ("Smiley removed [Whitman] . . . on November 27, 2007"), and basic misinterpretations of key terms ("[Whitman] enjoyed an 'indefinite' term of employment [as chief of police]").

The last of these is particularly egregious. The true, noncolloquial, definition of "indefinite" is "not definite"—i.e., "having no exact limits." *Merriam-Webster's Collegiate Dictionary* (2014). This is exactly the way in which the word is used in the city of Burton's city charter:

> All other administrative officers shall be appointed by the Mayor subject to the approval of the Council, and *shall serve at the pleasure of the Mayor for indefinte* [sic] *terms*, except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same. [Burton Charter § 6.2(b) (emphasis added).]

Instead of using the correct dictionary definition of "indefinite" and adhering to the broader context of the

sentence in which the word is used in the city of Burton's charter, the dissent interprets "indefinite" to mean "forever"—i.e., that Whitman had an expectation of continued employment for an unlimited period of time.

This interpretation is the *exact opposite* of what the word "indefinite" actually means in the context of the city charter. Again, an "indefinite" term of employment is one that is "not definite"—i.e., *one that can end at any time*—today, tomorrow, or any time before the conclusion of the four-year term. Accordingly, the city charter's use of "indefinite" means that while a police chief may be employed for a full four-year term, he serves at the pleasure of the mayor and may be terminated *at any time before* the expiration of the four-year term. Therefore, Whitman had no basis for his expectation of continued employment. But most important to the application of *Wurtz*, the law of the city of Burton required Whitman to be reappointed (and approved by the city council) as the chief of police *every four years*, after the mayor's reelection. Because the mayor chose not to reappoint Whitman as police chief *after* his term as police chief had expired, Whitman has no recourse under the WPA.

Finally, the dissent attempts to confuse matters by insinuating that we do not recognize that at-will employees are protected under the WPA. Of course we recognize the obvious proposition that an at-will employee, like any other employee, is protected under the WPA—*for retaliatory actions taken against him when he is employed*. Here, defendants never took retaliatory action against Whitman while he was employed as chief of police. Rather, the mayor chose to not reappoint Whitman *after* the mayor's reelection in Novem-

ber 2007, at which time Whitman became a candidate for the (then open) position of police chief.

V. CONCLUSION

We hold that Whitman's claim must be dismissed for any one or a combination of the following reasons: (1) *Wurtz* requires its dismissal, (2) objectively, Whitman's conduct did not advance the public interest, but instead ran contrary to the public interest, and (3) the mayor's refusal to reappoint Whitman, a political appointee, to another four-year term as police chief, was a result of Whitman's egregious misconduct, not the alleged whistleblowing activity that took place long before his four-year term as chief had ended.

Accordingly, because no reasonable fact-finder could legally find in favor of Whitman on his claim under the WPA, we reverse the trial court's denial of defendants' motion for JNOV and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

BECKERING, J. (*dissenting*). As noted by the majority, this matter is before the Court for a third time. Once again, I must disagree with the majority opinion. In addition to my conclusion that *Wurtz v Beecher Metro Dist*, 495 Mich 242; 848 NW2d 121 (2014), does not impact the outcome of this case, I disagree with the majority's analysis regarding the requirements of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and the majority's attempt to engraft language that does not exist into the act. In its first opinion in

this case, the majority held that "a critical inquiry" in determining the validity of a claim under the WPA "is whether the employee acted in good faith and with a desire to inform the public on matters of public concern . . . ." *Whitman v City of Burton*, 293 Mich App 220, 230; 810 NW2d 71 (2011) (*Whitman I*) (quotation marks and citations omitted). As the Michigan Supreme Court noted at the time of its first remand in this matter, "[n]othing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's *primary* motivation be a desire to inform the public of matters of public concern." *Whitman v City of Burton*, 493 Mich 303, 306; 831 NW2d 223 (2013) (*Whitman II*).[1] Yet the majority continues to focus on plaintiff Bruce Whitman's motivations, going so far as to call him "selfish." Perhaps it is to justify its decision to engraft into the plain language of the WPA another requirement: in addition to a plaintiff's duty to prove that he reported, or was about to report, a "violation or a suspected violation of a law or regulation or rule," the plaintiff must take the additional step of proving that the law or regulation or rule at issue is one that is deemed to "advance the public interest." Markedly absent from MCL 15.362 is

[1] The Supreme Court further noted that "the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim. To the extent that *Shallal* [*v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997)] has been interpreted to mandate those requirements, it is disavowed." *Whitman II*, 493 Mich at 306. See also *id*. at 313, 318-319, 321. As the Supreme Court pointed out in its opinion, *id*. at 314-319, and as I addressed in my dissenting opinion in *Whitman I*, 293 Mich App at 232-250 (BECKERING, J., dissenting), *Shallal* and related caselaw focused on *causation* and the failure to establish a causal connection between a plaintiff's firing and the protected activity.

any requirement that a court or jury determine whether the law at issue actually advances the public interest, or whether "the plaintiff's conduct objectively promoted the public interest." Because I cannot countenance an attempt to judicially impose a requirement into the WPA where no statutory basis exists, especially a requirement that appears to be nothing more than an attempt to get around our Supreme Court's last prohibition against using the plaintiff's motives as a factor to determine whether he or she has engaged in protected conduct, I dissent.[2] See *Whitman II*, 493 Mich at 319.

The primary purpose of the Supreme Court's latest remand order in this case, *Whitman v City of Burton*, 497 Mich 896 (2014) (*Whitman IV*), was to enable this Court to determine whether *Wurtz* impacts the outcome. In *Wurtz*, 495 Mich at 244, our Supreme Court evaluated whether the WPA applies to a fixed-term contract employee "whose term of employment has expired without being subject to a specific adverse employment action identified in the WPA and who seeks reengagement for a new term of employment . . . ." Noting that such an employee "occupies the same legal position as a prospective employee," and that "[t]he WPA, by its express language, only applies to current employees" and "offers no protection to prospective employees," the Court concluded that the

[2] As noted by the Supreme Court in *Whitman II*, 493 Mich at 313, "[t]o do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous." The fact that the majority's new requirement of "advanc[ing] the public interest" is seen nowhere else in the caselaw, from what I could ascertain, further supports the conclusion that the majority is overstepping its bounds. As the Supreme Court noted, the plain and unambiguous language of the WPA, *as is*, "meets its objective of protecting the public . . . ." *Id.* at 318.

WPA had no application. *Id*. The Supreme Court made clear, however, that its ruling did not affect the rights of at-will employees and others who enjoy an expectation of ongoing employment and an expectation that they will not be fired or otherwise discriminated against for reasons violative of the WPA. *Id*. at 256-257. It further clarified that its ruling did not address contracts with a "renewal clause imposing some obligation or duty on the employer to act." *Id*. at 258 n 32.

I respectfully dissent from the ruling of my colleagues because I would find that Whitman's employment situation was considerably different from, and distinguishable from, that of the plaintiff in *Wurtz*, and that Whitman was protected by the WPA. Unlike the plaintiff in *Wurtz*, Whitman was not a fixed-term employee whose contract was allowed to expire in accordance with the terms of the agreement. Instead, he was a full-time, 32½-year employee with the city of Burton who enjoyed an "indefinite" term of employment, much like any other at-will employee protected by the WPA, and who was not reaffirmed in his position as the chief of police because, according to the evidence and the jury's conclusion at trial, the mayor retaliated against him due to his whistleblowing activities. As such, I remain with my findings and conclusions on all pertinent appellate issues in this case as set forth in my prior dissents, *Whitman I*, 293 Mich App 220, and *Whitman v City of Burton*, 305 Mich App 16; 850 NW2d 621 (2014) (Whitman III).

I. *WURTZ*

In *Wurtz*, the plaintiff, Richard Wurtz, entered into a fixed-term employment contract with the Beecher Metropolitan District, which manages water and sewage for a portion of Genesee County. *Wurtz*, 495 Mich at 244-245. Wurtz contracted to serve a 10-year term as the

district administrator; he drafted the contract himself because he was serving as the district's attorney at the time he entered into the agreement. *Id*. at 245. Per the terms of the contract, Wurtz served from February 1, 2000, to February 1, 2010. *Id*. Notably, the contract did not contain an extension or renewal clause. *Id*. at 248. Wurtz's relationship with the board members soured and became "tumultuous" in the two years before his contract expired, which he claimed was due in part to his whistleblowing activities. *Id*. at 245-247. As his fixed term neared its expiration, Wurtz solicited the board to extend his contract, and he warned the board members that if they did not extend his contract beyond the 10-year period as he wished, he would consider their failure to do so retaliation under the WPA for actions he took against them during his tenure. *Id*. at 246-247. The board voted not to extend Wurtz's contract, and instead, allowed it to expire per the terms of the contract. *Id*. at 247. As the Supreme Court emphasized in its opinion, "[o]ne essential and undisputed fact bears emphasis: Wurtz suffered no adverse consequences in the context of his self-drafted 10-year contract." *Id*. He finished his term of employment with no change in his employment status. After the contract expired, Wurtz sued the district and three of its board members "alleging a violation of the WPA and wrongful termination in violation of public policy." *Id*. The trial court granted the district's motion for summary disposition, and this Court reversed in a split decision. *Id*. at 248.

The Supreme Court granted leave to appeal and framed one of the legal issues in dispute as "whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*., when the defendants declined to renew or extend the plaintiff's employment contract, *which did not contain a renewal clause beyond the expiration of its ten*

year term[.]" *Wurtz v Beecher Metro Dist*, 494 Mich 862 (2013) (emphasis added). In its analysis, the Supreme Court concluded that "a contract employee seeking a new term of employment should be treated the same as a prospective employee for purposes of the WPA." *Wurtz*, 495 Mich at 249. Thus, "[t]he question then becomes whether a spurned job applicant can bring a claim under the WPA." *Id*. The Court held that "the WPA, by its express language, has no application in the hiring context. Thus, the WPA does not apply when an employer declines to renew a contract employee's contract." *Id*. The Court held that in the context of the *Wurtz* case, "no relevant difference exists between a new job applicant and a current contract employee seeking a new term of employment." *Id*. at 250. Although the Court held that the WPA did not apply to the plaintiff's request for renewal of his contract in *Wurtz*, it expressly noted that the contract at issue did not contain a renewal clause and left open the issue whether such a clause would have an effect on its analysis. *Id*. at 258 n 32 ("Wurtz's contract *did not contain any renewal clause imposing some obligation or duty on the employer to act*. Thus, we need not address the effect that such a clause would have on our analysis.") (emphasis added).

The relevant provision of the WPA, MCL 15.362, states as follows:

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

public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Our Supreme Court noted that the WPA "only applies to individuals who currently have the status of an 'employee,' " *Wurtz*, 495 Mich at 252, and because Wurtz made "no claim that his employment contract was in any way breached or that he was subject to a specific adverse employment action enumerated by the WPA during his contract term," his claim was not covered by the WPA. *Id*. at 252 n 16. The Court noted that "[w]hile the ADEA[3] and Title VII[4] may apply in the context of a contract renewal, that fact has no bearing on the application of the WPA." *Id*. at 255. As to why the WPA only covers current employees and not prospective employees, our Supreme Court noted, "[t]his Court need not inquire why the Legislature chose to *confine the WPA's protections by the bookends of employment* while extending the [Civil Rights Act's] protections to the hiring context. The Legislature elected to craft its legislation that way, and we decline to second-guess the wisdom of the Legislature's policy decisions." *Id*. at 255 (emphasis added).

Our Supreme Court emphasized, however, the limited nature of its holding and made clear that the WPA "does protect" against prohibited employer actions both at-will employees, who "stand[] squarely within the WPA's protections," and employees working under fixed-term contracts with respect to an employee's service under such a contract. *Id*. at 256-257.

II. APPLICATION OF *WURTZ* TO WHITMAN

That brings us to the present case. Whitman testi-

[3] Age Discrimination in Employment Act, 29 USC 623(a)(1).

[4] Title VII of the federal Civil Rights Act, 42 USC 2000e-2(a)(1).

fied at trial that he was first hired by the city of Burton as a civilian police aide in June 1975. He attended the Flint Police Academy, and the city of Burton hired him as a paid reserve officer. He then became a part-time officer, and in 1978, he became a full-time officer. After working full-time as a patrolman, he was promoted to sergeant in 1991. In 1998, he was promoted to lieutenant. In December 2001, defendant Charles Smiley, the mayor at the time, appointed Whitman to serve as the interim police chief, and in March 2002, he promoted Whitman to the position of chief of police, which Whitman held until Smiley removed him from that post on November 27, 2007.[5]

A. PERTINENT CHARTER PROVISIONS DEFINING WHITMAN'S EMPLOYMENT RELATIONSHIP

Smiley testified that pursuant to the city charter, within 30 days of a mayor's election, the mayor must submit the names of "the clerk, the fire chief, the police chief, the assessor, [and] the treasurer . . . to the City Council" to be confirmed by the council. In this regard, the city charter provides that city administrative officers are "the Mayor, the Clerk, the Treasurer, the Attorney, the Assessor, the Chief of Police, the Fire Chief, and a Board of Review." Burton Charter § 6.1(a).

[5] Smiley, who was first elected mayor in 1991, testified that after the previous police chief retired in 2002, he formed a search committee and ultimately selected Whitman from among the top two or three candidates "because he was a Burton officer. I really thought we should promote within." After Smiley was reelected in 2003, he reaffirmed Whitman as the chief of police. What was described in detail in earlier opinions of this Court need not be rehashed here. Whitman presented evidence at trial to establish that he engaged in whistleblowing activities in 2003 and 2004 that raised the ire of Smiley and almost got Whitman fired in 2004. After Smiley was reelected in November 2007, he decided not to reaffirm Whitman as the police chief. The jury concluded that this decision was motivated in part by Whitman's whistleblowing activities.

Section 6.1(c) provides that "[t]he terms of all administrative officers, except the Mayor, shall be *indefinite*." (Emphasis added.)

Section 6.2(b) provides that

> [a]ll other administrative officers [except the City Attorney and the City Auditor] shall be appointed by the Mayor subject to the approval of the Council, and shall serve at the pleasure of the Mayor *for indefinte* [sic] *terms*, except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same. [Emphasis added.]

B. APPLICABILITY OF THE WPA TO WHITMAN'S EMPLOYMENT

I disagree with the majority's conclusion that this case fits so neatly into the rule established in *Wurtz*. I begin by noting the significant ways in which this case is different from *Wurtz*. The plaintiff in *Wurtz* was employed pursuant to a 10-year contract with no renewal clause. The contract contained no provisions for changing its end date or for otherwise renewing the term of Wurtz's employment. Thus, nothing required the employer to make a choice about the plaintiff's employment; the employment simply expired. The end of the plaintiff's employment relationship was a *fait accompli*. Any hope the plaintiff had of employment after the expiration of the 10-year term was in striking up a new term of employment. In this sense, given the terms of the plaintiff's employment agreement, he was nothing more than a prospective employee. As the dissenting opinion (which was ultimately embraced by the Supreme Court) pointed out when the *Wurtz* case was before this Court:

> The WPA requires the existence of an employment relationship. By plaintiff's own admission, defendants scrupu-

> lously adhered to the terms of his contract. Plaintiff now seeks damages because defendants abided by the terms of his employment contract. Plaintiff's position is illogical and lacks any support in our jurisprudence. *Absent a contractual obligation or legal duty to consider an extension or renewal* of an employment contract, a cause of action under the WPA is unavailing when a contractual employee finishes a fixed-term contract. [*Wurtz v Beecher Metro Dist*, 298 Mich App 75, 91; 825 NW2d 651 (2012) (K. F. KELLY, J., dissenting), rev'd 495 Mich 242; 848 NW2d 121 (2014) (emphasis added).]

I respectfully suggest that the instant case falls squarely within the exception set forth in the dissenting opinion of our Court in *Wurtz*, and as expressly carved out by our Supreme Court when it held that the ruling in *Wurtz* dealt only with a fixed-term contract that "*did not contain a renewal clause beyond the expiration of its ten-year term*." *Wurtz*, 494 Mich at 862 (emphasis added). See also *Wurtz*, 495 Mich at 258 n 32. Here, in contrast to Wurtz's fixed-term contract, the city of Burton's charter contained a clause providing that the chief of police's term of employment "shall be indefinite," § 6.1(c), as well as a clause pertaining to the renewal of that "indefinte [sic] term[]," § 6.2(b). Notably, § 6.2(b) of the city of Burton's charter provided that Whitman's employment was indefinite, "except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same."[6] This is effectively a renewal clause that imposed an obligation on Mayor Smiley to make a choice about Whitman. The

[6] Contrary to the characterization set forth in the majority opinion, plaintiff was not appointed to "a four-year term" or a "four-year appointment" as the chief of police. Rather, it was Mayor Smiley who held a four-year term. Upon his election, the city charter tasked him with deciding whose names to submit to the City Council to serve as his

issue involved in this case was purposely not addressed in *Wurtz*. See *Wurtz*, 495 Mich at 258 n 32 ("Wurtz's contract did not contain any renewal clause imposing some obligation or duty on the employer to act. Thus, we need not address the effect that such a clause would have on our analysis.").

It is the existence of the choice, mandated by the renewal clause, that takes this case outside the ambit of *Wurtz* and brings Whitman within the protection of the WPA. Under the city of Burton's charter, Whitman's term of employment was expressly and repeatedly defined as "indefinite," and it was only to be reevaluated at the time a mayor won reelection. Like any at-will employee, Whitman could certainly be fired at any time, as he served at the pleasure of the mayor—this simply means that the mayor was delegated the authority to choose several of the city's employees who served as his or her administrative officers. In general, Whitman was, for all intents and purposes, an at-will employee, and such employees are protected by the WPA. *Wurtz*, 495 Mich at 256-257. Notably, upon a mayor's reelection, § 6.2(b) imposed an obligation or duty on the mayor to act and to make a decision about his administrative officers' continued employment. Section 6.2(b) provides that the mayor "shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election, and give Council notice of same." Such a decision was mandated, as evidenced by the use of the word "shall" in § 6.2(b). Burton Ordinance § 10.05(B) (defining the word "shall" to mean that "[t]he act referred to is

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administrative officers; those officers served at his pleasure. After his reelection, Smiley was tasked with deciding whom to *reaffirm* in that capacity.

mandatory"). See also *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003) ("The word 'shall' is generally used to designate a mandatory provision . . . ."). Therefore, unlike *Wurtz*, this case did not involve an employment relationship that was bound to expire on its own terms, which would have left plaintiff in the same position as that of a prospective employee. The terms of Whitman's employment required Smiley to make a choice about the direction in which the employment relationship would go.

Although police chiefs often serve at the pleasure of their mayor, it is also true that police officers often attain such a position after years of service in law enforcement, and it becomes the capstone of their careers. Many serve for one or more decades in the position and retire from it at the end of their careers. To be sure, Whitman was not entitled to serve as long as he wished in the role of chief of police. He could be fired at any time and for any reason that did not violate the law. But given the language of the city of Burton's charter, I would hold that Whitman was serving within the bookends of his employment and that the WPA protected him from being fired or not reaffirmed by Smiley based on any discriminatory reasons. To interpret the applicability of the WPA as the majority suggests, in addition to being incorrect in my opinion, would potentially compromise the role of the chief of police, as the police chief could jeopardize his or her employment if he or she did not follow the mandates of the mayor, which might cause the police chief to ignore a violation of a law or regulation or rule so as to not risk being fired. That cannot be what the enactors of the WPA intended.

Because Whitman held an indefinite term of employment that carried with it the express option of being

continued by reaffirmation, I find that any decision to terminate that employment, if motivated by protected activity, was a violation of the WPA. "The underlying purpose of the WPA is protection of the public. *The statute meets this objective by protecting the whistle-blowing employee* and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Pace v Edel-Harrelson*, 309 Mich App 256, 264; 870 NW2d 745 (2015) (quotation marks and citations omitted; emphasis added). In light of the purpose of the WPA, I decline to adopt the majority's narrow reading of the act, which would allow an employer to discriminate against an employee whose term of employment is expressly subject to a renewal clause, yet face no consequences under the WPA for taking a discriminatory action.[7] Where the terms of employment require consideration of renewal, I cannot interpret the WPA as countenancing willful discrimination against an employee for whistleblowing activities at the time the employer makes a decision on the employee's renewal clause. Indeed, the WPA is a remedial statute that is to be liberally construed. See *id*. Allowing an employer who is mandated to make a choice about a current employee to discriminate against that employee because he or she engaged in protected whistleblowing activities would, in my mind, strike a damaging blow to the WPA.

III. ADOPTION OF THE ANALYSIS IN MY PRIOR DISSENTS

In light of the Supreme Court's opinion in *Whitman II*, 493 Mich 303, and its decision to "vacate the

[7] This is not to imply that a renewal clause offers an at-will employee such as Whitman any greater protections than those of any other at-will employee. Rather, I would simply hold that the choice an employer makes about a renewal clause is within the bookends of the at-will employee's employment.

judgment of the Court of Appeals" following the first remand, and to remand the case for a second time to consider the impact of *Wurtz*, *Whitman IV*, 497 Mich at 896, the slate has been wiped clean of this Court's earlier binding opinions. The majority duly fulfills its obligation to reconsider this case in light of *Wurtz*. But in addition, the majority readopts nearly verbatim its earlier analysis after the first remand in this case, *Whitman III*, 305 Mich App at 22-33. As noted in the introductory paragraph of this dissenting opinion, I take issue with the majority's attempt to engraft a requirement into MCL 15.362 that does not exist. MCL 15.362 provides that

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

Nothing in the plain language of the statute requires a court or a jury to decide as a matter of fact whether the law or regulation or rule objectively advances the public interest. No qualitative analysis is required to decide which law or regulation or rule is worthy of being covered by the WPA. The plain language of MCL 15.362 does not remotely suggest that some laws are included and others are not. As the Supreme Court pointed out in *Whitman II*, 493 Mich at 311-312:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.

The plain and unambiguous language of the WPA, *as is*, "meets its objective of protecting the public," *id*. at 318, and "further judicial construction" is neither required nor permitted, *id*. at 312. The Supreme Court also admonished that "there is no 'primary motivation' or 'desire to inform the public' requirement contained within the WPA," and such a requirement cannot be judicially imposed—"[t]o do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous." *Whitman II*, 493 Mich at 313.

Despite the Supreme Court's explicit and repeated admonitions *not* to consider a plaintiff's motives when determining whether a plaintiff has engaged in protected activity under the WPA—because such motive is irrelevant to the issue—the majority opinion attempts to place an invisibility cloak over its effort to do just that. Imposing on MCL 15.362 a new, judicially created requirement to evaluate whether, in fact, the law or regulation or rule at issue in the WPA action actually serves the public interest, brings motive—or purpose—back into the equation. For example, the majority describes Whitman's attempt to enforce Ordinance

68-C as a "(mis)use" of the WPA. They opine that Whitman's conduct "objectively disserved the public interest," that he "objectively served his interest, but harmed the public's," and that "[t]his is an employee's insistence, plain and simple, that he get his perk . . . ." As Shakespeare noted, calling a rose, by another name does not alter what it is. The majority attempts to add the sweet fragrance of a new name to its judicially created imposition: assessing the objectives of the plaintiff and determining whether his or her actions actually advance the public interest. Nothing in the plain language of MCL 15.362 supports this additional requirement.

Even if the majority has correctly engrafted a new requirement into the language of MCL 15.362, I disagree that Whitman's actions were "unquestionably and objectively contrary to the public interest" and "harmed, not advanced, the public interest," as characterized by the majority. As I noted in my prior dissenting opinions, seeking to balance a budget through violating one of the city's own ordinances hardly seems to serve the public interest. *Whitman I*, 293 Mich App at 248 (BECKERING, J., dissenting). As the chief of police, Whitman was fulfilling his duty to uphold the law, which was certainly in the public interest. *Id*. The public interest is served when a violation of the law is reported. *Whitman III*, 305 Mich App at 46 (BECKERING, J., dissenting); see also *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378 n 9; 563 NW2d 23 (1997). And while the city may save expenses by ignoring the requirements of Ordinance 68-C, the public will literally not be served on the days the public servants subject to the ordinance are absent from work, taking their allotted sick, personal, and vacation time in

light of the mayor's warning to "use it or lose it." *Whitman III*, 305 Mich App at 47 n 4 (BECKERING, J., dissenting).

I could, like the majority, reiterate the arguments I set forth in my prior dissenting opinions. To do so, however, would be purely repetitive, as nothing has changed the analysis. Consequently, to spare the reader the redundancy, I adopt and remain with my previous findings and conclusions on all pertinent appellate issues in this case. See *Whitman I*, 293 Mich App 220; *Whitman III*, 305 Mich App 16.

IV. CONCLUSION

Because I conclude that *Wurtz* does not affect the outcome of this case, I would affirm the trial court's order awarding judgment to Whitman in keeping with the jury's verdict. As set forth in my prior dissents, the trial court did not err in denying defendants' motion for JNOV. See *Whitman I*, 293 Mich App at 237-239 (BECKERING, J., dissenting); *Whitman III*, 305 Mich App at 41-47 (BECKERING, J., dissenting). There was sufficient evidence of causation to create a material question of fact for the jury. See *Whitman I*, 293 Mich App at 240-242 (BECKERING, J., dissenting); *Whitman III*, 305 Mich App at 47-57 (BECKERING, J., dissenting). The trial court did not abuse its discretion in denying defendants' motion for a new trial. See *Whitman I*, 293 Mich App at 250-252 (BECKERING, J., dissenting). And the trial court did not err by concluding that Smiley is not entitled to a setoff. *Id*. at 252-253. Finally, for the reasons stated above, I strongly disagree with the majority's conclusions that Whitman did not engage in protected activity and that he was not a whistleblower. Such conclusions conflict with our Supreme Court's earlier rulings and dangerously distort the WPA.

CLAY v DOE

Docket No. 321008. Submitted June 3, 2015, at Detroit. Decided July 14, 2015, at 9:00 a.m. Leave to appeal sought.

Willie Clay brought an action against John Doe and the Suburban Mobility Authority for Regional Transportation (SMART) in the Macomb Circuit Court. Plaintiff slipped, fell, and incurred injuries while boarding a SMART bus on April 18, 2011. Plaintiff filed a claim for no-fault benefits with SMART's insurance administrator, which received the claim 78 days after plaintiff was injured. Plaintiff filed his circuit court complaint almost two years after he was injured. Plaintiff alleged that the unidentified driver was negligent when he accelerated too quickly as he drove the bus away from the stop. SMART moved for summary disposition. The court, James M. Biernat, Sr., J., granted SMART's motion for summary disposition, concluding that plaintiff failed to comply with MCL 124.419 because he failed to timely serve SMART's insurance administrator with written notice of his claim. Plaintiff appealed.

The Court of Appeals *held*:

Under MCL 124.419, claims brought against a transportation authority must be presented as ordinary claims against the common carrier involved. Written notice of the claim must be served on the authority within 60 days of the occurrence through which injury occurred. In *Atkins v SMART*, 492 Mich 707 (2012), the Supreme Court held that written notice of a plaintiff's application for first-party no-fault benefits does not constitute written notice of a third-party tort claim sufficient to comply with MCL 124.419. In this case, plaintiff did not submit written notice of his ordinary claim for personal injury to SMART within 60 days of his injury. Instead, he sent a claim for no-fault benefits 78 days after his injury. Because notice of a claim for first-party benefits is not the equivalent of notice of a third-party tort claim, plaintiff failed to comply with MCL 124.419 and his suit was properly dismissed under *Atkins*. There was no reason under Michigan law not to apply *Atkins* retrospectively to plaintiff's case given that *Atkins* did not create a new

principle of law or overrule binding caselaw. *Atkins* merely interpreted a statute. Accordingly, plaintiff's case was properly dismissed.

Affirmed.

STATUTES — COMMON CARRIERS — WRITTEN NOTICE OF TORT CLAIMS.

Under MCL 124.419, claims brought against a transportation authority must be presented as ordinary claims against the common carrier involved; written notice of the claim must be served on the authority within 60 days of the occurrence through which injury occurred; under *Atkins v SMART*, 492 Mich 707 (2012), written notice of a plaintiff's application for first-party no-fault benefits does not constitute written notice of a third-party tort claim sufficient to comply with MCL 124.419; *Atkins* must be applied retrospectively.

Law Office of Carl L. Collins III (by *Carl L. Collins III*) for Willie Clay.

Driggers, Schultz & Herbst, PC (by *Brian J. Kingsley* and *Barbara D. Urlaub*), for Suburban Mobility Authority for Regional Transportation.

Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM. Plaintiff appeals the trial court's order that granted summary disposition pursuant to MCR 2.116(C)(7). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

While boarding a Suburban Mobility Authority for Regional Transportation (SMART) bus on April 18, 2011, plaintiff slipped and fell on the wet floor of the bus aisle. Thereafter, he filed a claim for no-fault benefits from SMART's insurance administrator, which received the claim on July 5, 2011, 78 days after plaintiff was injured. Almost two years later, on March 20, 2013, plaintiff filed a complaint against defendant SMART in the Macomb Circuit Court,

which alleged that SMART and the unidentified bus driver committed the common-law tort of negligence. Specifically, plaintiff claimed that the bus driver accelerated too quickly as he drove the bus away from the stop, which caused plaintiff to slip, fall, and incur injuries.

SMART moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and argued, among other things, that plaintiff's claim was barred by: (1) MCL 124.419, which requires *tort* claimants against a transportation authority to provide the authority with "written notice of any claim based upon injury . . . no later than 60 days from the occurrence through which such injury is sustained" and (2) *Atkins v SMART*, 492 Mich 707, 716; 822 NW2d 522 (2012), which held that a claimant, such as plaintiff, who files an application for no-fault benefits from a transit authority's insurance administrator, does not comply with the 60-day notice requirement of MCL 124.419. After a hearing, the trial court issued a written opinion and order that granted SMART's motion for summary disposition pursuant to MCR 2.116(C)(7). The court held that plaintiff failed to comply with MCL 124.419, because he did not "serve[]" SMART's insurance administrator with "written notice" of his claim "no later than 60 days from the occurrence" of his injury.

On appeal, plaintiff claims that the trial court erred when it granted summary disposition because: (1) he complied with MCL 124.419 when he mailed a claim for no-fault benefits to SMART's insurance administrator and (2) *Atkins* postdated the events that led to this suit. SMART reiterates its arguments made below and asks us to uphold the ruling of the trial court.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Diamond v Witherspoon*, 265 Mich App 673, 680; 696 NW2d 770 (2005). MCR 2.116(C)(7) permits summary disposition "because of release, payment, prior judgment, [or] immunity granted by law." MCR 2.116(C)(7). "When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015).

We review matters of statutory interpretation de novo, and interpret a statute "to give effect to the intent of the Legislature by focusing on the statute's plain language." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133-134; 860 NW2d 51 (2014).

III. ANALYSIS

A. RETROACTIVE APPLICATION OF *ATKINS*

"Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved." *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006). "A court may limit the retroactive effect of a judicial decision . . . if 'injustice might result from full retroactivity.' " *People v Quinn*, 305 Mich App 484, 489; 853 NW2d 383 (2014), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). In making a decision whether to apply caselaw retroactively, a court looks to "(1) the purpose to be served by the new rule, (2) the

extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Quinn*, 305 Mich App at 489 (citation and quotation marks omitted). In a civil suit, the court also looks to "whether the decision [to be applied retroactively] clearly established a new principle of law." *Pohutski*, 465 Mich at 696.

As noted, the Michigan Supreme Court recently held that an application for no-fault benefits from a transit authority's insurance administrator does not constitute sufficient "written notice of [a tort] claim" under MCL 124.419. *Atkins*, 492 Mich at 716.[1] Specifically, the Court explained that

> MCL 124.419 plainly requires "written notice" of any "ordinary claims" for personal injury within 60 days of the underlying occurrence, and the ordinary claims that may be brought pursuant to the statute are qualitatively different from a demand for no-fault benefits paid by a common carrier's insurer. [*Id*.]

As both plaintiff and defendants note, if *Atkins* is applied, retrospectively, to this case, plaintiff's claim must fail. Plaintiff did not submit a "written notice" of his " 'ordinary claims' for personal injury" to SMART "within 60 days" of his injury. *Id*. Instead, he sent a claim for no-fault benefits 78 days after his injury. Because "notice of a claim for first-party benefits is not the equivalent of notice of a third-party tort claim," plaintiff has failed to comply with MCL 124.419 and his suit must be dismissed. *Id*. at 718.

Though plaintiff asserts that *Atkins* should not apply to his suit, because the Michigan Supreme Court issued its decision after the events in issue here, this

[1] See also *Atkins*, 492 Mich at 718 ("[N]otice of a claim for first-party benefits is not the equivalent of notice of a third-party tort claim.").

assertion is not supported by Michigan law. Again, judicial decisions are generally "given full retroactive effect." *Paul*, 271 Mich App at 620. Contrary to plaintiff's arguments, under Michigan caselaw, there is no reason that *Atkins* should not be applied to his action. As SMART accurately observes, *Atkins* did not create a "new principle of law" or overrule binding caselaw[2]—it merely interpreted a statute, MCL 124.419. *Pohutski*, 465 Mich at 696. Plaintiff could not reasonably rely on an "old rule" that classified a request for no-fault benefits as compliance with the notice provision in MCL 124.419, because no such "old rule" existed. *Quinn*, 305 Mich App at 489. Accordingly, we must follow the general principle that gives "judicial decisions . . . full retroactive effect," and apply *Atkins*'s holding to this case. *Paul*, 271 Mich App at 620. For this reason, plaintiff's suit must be dismissed pursuant to MCR 2.116(C)(7).

B. MCL 124.419

Were we nonetheless to assume that *Atkins*'s ruling does not apply to plaintiff's suit, his claim should also be dismissed because he failed to comply with the notice provisions of MCL 124.419 under his preferred, but incorrect, interpretation of the statute.

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[2] Plaintiff's citation of unpublished cases that classified a request for no-fault benefits as compliance with MCL 124.419 is unavailing for two reasons. First, unpublished cases are not binding authority, and therefore cannot create a "rule" of law that can be relied upon. MCR 7.215(C)(1). Second, the unpublished cases to which plaintiff cites are not supportive of his position. In each of the decisions cited by plaintiff, SMART's insurance administrator received the claim for no-fault benefits within 60 days of the plaintiff's alleged injuries. In this case, SMART's insurance administrator *did not* receive plaintiff's claim for no-fault benefits within 60 days of plaintiff's alleged injuries—instead, it received plaintiff's claim for no-fault benefits 78 days after the occurrence of plaintiff's alleged injury.

MCL 124.419 reads, in full:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property *shall be served upon the authority no later than 60 days* from the occurrence through which such injury is sustained and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority. [Emphasis added.]

As the trial court correctly held, MCL 124.419 thus requires "written notice" of an "ordinary claim[] against a common carrier" to be "served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . ." *Id*.; see also *Nuculovic v Hill*, 287 Mich App 58, 66; 783 NW2d 124 (2010).

Here, plaintiff failed to provide SMART's insurance administrator with "written notice" of his demand for no-fault benefits within 60 days of his fall—instead, SMART's insurance administrator received plaintiff's demand 78 days after the event. He accordingly did not "serve" "written notice" on defendants "no later than 60 days" after his injury, and therefore did not comply with the mandates of MCL 124.419. See *Nuculovic*, 287 Mich App at 66.[3] Accordingly, his claim fails and must be dismissed.

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[3] Plaintiff's argument that the "mailbox rule" should apply to the notice provision of MCL 124.419 is unavailing, directly contravenes the plain language of the statute, and is unsupported by any relevant caselaw. "It is not sufficient for a party simply to announce a position . . .

The trial court properly granted summary disposition pursuant to MCR 2.116(C)(7).

Affirmed.

SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ., concurred.

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and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted); see also *Nuculovic*, 287 Mich App at 67 (using *Black's Law Dictionary* (8th ed) to define the term "service" as used in MCL 124.419 as " '[t]he *formal delivery* of a writ, summons, or other legal process' ") (alteration in original).

DETROIT EDISON COMPANY v STENMAN

Docket No. 321203. Submitted June 9, 2015, at Detroit. Decided July 14, 2015, at 9:05 a.m. Leave to appeal denied 499 Mich ___.

The Detroit Edison Company (Edison) brought an action in the Oakland Circuit Court against Ralph and Donna Stenman, seeking a declaratory judgment (1) that Edison had a right to access the Stenmans' property and install and maintain its equipment on the Stenmans' property, (2) that the Stenmans were responsible for protecting Edison's equipment on the Stenmans' property, and (3) that Edison's Rate Book for Electric Service, also known as its tariff, and the rules promulgated by the Michigan Public Service Commission (PSC) controlled the rights and obligations of the parties. In September 2011, Edison installed an advanced-metering-infrastructure meter, also known as a "smart meter," on the Stenmans' property. The Stenmans subsequently complained and demanded that Edison remove the meter. When Edison failed to do so, the Stenmans removed the meter themselves and replaced it with an analog meter. Edison then filed suit and moved for partial summary disposition. The court, Rudy J. Nichols, J., granted the motion, concluding that the Stenmans had failed to present any evidence creating a question of material fact with regard to either health or privacy issues sufficient to preclude enforcement of the law governing the parties' rights and obligations. The court ordered that Edison be given access to the Stenmans' property to install, inspect, read, repair, and maintain its company-owned equipment, that the Stenmans were responsible for the safekeeping of Edison's property, and that the PSC rules governed the rights and responsibilities of the parties. The Stenmans moved to stay enforcement of the order; the court granted the motion for the purpose of obtaining a ruling from the PSC on Edison's proposed smart meter opt-out provision, which was to be included in its rate book. After the PSC entered an order approving an opt-out provision, Edison moved to lift the stay. The court granted the motion and denied the Stenmans' motion for reconsideration. The court, pursuant to a stipulation reached by the parties, subsequently entered a final judgment dismissing with prejudice the remaining unresolved claims. The Stenmans appealed.

The Court of Appeals *held*:

1. Generally, under MCL 460.6(1), the PSC is vested with complete power and jurisdiction to regulate public utilities, including all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. Mich Admin Code, R 460.3101(4) provides that each utility may adopt reasonable rules and regulations governing its relations with customers that it finds necessary and that are not inconsistent with the Michigan Administrative Code's rules for electric service. Under the code, "meter" is defined as a device that measures and registers the integral of an electrical quantity with respect to time. That definition was incorporated into Edison's rate book, and, contrary to the Stenmans' argument, a smart meter qualifies as a meter under this definition even if the smart meter also has additional capabilities. Therefore, Edison's installation of the meter was lawful under the applicable administrative rules and Edison's rate book.

2. An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. In this case, the Stenmans argued that their privacy and health concerns excused their conduct, but they failed to provide any authority supporting that argument. On this record, the Stenmans had to comply with the rules promulgated by the PSC and the rate book provisions approved by the PSC in order to continue receiving electric service from Edison. Contrary to the Stenmans' claims that receiving electric service from Edison was not a voluntary act because there was no practical alternative, it was evident from the application procedures for receiving electric service delineated in the PSC rules and the rate book and the various bases available for terminating service, that applying for and receiving electric service from Edison is a voluntary act. Further, even if the Stenmans' privacy and health concerns could constitute valid defenses for their failure to comply with the relevant rules and the rate book provisions, the Stenmans failed to establish the factual bases of those defenses. Accordingly, the trial court did not err by concluding that the Stenmans failed to demonstrate a genuine issue of material fact with regard to the viability of those defenses.

3. A trial court may stay the enforcement of a judgment or issue a stay of the proceedings in certain circumstances. Contrary to the Stenmans' argument that the trial court abused its discretion when it lifted the stay because its purpose had not been

fulfilled and they would be irreparably harmed by the lifting of the stay, the trial court did not abuse its discretion. The trial court's order granting the partial stay specifically stated that it was entered for the purpose of obtaining the PSC ruling on Edison's proposed smart meter opt-out provision. Once the PSC entered its order approving an opt-out provision, the express purpose of the stay was fulfilled. Moreover, given the express purpose of the stay, the Stenmans' claims in the trial court regarding the irreparable harm that they would face if the trial court lifted the stay were unavailing because they constituted a collateral challenge to the validity or enforceability of the trial court's initial order. However, as with any investigation or litigation, if a litigant wishes to challenge a ruling by a court, the appropriate remedy is to seek a rehearing of the decision or file an appeal. Therefore, the trial court did not abuse its discretion when it lifted the stay.

4. The United States and Michigan Constitutions guarantee every person's right to be free from unreasonable searches. In order for those protections to apply, the government must perform a search; but the Stenmans' argument focused on the potential for smart meters to collect information in the future, and the Stenmans failed to establish that Edison's installation of the smart meters constituted governmental action. Therefore, the Stenmans' Fourth Amendment argument failed.

Affirmed.

PUBLIC UTILITIES — ELECTRICITY — SMART METERS.

Generally, under MCL 460.6(1), the Michigan Public Service Commission is vested with complete power and jurisdiction to regulate public utilities, including all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities; the Michigan Administrative Code defines the word "meter" as a device that measures and registers the integral of an electrical quantity with respect to time; that definition was incorporated into Detroit Edison's Rate Book for Electrical Service, and a smart meter qualifies as a "meter" under that definition even if the smart meter also has additional capabilities.

Cummings, McClorey, Davis & Acho, PLC (by *Timothy Young*), and *Lincoln G. Herweyer, PC* (by *Lincoln G. Herweyer*), for the Detroit Edison Company.

Ralph and Donna Stenman, *in propriis personis*, *Robert Igrisan*, and the *Public Resource Law Center PLLC* (by *Brian W. Coyer* and *Don L. Keskey*) for Ralph and Donna Stenman.

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

PER CURIAM. Defendants, Ralph and Donna Stenman, appeal as of right a trial court order that, pursuant to a stipulation between the parties, dismissed the remaining claims of plaintiff, the Detroit Edison Company (DTE), with prejudice following an order that granted partial summary disposition in favor of plaintiff. We affirm.

I

In September 2011, plaintiff installed an advanced-metering-infrastructure (AMI) meter, commonly known as a "smart meter," on defendants' property. In March 2012, defendants mailed a letter to plaintiff indicating that they revoked and denied their consent to the installation of a smart meter or any other meter that emits electromagnetic radiation, conducts surveillance, or records events and activities on their property, asserting a series of claims related to the health-related consequences of smart meters and the legality of plaintiff's installation of such a meter on their property. Additionally, among numerous other claims and demands, defendants asked plaintiff to immediately remove the smart meter from their property, threatened to remove and replace the meter themselves if plaintiff failed to remove it within 21 days after receiving the letter, and asserted that plaintiff's personnel may only enter or perform activities on their property if they schedule an appointment at a time

convenient for defendants. Defendants ultimately removed the smart meter and mailed it back to plaintiff in May 2012, installing an analog meter in its place.

On August 17, 2012, plaintiff filed a three-count complaint against defendants.[1] Plaintiff alleged that defendants tampered with the smart meter and replaced it with an unauthorized and untested meter, which potentially created safety risks for individuals on defendants' property. Additionally, plaintiff alleged that defendants' conduct constituted a felony in violation of MCL 750.383a and violated the terms of the tariff filed by plaintiff and approved by the Michigan Public Service Commission (MPSC) under MCL 460.6(1),[2] which defendants were required to follow as a condition of receiving electricity from plaintiff. Plaintiff asked the trial court to enter a declaratory judgment ordering that (1) plaintiff had the right to access defendants' property and install and maintain its equipment on defendants' property, as authorized by the tariff, (2) defendants were responsible for protecting plaintiff's equipment on their property and preventing any individuals, including themselves, from tampering with or removing the equipment, and (3) plaintiff's tariff and the rules promulgated by the MPSC control the rights and obligations of the parties, not the letter that defendants sent to plaintiff in March 2012.

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[1] Because plaintiff only requested partial summary disposition with regard to Count I, we will not discuss the procedural history and arguments raised by the parties concerning the other allegations in the complaint. Additionally, we will not discuss the procedural history related to defendants' counterclaim.

[2] The "tariff" is the "Rate Book for Electric Service" that applies to customers' receipt of electric power from plaintiff. The language quoted in this opinion comes from the rate book in effect until February 6, 2013, also referred to as "MPSC No. 10 — Electric." The quoted language remains the same in the current rate book, "MPSC No. 1 — Electric."

On September 24, 2012, defendants filed an amended answer and counterclaim to plaintiff's complaint. Defendants asserted, *inter alia*, that a factual dispute exists regarding whether a smart meter is actually a "meter" under the relevant tariff and regulations, that plaintiff failed to demonstrate that the tariff authorized the installation of "smart meters" with radio transmitters, and that smart meters constitute surveillance devices in violation of federal law. Defendants also raised numerous affirmative defenses, including that smart meters will allow plaintiff to collect and sell private data in violation of the Fourth Amendment, that the smart meter will constantly cover their home with electromagnetic radiation and endanger defendants' health, and that defendants acted in self-defense by removing and replacing the smart meter in light of the ways in which the smart meter threatened their health and safety.

On October 4, 2012, plaintiff filed a motion for partial summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact with regard to the claims raised in Count I of its complaint. With its motion, plaintiff proffered an MPSC order that discussed a staff report that considered concerns similar to those raised by defendants in this case and concluded that the health risks associated with smart meters including radio transmitters were insignificant. Additionally, in its October 9, 2012 reply to defendants' affirmative defenses, plaintiff asserted that the defenses raised by defendants were either untrue or improper under MCR 2.111(F)(3).

In their November 7, 2012 response to plaintiff's motion for partial summary disposition, defendants asserted, among other things, that there were genuine issues of material fact regarding (1) whether plaintiff

was authorized by the MPSC to install a smart meter on defendants' property, when plaintiff had failed to show that a smart meter qualifies as a "meter" under the definition set forth in the tariff or any other rule promulgated by the MPSC and (2) whether the smart meter presents a danger to defendants' health and privacy rights under the Fourth Amendment. Defendants also argued that they are entitled to an "opportunity to prove, through an evidentiary process, that their concerns about the health and safety of the [smart meter] . . . are valid," asserting that they had provided "preliminary evidence" indicating "that it is at least plausible that they might meet their burden with respect to the danger posed by [the smart meter]" through the affidavit of Dr. Donald Hillman, which described the alleged effects of a smart meter on the health of a child not involved in the instant case.

On November 16, 2012, plaintiff filed a reply to defendants' response, in which they asserted that both a smart meter and a digital meter qualify under the definition of "meter" under the MPSC rules and regulations and that the MPSC has authorized the use of smart meters.

After holding a hearing on plaintiff's motion, the trial court granted plaintiff's motion for partial summary disposition on November 29, 2012. The opinion provided, in relevant part:

> Defendants fail to present any evidence creating a question of fact regarding either health or privacy issues sufficient to preclude enforcement of the law governing Plaintiff's use of the smart meter and Defendants responsibilities under the tariff and administrative rules. Defendants' reliance on Dr. Hillman's Affidavit is not responsive to Plaintiff's argument and refers to individuals that are not parties to this case. The Court observes that the Michigan Public Service Commission issued an Order that

> addressed the concerns similar to Defendants['], specifically adverse health effects, customer privacy concerns, data protection and cyber security issues as well as costs raised by individuals and local governments regarding implementing the AMI by electric utilities operating in Michigan. The Commission accepted a Staff report that health risks from the installation and operation of metering systems using radio transmitters [are] insignificant and that the appropriate federal health and safety regulations provide assurance that smart meters represent a safe technology. Additionally, the Commission held that investor-owned utilities, such as Detroit Edison, must make available an opt-out option, based on cost-of-service principles for their customers.
>
> For these reasons and those further stated by Plaintiff, the Court grants Plaintiff's motion for partial summary disposition and orders that Plaintiff shall be entitled to have access to Defendants' property to install, inspect, read, repair and/or maintain its company-owned equipment on their premises. Furthermore, the Court orders that Defendants shall be responsible for the safe-keeping of Plaintiff's property on Defendants' premises. Finally, the Court finds that the MPSC rules govern the rights and responsibilities of the parties. [Citation and some punctuation omitted.]

On December 12, 2012, defendants moved for a 60-day partial stay of the order of partial summary disposition entered in favor of defendant, citing MCR 2.614(B) as the basis of their motion. In particular, defendants asserted that a stay was necessary because defendant Donna Stenman had experienced headaches, nausea, and sleep difficulties when the smart meter was installed, and, as a result, defendants needed time to sell their home and move to another location.[3] In its December 17, 2012 response to defendants' motion,

[3] Also on December 12, 2012, defendants filed a motion for reconsideration of the order granting partial summary disposition, which the trial court neither granted nor denied.

plaintiff asserted that defendants were not entitled to a stay because MCR 2.614(B) only permits a stay when a motion for relief from an order or judgment is pending, and no such motion was pending. The court held a hearing on defendants' motion and entered an order granting defendants' motion for a stay on January 11, 2013, "for the purpose of obtaining the [MPSC] ruling on [plaintiff's] proposed opt-out provision."

On June 17, 2013, plaintiff filed a motion to vacate the trial court's order granting a partial stay of the proceedings because the purpose of the partial stay was achieved when the MPSC entered an order on May 15, 2013, stating that customers may participate in the opt-out program set forth "under the Non-Transmitting Meter Provision of MPSC Tariff No. 10 . . . ." In their response to plaintiff's motion, defendants raised a series of challenges to the validity of the MPSC order and argued that the trial court should not vacate the stay because the reasons for which the stay was granted had not been achieved and because defendants had filed an interlocutory appeal of the trial court's order granting partial summary disposition.[4] Moreover, defendants argued that the trial court should continue the stay because lifting the stay would place defendants in immediate danger given their health conditions, whereas plaintiff would experience no harm, as demonstrated by the fact that plaintiff had replaced smart meters with analog meters at two of their neighbors' homes. In their reply to defendants' response, plaintiff refuted the arguments and evidence presented by defendants. After holding a hearing, the trial court granted plaintiff's motion to vacate the

[4] This Court denied defendants' application for leave to appeal on September 10, 2013. *Detroit Edison Co v Stenman*, unpublished order of the Court of Appeals, entered September 10, 2013 (Docket No. 316431).

partial stay, noting in its opinion that the express purpose of the stay had been to obtain the MPSC ruling concerning plaintiff's proposed opt-out provision.

On September 4, 2013, defendants filed a motion for reconsideration of the trial court's order granting plaintiff's motion to vacate the partial stay of the proceedings. Defendants asserted that the trial court had refused to recognize that it was required to stay the proceedings under MCR 7.205(E)(3)[5] in light of defendants' interlocutory appeal, and reiterated a series of claims and arguments related to the danger of smart meters, the consequences of lifting the stay, and the evidence supporting their claims. On October 18, 2013, the trial court entered an order denying defendants' motion for reconsideration, concluding that defendants failed to demonstrate that there was a palpable error by which the court and parties were misled and noting that this Court had denied defendants' application for leave to appeal.

On March 17, 2014, pursuant to a stipulation between the parties, the trial court entered a final judgment that dismissed with prejudice plaintiff's claims that were not resolved by the November 29, 2012 order.

II

First, defendants argue that the trial court erred by granting partial summary disposition in favor of plaintiff under MCR 2.116(C)(10) because defendants established genuine issues of material fact with regard to (1) whether plaintiff's installation of the smart meter was

[5] We note that defendants cited the wrong court rule in support of their argument. We presume that they intended to cite MCR 7.205(F)(3).

lawful under the definition of "meter" in the applicable administrative rules and tariff and (2) whether defendants' privacy and health concerns justified or excused their conduct. We disagree.

This Court reviews de novo a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court may only consider, in the light most favorable to the party opposing the motion, the 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). Additionally, "[w]here the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009) (quotation marks and citation omitted; second alteration in original).

A

First, there was no genuine issue of material fact regarding whether the smart meter installed by plaintiff was lawful under the definition of "meter" applicable to the relevant administrative rules and tariff. Plaintiff is a public utility that is regulated by the MPSC. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 554; 655 NW2d 304 (2002). With regard to the regulation of public utilities, MCL 460.6(1) provides:

> The [MPSC] is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in [MCL 460.6d], and except as otherwise restricted by law. *The* [*MPSC*] *is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities.* The [MPSC] is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative . . . . [Emphasis added.]

Likewise, Mich Admin Code, R 460.3101(4) provides, "Each utility may adopt reasonable rules and regulations governing its relations with customers which it finds necessary and which are not inconsistent with these rules for electric service. Adopted rules and regulations shall be filed with, and approved by, the [MPSC]." Accordingly, if the installation of a smart meter is permitted under the regulations promulgated by the MPSC, and the utility rules and tariff approved by the MPSC, the installation of the smart meter was lawful.

On appeal, defendants argue that plaintiff failed to identify the "legal definition" of "meter" under the

relevant statutes, regulations, or tariff and failed to assert that the smart meter installed on their residence qualifies under any of these definitions. Contrary to defendants' claims, plaintiff identified the definition of "meter" set forth in Mich Admin Code, R 460.3102, which provides the definitions of terms used in the MPSC regulations related to the provision of electric service: " 'Meter,' unless otherwise qualified, means a device that measures and registers the integral of an electrical quantity with respect to time." R 460.3102(g). Although the tariff that applied to defendants' receipt of electric service through plaintiff, MPSC No. 10 — Electric, did not include its own definition of "meter," we conclude that the definition of "meter" provided in R 460.3102(g) was applicable to the tariff, as the tariff specifically referred to R 460.3102 in its Administrative Rules Index.

Moreover, there was no genuine issue of material fact with regard to whether a smart meter qualifies as a "meter" under R 460.3102(g), or whether plaintiff's installation of a smart meter was lawful. In the trial court and on appeal, defendants assert that a "meter" installed by a regulated public utility may only perform the functions that it is authorized by law to perform, arguing that the smart meter installed by plaintiff violated the "lawful definition of 'meter' " because it was capable of performing functions other than measuring electricity use. However, based on the plain language of the definition of "meter" in R 460.3102(g), there is no indication that electricity-measuring devices that have radio transmitters or other additional capabilities do not constitute "meters." See *Danse Corp v City of Madison Hts*, 466 Mich 175, 184; 644 NW2d 721 (2002) (stating that the same rules of statutory construction apply to statutes and regulations and that an appellate court's interpreta-

tion is governed by the plain language of the regulation at issue). The mere fact that the definition does not expressly state that a meter with a radio transmitter still constitutes a meter does not indicate that a meter with such a feature is not included under the definition. Defendants failed to provide in the trial court any evidence or authority indicating that smart meters do not qualify under the legal definition of "meter." See MCR 2.116(G)(4) ("When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.").[6] Accordingly, we conclude that reasonable minds could not differ in finding that the smart meter installed by plaintiff qualified as a "meter."[7]

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[6] We also find defendants' argument unconvincing in light of the fact that the MPSC required investor-owned utilities, including plaintiff, to make available an opt-out provision for its customers when they "elect[] to implement AMI"; expressly recognized that plaintiff was currently installing AMI meters; and noted that plaintiff had already submitted a proposed opt-out tariff. *In re Deployment of Smart Meters by Regulated Electric Utilities*, order of the Public Service Commission, entered September 11, 2012 (Case No. U-17000), p 5. Defendants offer no plausible explanation as to why, given the acknowledgment and regulation of this particular electricity-measuring device, the MPSC cannot appropriately consider this device to be a meter within its jurisdiction, or why the MPSC would acknowledge and regulate the use of an electricity-measuring device that does not qualify as a "meter" under the regulations promulgated by, and the tariff approved by, the MPSC.

[7] Defendants also argue on appeal that smart meters do not qualify as "other equipment" under the MPSC regulations and plaintiff's tariff. However, because defendants failed to preserve this argument in the trial court, we decline to address it. See *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007) (noting that an appellate court may decline to review an issue that was not raised in or decided by the trial court).

B

Second, the trial court properly concluded that defendants failed to demonstrate a genuine issue of material fact as to whether their privacy and health-related concerns constituted valid affirmative defenses that excused or justified their actions related to the smart meter. Mich Admin Code, R 460.3409(1) provides:

> The customer shall use reasonable diligence to protect utility-owned equipment on the customer's premises and to prevent tampering or interference with the equipment. *The utility may shut off service* in accordance with applicable rules of the commission *if the metering or wiring on the customer's premises has been tampered with or altered in any manner* that allows unmetered or improperly metered energy to be used or to cause an unsafe condition. [Emphasis added.]

Additionally, "a utility may shut off or terminate service to a residential customer" if "[t]he customer has refused to arrange access at reasonable times for the purpose of inspection, meter reading, maintenance, or replacement of equipment that is installed upon the premises, or for the removal of a meter," or if "[t]he customer has violated any rules of the utility approved by the commission so as to adversely affect the safety of the customer or other persons or the integrity of the utility system." Mich Admin Code, R 460.137(e) and (g).

Likewise, there is no indication in plaintiff's tariff, which was approved by the MPSC, that defendants may violate the provisions of the tariff because of privacy or health-related concerns and continue to receive electricity service. Instead, the tariff expressly states in § C4.3, which pertains to applications for service, that "[a]pplicants for General Service or Indus-

trial electric service will be required to sign a contract or agreement. However, whether an agreement is signed or not, *a customer is subject to the rules and rates of the Company and is responsible for the service used*." [Emphasis added.] Additionally, § C5.4 of the tariff provides, in relevant part:

> *As a condition of taking service*, authorized employees and agents of the Company shall have access to the customer's premises at all reasonable hours to install, turn on, disconnect, inspect, read, repair or remove its meters, and to install, operate and maintain other Company property, and to inspect and determine the connected electrical load. [Emphasis added.]

Moreover, MCL 750.383a provides that cutting, obstructing, or tampering with the property of an electric utility constitutes a felony, and we have found no authority indicating that privacy or health-related concerns may serve as a defense to actions in violation of MCL 750.383a, which suggests that such defenses are not available.

> An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. In other words, it 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) (citation omitted).]

See also MCR 2.111(F)(3). In the trial court, defendants failed to provide any authority in support of their claim that their privacy and health-related concerns constituted valid affirmative defenses to their violations of the relevant statutes, regulations, and tariff. Likewise, we find no basis for concluding that defendants' concerns should deny relief to plaintiff, and allow defen-

dants to continue receiving electricity service from plaintiff, while defendants continue to violate the applicable rules. Given the record before us, we conclude that defendants must comply with the rules promulgated by the MPSC and the tariff provisions approved by the MPSC in order to continue receiving electric service from plaintiff. Contrary to defendants' claims that receiving service from plaintiff is not a voluntary act because there is not a practical alternative to receiving electricity from plaintiff in southeastern Michigan, it is evident from the application procedures for receiving electric service delineated in the MPSC rules and the tariff, and the various bases available for terminating service, that applying for and receiving electric service from plaintiff is a voluntary act. See Mich Admin Code, R 460.106; Mich Admin Code, R 460.127; Mich Admin Code, R 460.137 through 460.144; MPSC No. 10 — Electric, § C4.3.

Furthermore, even if we assume, arguendo, that defendants' privacy or health-related concerns constitute valid defenses to their failure to comply with the relevant rules and tariff provisions, defendants failed to establish the factual bases of those defenses. "The party asserting an affirmative defense has the burden of presenting evidence to support it." *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). In support of their privacy defense, defendants proffered a report prepared by the National Institute of Standards and Technology entitled *Guidelines for Smart Grid Cyber Security: Vol. 2, Privacy and the Smart Grid* (NISTIR 7628) (August 2010). Even assuming that this report constituted admissible evidence, see MCR 2.116(G)(6), this document does not demonstrate that the smart meter installed on defendants' property posed an actual risk to defendants' privacy; the report

generally discussed the *possibility* of privacy risks related to smart meters and provided recommendations for entities participating in a smart grid. Further, there is no indication that the recommendations in the report were binding on plaintiff. Moreover, as discussed later in this opinion, defendants have not shown that plaintiff's installation and use of a smart meter violated their Fourth Amendment rights.

In support of their health-related defense, defendants provided the affidavit of Dr. Hillman, discussing the health of a three-year-old child not involved in the instant case. The affidavit does not establish that the smart meter installed at defendants' home operated in a similar fashion, emitted the same level of "electricity [that] permeat[ed] the house," or caused similar health effects, and thus fails to be competent evidence that the smart meter installed on *defendants'* property posed a risk to *defendants'* health. Again, considering the evidence that was before the trial court, we conclude that reasonable minds could not differ in holding that defendants failed to provide a factual basis for their privacy and health-related defenses and, as a result, failed to demonstrate that a genuine issue of material fact exists with regard to the viability of those defenses.

III

Next, defendants assert that the trial court erred by granting plaintiff's motion to lift the partial stay imposed by the trial court after it granted partial summary disposition. We disagree.

We review the trial court's decision for an abuse of discretion.[8] "An abuse of discretion occurs when a trial

[8] The basis on which the trial court granted the stay is not clear from the trial court record received on appeal. Nevertheless, pursuant to the

court's decision is not within the range of reasonable and principled outcomes." *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013) (quotation marks and citation omitted).

Defendants assert that the trial court abused its discretion in two ways when it lifted the stay. First, defendants argue that the purpose of the stay had not been fulfilled when the MPSC issued an order that approved plaintiff's opt-out plan because the MPSC, in issuing the order, did not consider the arguments that defendants raised in the instant case, i.e., plaintiff's authority to install smart meters as a condition of service and privacy and health concerns related to smart meters, such that the order was "improper" and was likely to be overturned on appeal. Second, defendants argue that they had offered reasons for why they would be irreparably harmed if the trial court lifted the stay, whereas plaintiff was unable to establish irreparable harm, as demonstrated by the fact that plaintiff accommodated other customers who wanted the smart meters removed from their homes.

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court rule cited by defendants as the basis of their motion for a partial stay, i.e., MCR 2.614(B), and the court rules cited by plaintiff on appeal, i.e., MCR 2.614(G)(1) and MCR 7.209(E)(1), the trial court *may* stay enforcement of a judgment or issue a stay of the proceedings. Because the use of the word "may" indicates that the court's action is discretionary rather than mandatory, *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), vacated in part and aff'd on other grounds 483 Mich 885 (2009), we find, and the parties appear to agree, that review for an abuse of discretion is appropriate.

It appears that defendants intended to cite MCR 7.205(F)(3) in their motion for reconsideration and on appeal, but that rule has no applicability here. The trial court did not make a decision on the admissibility of evidence, and the basis of defendants' interlocutory appeal was not the admissibility of evidence. Accordingly, there is no indication that the trial court was *required* to stay the proceedings under MCR 7.205(F)(3) while defendants' application for leave to appeal was pending.

We find no basis for concluding that the trial court abused its discretion by granting plaintiff's motion to vacate the stay. The trial court's order granting the partial stay specifically stated that it was entered "for the purpose of obtaining the [MPSC] ruling on Detroit Edison's proposed opt-out provision." Once the MPSC entered its order on May 15, 2013, approving DTE's "application for authority to implement an advanced metering infrastructure non-transmitting meter provision" and requiring DTE to file with the MPSC tariff sheets that complied with the opt-out provision procedures and fees required by the order, the express purpose of the stay was fulfilled. See *In re Detroit Edison's Application for Approval to Implement an AMI Opt-Out Program*, order of the Public Service Commission entered May 15, 2013 (Case No. U-17503). Accordingly, the trial court's order vacating the stay was not outside the range of reasonable and principled outcomes.

Moreover, given the express purpose of the stay, defendants' claims in the trial court regarding the irreparable harm that they would allegedly face if the trial court lifted the stay were unavailing. Defendants' arguments in that respect constituted a collateral challenge to the validity or enforceability of the trial court's initial order. However, "[a]s with any investigation or litigation, if a litigant wishes to challenge a ruling by a court, the appropriate remedy is to seek a rehearing of the decision or file an appeal." *Fieger v Cox*, 274 Mich App 449, 459; 734 NW2d 602 (2007). Therefore, the trial court did not abuse its discretion by lifting the stay.

IV

Finally, defendants argue that plaintiff's installation of a smart meter on their home constituted a warrantless search in violation of the Fourth Amendment. We disagree.

This Court reviews de novo questions of constitutional law, such as whether an individual's Fourth Amendment right against unreasonable searches has been violated. *Bonner v Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014); see also *People v Frohriep*, 247 Mich App 692, 696; 637 NW2d 562 (2001).

The United States and Michigan Constitutions guarantee every person's right to be free from unreasonable searches. US Const, Am IV; Const 1963, art 1, § 11. However, in order for Fourth Amendment protections to apply, *the government* must perform a search. *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014); see also *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002), citing *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). "[T]he Fourth Amendment proscribes only government action and is not applicable to a search or seizure, even an unreasonable one, conducted by a private person not acting as an agent of the government or with the participation or knowledge of any government official." *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991); see also *id*. at 142-143 (identifying two factors that must be shown in order to conclude that a search is proscribed by the Fourth Amendment).

First, defendants have not shown, or even argued, that an illegal search has already been performed through the smart meter that was installed on their property. Instead, their arguments in the lower court and on appeal focus on the *potential* for smart meters to collect information from the homes of Americans in the future. Further, defendants have failed to establish that plaintiff's installation of smart meters constitutes governmental action for Fourth Amendment purposes. Even if the state and federal governments have advocated or incentivized, as a matter of public policy, the

use of smart meters, there is no indication that the government controls the operations of plaintiff, an investor-owned electric utility, or that plaintiff acts as an agent of the state or federal governments. Accordingly, we reject defendants' claim that plaintiff's installation of a smart meter violated their Fourth Amendment rights.

V

Defendants also raised several unpreserved issues in their brief on appeal and during oral argument in this Court. First, defendants claim the trial court erred by failing to grant reconsideration of its order granting partial summary disposition on the basis of new evidence. However, defendants' motion for reconsideration was not based on new evidence, but instead raised the same claims, which the trial court declined to rehear. In addition, defendants challenge whether the doctrine of collateral estoppel applies in this case, whether defendants' pleadings should be considered as admissible evidence in support of their health-related claims because they filed the pleadings *in propriis personis*, whether plaintiff violated MCL 750.539d when it installed a smart meter on defendants' property, and whether plaintiff's opt-out provision actually allows customers to fully opt out of the smart meter program. Because these issues were not raised in or decided by the trial court, we decline to review them on appeal. See *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007).

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

METER, P.J., and CAVANAGH and WILDER, JJ., concurred.

TUSCANY GROVE ASSOCIATION v PERAINO

Docket No. 320685. Submitted July 8, 2015, at Detroit. Decided July 14, 2015, at 9:10 a.m.

Tuscany Grove Association brought an action in the Macomb Circuit Court against Kimberly Peraino (who owned a condominium unit in the condominium complex it administered and managed), seeking to compel her compliance with fencing-related restrictions in the condominium bylaws. The court, Mark S. Switalski, J., granted Peraino summary disposition, concluding that Tuscany Grove lacked the authority to initiate the lawsuit because it had violated the condominium bylaws itself by failing to obtain the requisite approval of a supermajority of owners before incurring the legal expenses involved with the litigation. Tuscany Grove appealed.

The Court of Appeals *held*:

1. The trial court properly granted Peraino's motion for summary disposition because Tuscany Grove lacked authority to file this suit. Tuscany Grove established the complex under the Condominium Act, MCL 559.101 *et seq*. MCL 559.153 provides that the condominium bylaws govern the administration of a condominium project and, along with the master deed and other condominium documents, dictate the rights and obligations of a co-owner in the condominium. The bylaws of the Tuscany Grove condominium contained a provision requiring the affirmative vote of at least 66⅔% of co-owners before the board of directors could incur expenses for litigation. That provision was a reasonable effort to protect the condominium owners' financial interests by requiring approval before permitting the condominium's board of directors to incur potentially extensive legal expenses on behalf of the owners.

2. The supermajority provision did not conflict with the Nonprofit Corporation Act, MCL 450.2101 *et seq*. MCL 450.2261(1)(b) provides that a nonprofit corporation such as Tuscany Grove generally has the power to sue and be sued in the same manner as an individual. The statute, however, envisions the possibility of limitations on a corporation's power to sue, and it specifies that those limitations may be imposed in the corporation's articles of

incorporation, by another statute of this state, or otherwise by law. Further, a corporation's ability to sue may only be exercised in furtherance of its corporate purposes. While the condominium's articles of incorporation did not expressly place any limits on Tuscany Grove's ability to sue, the supermajority provision in the bylaws was nonetheless enforceable because the articles of incorporation mandate enforcement of the condominium bylaws and failure to enforce the voting requirement would be contrary to Tuscany Grove's corporate purposes. The supermajority requirement was a permissible limitation on Tuscany Grove's power to sue, and it did not impermissibly conflict with MCL 450.2261(1)(b).

3. The supermajority provision also did not conflict with the Condominium Act. MCL 559.206(a) provides that a co-owner's failure to comply with any of the terms or provisions of the condominium documents entitles the association of co-owners to seek relief, which may include an action for damages, injunctive relief, foreclosure of a lien, or any combination of that relief. The statute, however, does not prohibit co-owners from choosing to limit the use of that authority to instances in which a supermajority of owners deem the litigation worth pursuing. A rule specifying who should have the authority to make a decision to pursue litigation is clearly a matter relating to the administration of the condominium project that is properly regulated by the bylaws without creating a conflict with MCL 559.206(a).

4. Tuscany Grove also asserted that the trial court erred by granting Peraino summary disposition because it had complied with the supermajority requirement by subsequently obtaining the approval of 73.7% of the owners by means of petitions. In general, when an actor exceeds his or her authority, his or her actions may be ratified after the fact. Ratification is the affirmance by a person of a prior act that did not bind the person but was done or professedly done on the person's account and is the means by which the act is given effect as if the person had originally authorized it. To be ratified, an act must be one that could have been legally authorized in the first instance. If formalities are required for the authorization of an act, the same formalities are required for ratification. The prelitigation voting provision in Tuscany Grove's bylaws required approval by the affirmative vote of at least 66⅔% of the co-owners. The condominium bylaws envisioned that voting would occur at a meeting with a quorum of co-owners present. Taking action without a meeting required the use of written ballots by the members, and the ballots had to provide particular information concerning the

voting procedure. Because Tuscany Grove failed to comply with the formalities specified in the supermajority provision, the belated petitions were not sufficient to ratify the litigation against Peraino.

Affirmed.

Makower Abbate PLLC (by *Nathaniel Abbate Jr.*) for Tuscany Grove Association.

Aloia & Associates, P.C. (by *Benjamin J. Aloia* and *Aaron M. Keyes*), for Kimberly Peraino.

Before: HOEKSTRA, P.J., and JANSEN and METER, JJ.

PER CURIAM. In this dispute relating to the enforcement of condominium bylaws, plaintiff appeals as of right the trial court's order granting summary disposition to defendant on the basis of the determination that plaintiff lacked authority to initiate the present action. Because plaintiff failed to obtain approval from a supermajority of co-owners before filing suit in violation of the plain language of the bylaws and plaintiff's efforts to obtain approval after the fact failed to comply with the voting formalities set forth in the bylaws, we affirm.

Tuscany Grove Condominium (hereafter "Tuscany Grove") is a condominium complex established in Shelby Township, Michigan in 2001 under the Condominium Act, MCL 559.101 *et seq*. Plaintiff, the Tuscany Grove Association, which has responsibility for administration and management of the condominium complex, is incorporated as a nonprofit corporation under the Nonprofit Corporation Act, MCL 450.2101 *et seq*. Defendant, Kimberly Peraino, owns one of the condominium units in Tuscany Grove. Plaintiff filed the present lawsuit against defendant in an effort to compel defendant's compliance with certain fencing-

related restrictions contained within the condominium bylaws. However, the trial court granted defendant's motion for summary disposition because plaintiff lacked authority to initiate the present suit. In particular, the trial court concluded that plaintiff itself had violated the condominium bylaws by failing to obtain the requisite approval of a supermajority of owners before incurring legal expenses involved with litigation. Plaintiff now appeals as of right.

At issue on appeal is the application of a provision in the condominium bylaws requiring plaintiff to obtain approval from $66^{2}/_{3}\%$ of co-owners before incurring any legal expenses incident to litigation. Plaintiff disputes the applicability of this provision on appeal. In particular, plaintiff contends that, as a matter of contract interpretation, application of this clause leads to absurd results when the bylaws are considered as a whole and that, in these circumstances, the provision should not be applied. In addition, plaintiff contends that the clause is void because it impermissibly conflicts with the Condominium Act and the Nonprofit Corporation Act. Finally, plaintiff argues that the trial court should not have granted defendant's motion for summary disposition because plaintiff complied with the supermajority requirement, albeit after filing suit, by obtaining the approval of 73.7% of owners by way of petitions. Given this approval from co-owners, plaintiff maintains that it would be contrary to the statutory schemes as well as the bylaws themselves to prevent the co-owners from choosing to ratify the litigation against defendant. We disagree with each of these arguments.

On appeal, we review de novo a trial court's decision to grant a summary disposition motion. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563

(2011). Likewise issues involving statutory interpretation, as well as contract interpretation, present issues of law that are reviewed de novo. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011).

Pursuant to the Condominium Act, the administration of a condominium project is governed by the condominium bylaws. MCL 559.153. Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium. See MCL 559.103(9) and (10); MCL 559.108. Condominium bylaws are interpreted according to the rules governing the interpretation of a contract. See *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). Accordingly, this Court begins by examining the language of the bylaws. See *Wiggins v City of Burton*, 291 Mich App 532, 551; 805 NW2d 517 (2011). Words are interpreted according to their plain and ordinary meaning. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). Further, this Court avoids interpretations that would render any part of the document surplusage or nugatory, and instead this Court gives effect to every word, phrase, and clause. *Id*. Ultimately, we enforce clear and unambiguous language as written. *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

In this case, the provision at issue states:

> **Limitations on Assessments for Litigation**. The Board of Directors shall not have authority under this Article II, Section 2, or any other provision of these Bylaws or the Master Deed, to levy any assessment, *or to incur any expense or legal fees with respect to any litigation, without the prior approval, by affirmative vote, of not less than 66-2/3% of all Co-owners in value and in number*. This section shall not apply to any litigation commenced

> by the Association to enforce collection of delinquent assessments pursuant to Article II, Section 6 of these Bylaws. In no event shall the Developer be liable for, nor shall any Unit owned by the Developer be subject to any lien for, any assessment levied to fund the cost of asserting any claim against Developer whether by arbitration, judicial proceeding, or otherwise. [Emphasis added.]

By its clear and unambiguous terms, this provision makes plain that plaintiff's board of directors lacks authority "to incur any expense or legal fees with respect to any litigation" without first obtaining approval from a supermajority of co-owners. The only exception to this rule is for cases involving "collection of delinquent assessments," which is not the underlying issue in the present lawsuit. By virtue of this provision, the board of directors was without authority to hire an attorney or incur any other expenses related to litigation against defendant aimed at the enforcement of fencing restrictions. Given the legal expenses necessarily incident to litigation, the effect of this provision is to prevent the board of directors from filing suit without supermajority approval. Consequently, the trial court properly granted defendant's motion for summary disposition because plaintiff lacked the authority to file suit.

In contesting the application of this provision, plaintiff does not dispute that the clause plainly prevents the board of directors from pursuing the present litigation against defendant. Instead, plaintiff argues that absurd results will arise if this provision is enforced because, for example, it will effectively prevent the board of directors from enforcing the bylaws, thereby essentially enabling a minority of owners to amend the bylaws by thwarting litigation aimed at enforcement. Contrary to these various arguments, there is nothing absurd about requiring approval be-

fore permitting the board of directors to incur potentially extensive legal expenses on behalf of the owners. Such a clause functions as nothing more than a reasonable effort to protect the owners' financial interests.[1] See *Port Liberte II Condo Ass'n, Inc v New Liberty Residential Urban Renewal Co, LLC*, 435 NJ Super 51, 65; 86 A3d 730 (2014). The board of directors may still exercise any of their other enforcement powers under the bylaws and may still file suit when appropriate, provided that they obtain approval to incur legal expenses. Indeed, if the supermajority-prelitigation-approval provision is unsatisfactory, the bylaws permit amendment and the co-owners thus remain free to amend the bylaws to their liking. Ultimately, parties are free to contract as they see fit, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003), and there is simply no basis for this Court to rewrite the clear and unambiguous language of the bylaws. Enforced as written, the provision requires dismissal of plaintiff's lawsuit against defendant because the board of directors lacked authority to incur the expenses necessary to pursue this litigation. Thus, the trial court properly granted defendant's motion for summary disposition.

Aside from the assertion that application of the supermajority provision would lead to absurd results, plaintiff argues that the provision cannot be enforced because it conflicts with the Nonprofit Corporation Act

[1] Plaintiff emphasizes that pursuant to MCL 559.206(b), an association may recover litigation costs from a co-owner when the association succeeds in litigation against the co-owner. While this is true, it is obviously only true if the association prevails in the litigation, meaning it is by no means certain that litigation against a co-owner will be cost-free. Any litigation involves a certain amount of risk, and the bylaw provision at issue in this case simply allows co-owners a voice in deciding when the financial risks of litigation should be assumed.

and the Condominium Act. First, regarding the Nonprofit Corporation Act, as noted, the plaintiff has been organized as a nonprofit corporation under MCL 450.2101 *et seq*. As a nonprofit corporation, plaintiff generally has the power under MCL 450.2261 to sue and be sued in the same manner as an individual. In particular, at all times relevant to the present dispute,[2] MCL 450.2261(1), as amended by 2009 PA 88, stated:

> A corporation, subject to any limitation provided in this act, in any other statute of this state, in its articles of incorporation, or otherwise by law, has the power in furtherance of its corporate purposes to do any of the following:
>
> * * *
>
> Sue and be sued in all courts and participate in actions and proceedings judicial, administrative, arbitrative, or otherwise, in the same manner as a natural person.

Given this provision, plaintiff now claims that any limitation on its power to sue must be contained in plaintiff's articles of incorporation and that, therefore, the supermajority prelitigation provision in the condominium bylaws is not enforceable.

This argument is without merit in light of the plain statutory language. In particular, the statute obviously envisions the possibility of limitations on a corporation's power to sue and it specifies that those limitations may be imposed in the corporation's articles of

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[2] MCL 450.2261(1)(b) has recently been amended, effective January 15, 2015. 2014 PA 557. The parties do not, however, address this amendment on appeal. Nor do they address whether the amendment should apply retroactively. Given that there has been no argument for the application of the newer version of the statute, we therefore consider the former version of the statute without making a determination regarding the new statute's retroactive or prospective effect.

incorporation, by another statute of this state, or "otherwise by law." MCL 450.2261(1)(b). Further, from the statute's plain language, it is clear that a corporation's ability to sue may only be exercised in "furtherance of its corporate purposes." MCL 450.2261(1).

In this case, as plaintiff notes, the articles of incorporation do not expressly place any limits on plaintiff's ability to sue. However, the supermajority provision is nonetheless enforceable because it is clear that the articles of incorporation mandate enforcement of the condominium bylaws and failure to enforce the voting requirement would be contrary to plaintiff's corporate purposes. In particular, in relevant part, plaintiff's articles of incorporation provide that the purposes for which the corporation is formed, include the following:

> (i) To enforce the provisions of the Master Deed and Bylaws of the Condominium and of these Articles of Incorporation and such Bylaws and Rules and Regulations of this corporation as may hereinafter be adopted;
>
> (j) To do anything required of or permitted to it as administrator of said Condominium by the Condominium Master Deed or Bylaws or by Act No. 59 of Public Acts of 1978 [the Condominium Act], as amended[.]

From these purposes, it appears plain that the limitations on the power to sue expressed in the condominium bylaws are enforceable under the corporate articles of incorporation because plaintiff's corporate purpose is to "enforce" the bylaws and do those things "permitted to it" by the bylaws. Indeed, given these express purposes, allowing plaintiff to sue without requiring the supermajority approval demanded in the bylaws would be contrary to plaintiff's obligation to enforce the bylaws and therefore not "in furtherance" of plaintiff's corporate purposes as required by MCL 450.2261(1)(b). In sum, the supermajority requirement

is a permissible limitation on plaintiff's power to sue, and it does not impermissibly conflict with MCL 450.2261(1)(b).

Turning to consideration of the Condominium Act, plaintiff argues that any limitation on its authority to sue a co-owner for violation of the bylaws directly conflicts with MCL 559.206(a), which states:

> A default by a co-owner shall entitle the association of co-owners to the following relief:
>
> (a) Failure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof.

Contrary to plaintiff's arguments, while this provision recognizes that an association might pursue an action for damages or injunctive relief against a co-owner, it does not prohibit co-owners from choosing to limit this authority to instances in which a supermajority of owners deem the litigation worth pursuing. That is, the statute mandates that an owner's failure to comply with condominium documents "shall be grounds for relief," but it does not dictate under what circumstances an association must pursue that relief. For example, the statute does not *require* plaintiff to pursue relief, it does not specify who should make the determination to pursue litigation, and it certainly does not prohibit the adoption of a supermajority requirement designed to protect owners from the potentially expensive risks involved with litigation.[3] To

[3] Further, while MCL 559.206(a) includes the language "without limitations," it does so in reference to the relief available, not in reference to an association's authority to pursue that relief. In other words, the types of relief identified in the statute are meant to serve an

the contrary, elsewhere the Condominium Act specifies that the "administration of a condominium project shall be governed by bylaws," MCL 559.153, and the bylaws may contain any provision "deemed appropriate for the administration of the condominium project not inconsistent with this act or any other applicable laws," MCL 559.156(a). A rule specifying who should have the authority to make a decision to pursue litigation is clearly a matter relating to the administration of the condominium project, and it is therefore properly regulated by the bylaws without causing a conflict with MCL 559.206(a).

Finally, plaintiff asserts that the trial court should not have granted defendant's motion for summary disposition because plaintiff complied with the supermajority requirement by obtaining the approval of 73.7% of owners by way of petitions.[4] In effect, plaintiff

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illustrative, inclusive purpose rather than to represent an exhaustive list of the relief available to an association. Indeed, the statute goes on to provide that relief may also include "other reasonable remedies the condominium documents may provide including but without limitation" fines or late fees. MCL 559.206(c). In no way does the statute suggest that a condominium association enjoys an unlimited, unconditional authority to sue its owners. Such an interpretation would be ridiculous given that every litigant faces limits in litigation including, for example, statutes of limitations, pleading requirements, rules of evidence, etc. Instead, the language "without limitations" is properly read in reference to the relief available, which may include, but is not limited to, actions for damages, injunctive relief, etc.

[4] On appeal, defendant contests plaintiff's assertion that it obtained approving petitions from 73.7% of owners. However, plaintiff provided the trial court with an affidavit from the property manager for Tuscany Grove to support this assertion. Given that this is a motion for summary disposition, this documentary evidence must be viewed in a light most favorable to plaintiff. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Viewed in this light, contrary to defendant's arguments, there is support for plaintiff's claim that it belatedly obtained petitions approving the litigation from a supermajority of co-owners.

suggests that its belated efforts to seek approval should serve as a ratification of the board of directors' decision to file suit, and plaintiff argues that it would be contrary to the statutory schemes as well as the bylaws themselves to prevent the co-owners from choosing to ratify the litigation against defendant.

As a general principle, when an actor exceeds his or her authority, his or her actions may be ratified after the fact. See *David v Serges*, 373 Mich 442, 443-444; 129 NW2d 882 (1964). "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Id*. (quotation marks and citation omitted). To be ratified, the act must be one that might have been legally authorized in the first instance. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 675; 854 NW2d 489 (2014). "If formalities are required for the authorization of an act, the same formalities are required for ratification." 1 Restatement Agency, 3d, § 4.01, comment *e*, p 308.

In this case, the prelitigation voting provision in the bylaws requires "approval, by affirmative *vote*, of not less than 66-2/3% of all Co-owners in value and in number." (Emphasis added.) Typically, as discussed in Article VIII of the condominium bylaws, the bylaws envision voting at a meeting at which a quorum of co-owners is present. Action may be taken outside a meeting, provided that it occurs as set forth in Article IX, § 8 of the bylaws, which states:

> **Action Without Meeting.** Any action which may be taken at a meeting of the members (except for the election or removal of Directors) may be taken without a meeting by written ballot of the members. Ballots shall be solicited in the same manner as provided in Section 5 [of Article IX] for the giving of notice of meetings of members. Such

> solicitations shall specify (a) the number of responses needed to meet the quorum requirements; (b) the percentage of approvals necessary to approve the action; and (c) the time by which ballots must be received in order to be counted. The form of written ballot shall afford an opportunity to specify a choice between approval and disapproval of each matter and shall provide that, where the member specifies a choice, the vote shall be cast in accordance therewith. Approval by written ballot shall be constituted by receipt within the time period specified in the solicitation of (i) a number of ballots which equals or exceeds the quorum which would be required if the action were taken at a meeting; and (ii) a number of approvals which equals or exceeds the number of votes which would be required for approval if the action were taken at a meeting at which the total number of votes cast was the same as the total number of ballots cast.

Considering these requirements for action without a meeting, the petitions collected by plaintiff did not serve to ratify the litigation against defendant because the petitions did not satisfy the formalities necessary to authorize litigation through an affirmative vote. In particular, there was no meeting in this case and, contrary to the requirements for taking action without a meeting, the petitions circulated in this case did not indicate "(a) the number of responses needed to meet the quorum requirements; (b) the percentage of approvals necessary to approve the action; and (c) the time by which ballots must be received in order to be counted." Further, the petitions simply had a space for owners to sign their names in approval, they were not ballots that afforded owners "an opportunity to specify a choice between approval and disapproval of each matter," and they did not state that "where the member specifies a choice, the vote shall be cast in accordance therewith." Moreover, there is no indication

regarding how the petitions were circulated or whether the method of soliciting the petitions complied with § 5 of Article IX of the bylaws.

In sum, plaintiff failed to comply with the formalities necessary to obtain an affirmative vote as required by the prelitigation supermajority requirement. Because plaintiff failed to comply with these formalities, the belated petitions were not sufficient to ratify the litigation against defendant. See Restatement, § 4.01, comment *e*, p 308. Thus, because plaintiff lacked authority to pursue this litigation, the trial court properly granted defendant's motion for summary disposition.[5]

Affirmed.

HOEKSTRA, P.J., and JANSEN and METER, JJ., concurred.

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[5] In the alternative, defendant argues for the first time on appeal that collateral estoppel should control resolution of this case because plaintiff was a party to another lawsuit against another co-owner in which the same supermajority prelitigation requirement was interpreted to prevent plaintiff from pursuing litigation without supermajority approval. See *Tuscany Grove Ass'n v Gasperoni*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 314663). However, *Gasperoni* was not decided by this Court until after the trial court had decided the present case, meaning that there was no final decision in place at the time summary disposition was granted, as required to invoke collateral estoppel. See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Indeed, defendant failed to raise the issue of collateral estoppel in the trial court, and by failing to include collateral estoppel and supporting facts in her first responsive pleading, defendant waived this affirmative defense. See MCR 2.111(F)(3); *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). In short, given plaintiff's failure to raise this argument below, we decline to decide the present case on the basis of collateral estoppel.

CANNON TOWNSHIP v ROCKFORD PUBLIC SCHOOLS

Docket Nos. 320683 and 320940. Submitted July 8, 2015, at Grand Rapids. Decided July 14, 2015, at 9:15 a.m.

Cannon Township brought an action in the Kent Circuit Court against Rockford Public Schools (RPS) after a power outage caused a valve in RPS's water filtration system to remain open, which in turn caused sewage to back up into the basement of a nearby home. The homeowners submitted a claim to their insurance company, which paid the $5,000 policy limit for the event, then sought further compensation from the township or RPS. The township agreed to pay the homeowners $50,000—through its insurer, the Michigan Municipal League Liability and Property Pool (MMLLPP)—in exchange for releasing the township from further liability and fully assigning to the township any of their claims against RPS. The court, Christopher P. Yates, J., granted the township leave to amend its complaint to reflect that it was litigating as the assignee of both the homeowners and the MMLLPP. RPS moved for summary disposition under MCR 2.116(C)(4), (7), and (8), arguing that the township was not the real party in interest because it had paid no money to the homeowners and that the township had failed to plead in avoidance of the immunity to which RPS was entitled under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. After a hearing, the court denied the motion, ruling that the township was the real party in interest by virtue of the assignment agreements it had executed with the homeowners and the MMLLPP and that the township had satisfied its burden of producing evidence to satisfy MCL 691.1417, the exception to governmental immunity for sewage disposal system events. RPS appealed by right in Docket No. 320683 and by leave granted in Docket No. 320940, seeking a determination that the township was not the real party in interest.

The Court of Appeals *held*:

1. The trial court did not err by ruling that the township was the real party in interest. A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. The homeowners and the

MMLLPP, who each had a right of action against RPS, assigned their respective rights to the township. An assignee of a cause of action becomes the real party in interest with respect to that cause of action, inasmuch as the assignment vests in the assignee all rights previously held by the assignor. Thus, by virtue of the assignments, the township became the real party in interest. Although the MMLLPP did not assign its rights to the township until after the lawsuit was filed, the trial court properly granted the township leave to amend its complaint to reflect that it was litigating as the assignee of both the homeowners and the MMLLPP. Further, although the township agreed to remit any damages awarded by the trial court above $50,000 to the homeowners, to be a real party in interest, a plaintiff need only be vested with the right of action on the claim; the beneficial interest may be with another.

2. The township was properly considered a claimant as that term is defined by the exception to the GTLA for sewage disposal system events. MCL 691.1416(c) defines a claimant as a property owner that believes that a sewage disposal system event caused damage to the owner's property or a person making a claim on behalf of a property owner. The definition specifically includes a person who is subrogated to a claim of a property owner. There was no dispute that the property owners had suffered damages from what is alleged to have been a sewage disposal system event, or that they were reimbursed $50,000 from the MMLLPP to cover some, but not all, of those alleged damages. Thus, under the plain terms of the statute, both the property owners and the MMLLPP, as a subrogee, were entitled to bring a claim under the exception to the GTLA for sewage disposal system events. Having been vested with all the rights previously owned by the property owners and the MMLLPP when they assigned their rights to the township, the township brought the instant lawsuit on behalf of those two claimants and was, therefore, a claimant in its own right.

3. The trial court did not err by denying RPS's motion for summary disposition under MCR 2.116(C)(7). Under MCL 691.1417(2), a governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate agency. In order to avoid governmental immunity under this exception, a claimant must show (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event, (2) that the governmental agency against which the claim is made was an appropriate governmental agency, (3) that the sewage disposal

system had a defect, (4) that the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect, (5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect, (6) that the defect was a substantial proximate cause of the event and the property damage or physical injury, (7) reasonable proof of ownership and the value of any damaged personal property, and (8) that the claimant provided notice to the governmental agency of the claim as set forth in MCL 691.1419.

While RPS's water filtration system was primarily used as a potable water delivery system, it also collected and disposed of unwanted wastes that were discharged directly into a sewer line, and therefore was properly considered an instrumentality used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes under MCL 691.1416(j). The trial court also correctly held that the township had presented sufficient evidence of a defect in the sewage disposal system. The parties did not dispute that if electrical power to the system was interrupted during a backwash cycle, the valves would remain in the open position after the power was restored, resulting in a large amount of water being discharged into the sewer line, which would overwhelm the line and lead to sewage backups. Although RPS argued that it had no prior knowledge of any defects in the water filtration system, the record reveals that an almost identical sewage event had occurred a year before the event at issue, and deposition testimony indicated that RPS was notified about the problem by one of their employees. Accordingly, there was a genuine issue of material fact regarding the extent to which RPS was aware of the defect in its water filtration system before the event at issue.

Affirmed.

GOVERNMENTAL IMMUNITY — EXCEPTIONS TO IMMUNITY — SEWAGE DISPOSAL SYSTEM EVENTS.

Under MCL 691.1417(2), a governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate agency; in order to avoid governmental immunity under this exception, a claimant must show (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event, (2) that the governmental agency against which the claim is made was an appropriate governmental agency, (3) that the sewage disposal system had a defect, (4) that the governmental

> agency knew, or in the exercise of reasonable diligence should have known, about the defect, (5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect, (6) that the defect was a substantial proximate cause of the event and the property damage or physical injury, (7) reasonable proof of ownership and the value of any damaged personal property, and (8) that the claimant provided notice to the governmental agency of the claim as set forth in MCL 691.1419.

Silver & Van Essen, PC (by *Douglas W. Van Essen*), for plaintiff.

McGraw Morris PC (by *Craig R. Noland*) for defendant.

Before: SERVITTO, P.J., and BECKERING and BOONSTRA, JJ.

BOONSTRA, J. This is a consolidated appeal involving a claim under the "sewage disposal system event" exception to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. In Docket No. 320683, defendant Rockford Public Schools (RPS) appeals by right the trial court's order denying RPS's motion for summary disposition, in which RPS had argued that plaintiff Cannon Township was not the real party in interest and had failed to plead its claims in avoidance of governmental immunity. In Docket No. 320940, RPS appeals, by leave granted,[1] that same order, seeking again a determination that the township is not the real party in interest. This Court previously consolidated these appeals.[2] For the reasons set forth below, we affirm the trial court's order denying RPS's motion for summary disposition.

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[1] *Cannon Twp v Rockford Pub Sch*, unpublished order of the Court of Appeals, entered August 8, 2014 (Docket No. 320940).

[2] *Id*.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Cannon Township, located in Kent County, Michigan, owns and operates a sewage water collection and transportation system (i.e., a sewer system), a portion of which is known as the "Davies line." The Davies line serves the East Rockford Middle School (part of RPS, a public school system) as well as a number of residential customers, including Robert and Pamela Mack. The middle school has a water filtration system that connects to the Davies sewer line. The filtration system, which is located in the middle school's boiler room, works by filtering water through a series of tanks and pipes to remove iron and other sediments. The "backwash"—i.e., the wastewater containing the impurities—is ultimately discharged into the Davies line during a "backwash cycle."

The parties agree that the filtration system was designed so that when the system is filtering water, the pipes connecting the system to the sewer line, which are controlled by valves, remain closed. However, during the backwash cycle, the valves are designed to automatically open so that the wastewater can be discharged into the sewer line. The backwash cycle is designed to last approximately 15 minutes, after which the valves are supposed to close. However, if a power outage occurs during a backwash cycle, the valves remain in the open position after the power is restored, resulting in a large amount of water being discharged into the sewer line. The Davies line is not designed to handle such a large discharge of water. Accordingly, when such an event occurs, the Davies line is overwhelmed, which can lead to sewage backups.

This is exactly what happened on the weekend of August 20, 2011, when a power outage occurred, causing a valve in East Rockford Middle School's water

filtration system to remain open. This resulted in a prolonged backwash cycle that caused a large volume of water to be discharged into the sewer line, which eventually led to a sewage backup in the Macks' home. The sewage backup allegedly caused in excess of $90,000 in damages.

The Macks submitted a claim to their homeowner's insurance company, which immediately paid the $5,000 policy limit for the event. The Macks then sought further compensation from the township and RPS. On November 1, 2011, the township and the Macks reached a settlement whereby the township agreed to pay the Macks, through its insurer, the Michigan Municipal League Liability and Property Pool (MMLLPP), the sum of $50,000 in partial compensation for the damages they had incurred. In exchange, the Macks agreed to release the township from any future liability and to "fully assign" to the township their claim "in total, including but not limited to any and all damages in excess of the Settlement Sum and including but not limited to any and all claims against [RPS] related to" the 2011 event. The parties further agreed that the township would likely pursue a claim against RPS "as an assignee or subrogee of the Macks' rights," that the Macks authorized such a lawsuit by the township, and that if the township recovered more than $50,000 in damages from RPS, the excess would be remitted to the Macks.

In October 2012, the township filed suit against RPS "on its behalf and additionally as assignee and subrogee of" the Macks, seeking $90,000 in damages. Subsequently, on October 14, 2013—i.e., approximately one year after the complaint was filed—the township and its insurer, the MMLLPP, entered into an "assignment agreement," whereby the parties stipulated that

the MMLLPP had previously paid $50,000 to the Macks "on behalf of [the township]" and was therefore subrogated to the Macks' rights to recover against other entities. The agreement provided that MMLLPP would "assign all of its subrogation rights and obligations" to the township in exchange for consideration of $1 and the township's agreement to hold the MMLLPP harmless for any future liability arising from the loss suffered by the Macks.

Subsequently, RPS moved the trial court for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction),[3] (C)(7) (claim barred by governmental immunity), and (C)(8) (failure to state a claim on which relief can be granted). RPS argued that the township was not the real party in interest to pursue a claim against RPS because it had paid no money to the Macks and therefore had no basis to pursue an equitable subrogation claim, and further because the Macks "could not, and did not, assign their cause of action for amounts in excess of insurance proceeds." RPS additionally argued that the township had failed to plead in avoidance of RPS's governmental immunity because it could not satisfy all of the elements of the "sewage disposal system event" exception to the GTLA, as outlined in MCL 691.1417. Specifically, RPS argued that the township had failed to show that (1) the water filtration system was a "sewage disposal system," as defined in MCL 691.1416(j); (2) there was a "defect" in that "sewage disposal system," as defined in MCL 691.1416(e); or (3) RPS had any

[3] Although RPS made reference to MCR 2.116(C)(4) in its motion, it made no reference to that subrule in its brief in support of its motion. Instead it made reference to MCR 2.116(C)(10) as a basis for summary disposition. The issue of subject-matter jurisdiction was not raised before or decided by the trial court, nor does RPS argue that issue on appeal.

previous knowledge of such a "defect." The township responded that it was the real party in interest by virtue of the assignments it had received from the Macks and the MMLLPP, and that it had sufficiently pleaded its claim in avoidance of governmental immunity.

After a hearing, the trial court denied RPS's motion for summary disposition. With respect to the issue of whether the township was a real party in interest, the trial court concluded that, although the township itself had not suffered any loss, it was the real party in interest by virtue of the assignment agreements it had executed with the Macks and the MMLLPP, respectively. With respect to governmental immunity, the trial court concluded, on the basis of the evidence presented, that the school's water filtration system "fits comfortably" within the statutory definition of a "sewage disposal system," that the township had satisfied its burden of producing evidence of a defect in the water filtration system, and that RPS "most certainly 'knew, or in the exercise of reasonable diligence should have known, about the defect' " before the August 20, 2011 sewage event. RPS challenges on appeal each of these determinations.

II. REAL PARTY IN INTEREST

RPS argues that the trial court erred by concluding that the township was the real party in interest. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). In this case, as it pertained to the real-party-in-interest argument, the trial court viewed RPS's motion as one brought under MCR 2.116(C)(5) (plaintiff lacks legal capacity to sue). However, as our

Supreme Court has previously held, "the real-party-in-interest [defense] is not the same as the legal-capacity-to-sue defense." *Leite v Dow Chem Co*, 439 Mich 920, 920 (1992). Accordingly, a motion for summary disposition asserting the real-party-in-interest defense more properly fits "within MCR 2.116(C)(8) or MCR 2.116(C)(10), depending on the pleadings or other circumstances of the particular case." *Id*. Because it is clear in this case that the trial court reviewed documents outside the pleadings in reaching its decision as to whether the township was the real party in interest, we will treat the trial court's decision as having been made under MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). MCR 2.116(C)(10) provides that summary disposition is proper when "there is no genuine issue as to any material fact . . . ." A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. When deciding a motion under MCR 2.116(C)(10), a trial court may consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the nonmoving party. *Id*. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when, viewed in the light most favorable to the nonmoving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, the issue of whether a plaintiff is the real party in interest is a question of law that we review de novo. *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

"An action must be prosecuted in the name of the real party in interest[.]" MCR 2.201(B). As previously discussed by this Court:

> A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. A defendant is not harmed provided the final judgment is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party. [*Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (quotation marks and citations omitted).]

In this case, there is no dispute that the township did not suffer damages and did not itself pay any money to the Macks. However, both the Macks and the MMLLPP, who each had a right of action against RPS, assigned their respective rights to the township. As the trial court correctly recognized, an assignee of a cause of action becomes the real party in interest with respect to that cause of action, inasmuch as the assignment vests in the assignee all rights previously held by the assignor. *Kearns v Mich Iron & Coke Co*, 340 Mich 577, 582-584; 66 NW2d 230 (1954); *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). Thus, by virtue of the assignments, the township became the real party in interest.

In reaching this conclusion, we recognize that the MMLLPP did not assign its rights to the township until after this lawsuit was filed. Therefore, at the time the township initiated the lawsuit, it was not the real party in interest as it pertained to the first $50,000 of damages sought in the complaint. However, in denying RPS's motion for summary disposition, the trial court granted the township leave to amend its complaint to properly reflect that it was litigating as the assignee of both the Macks and the MMLLPP. RPS does not assert,

and we do not find, any error in the trial court's grant of leave to amend. See MCR 2.116(I)(5). Further, although the township agreed to remit any damages awarded by the trial court of more than $50,000 to the Macks, to be a real party in interest, a plaintiff need only be vested with the right of action on the claim; the beneficial interest may be with another. *Barclae*, 300 Mich App at 483.

Relatedly, RPS argues that the township cannot be considered a "claimant" as that term is defined by the "sewage disposal system event" exception to the GTLA. We disagree. As discussed further below, to justify the application of the "sewage disposal system event" exception to the GTLA, a "claimant" is required to meet several elements. See MCL 691.1417. A "claimant," for purposes of the "sewage disposal system event" exception, "means a property owner that believes that a sewage disposal system event caused damage to the owner's property . . . or a person making a claim on behalf of a property owner . . . ." MCL 691.1416(c). The definition specifically includes, as a claimant, "a person that is subrogated to a claim of a property owner[.]" There is no dispute that the Macks are property owners who suffered damages from what is alleged to have been a sewage disposal system event. There is also no dispute that the Macks were reimbursed $50,000 from the MMLLPP to cover some, but not all, of those alleged damages. Accordingly, under the plain terms of the statute, both the Macks, as the property owners, and the MMLLPP, as a subrogee, would have been entitled to bring a claim under the "sewage disposal system event" exception to the GTLA. MCL 691.1416(c). However, as discussed earlier, both the Macks and the MMLLPP assigned their rights to the township. Thus, having been vested with all the rights previously owned by the Macks and the MMLLPP, the

township is bringing the instant lawsuit "on behalf of" those two claimants and is, therefore, a claimant in its own right.

III. GOVERNMENTAL IMMUNITY

RPS also argues that the trial court erred by denying its motion for summary disposition based on governmental immunity. Again, we disagree. As stated earlier, we review a trial court's decision on a motion for summary disposition de novo. *BC Tile*, 288 Mich App at 583. Likewise, claims of governmental immunity under MCR 2.116(C)(7) present a question of law, which we review de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

> Under MCR 2.116(C)(7), all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. But such materials shall only be considered to the extent that the[y] . . . would be admissible as evidence . . . . If no [material] facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question of whether the claim is barred by governmental immunity is an issue of law. [*Id.* (quotation marks and citations omitted).]

We review issues of statutory interpretation de novo. *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 196; 826 NW2d 197 (2012).

Subject to various exceptions, a governmental agency is generally immune from tort liability when it is "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The immunity from tort liability provided by MCL 691.1407 "is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort

liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000) (emphasis in original). The statutory exceptions are to be narrowly construed. *Id*. at 158.

Among the statutory exceptions to governmental immunity is the "sewage disposal system event" exception, MCL 691.1416 through MCL 691.1419. MCL 691.1417(2) provides that "[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." In *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 113-114; 729 NW2d 883 (2006), this Court set forth the elements a claimant must show in order to avoid governmental immunity under this exception:

> (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event [see MCL 691.1417(2) and (3)];
>
> (2) that the governmental agency against which the claim is made is "an appropriate governmental agency" . . . [see MCL 691.1417(2), (3)(a)];
>
> (3) that "[t]he sewage disposal system had a defect" [see MCL 691.1417(3)(b)];
>
> (4) that "[t]he governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect" [see MCL 691.1417(3)(c)];
>
> (5) that "[t]he governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect" [see MCL 691.1417(3)(d)];
>
> (6) that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury" [see MCL 691.1417(3)(e)];

> (7) "reasonable proof of ownership and the value of [any] damaged personal property" [see MCL 691.1417(4)(a)]; and
>
> (8) that the claimant provided notice [to the governmental agency of the claim] as set forth in MCL 691.1419 [see MCL 691.1417(4)(b)].

A plaintiff must satisfy all of these elements to survive a motion for summary disposition based on governmental immunity. *Willett*, 271 Mich App at 50.

RPS argues that the trial court erred by finding that the township could show that (1) the water filtration system is a "sewage disposal system," (2) the system had a "defect," and (3) RPS "knew, or in the exercise of reasonable diligence should have known, about the defect." We disagree.

With respect to whether East Rockford Middle School's filtration system is a "sewage disposal system," MCL 691.1416(j) defines a "sewage disposal system" as

> all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, *and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes*, and includes a storm water drain system under the jurisdiction and control of a governmental agency. [Emphasis added.]

The statute does not itself define the terms "sewer" or "sewage," and these terms should therefore be provided their plain and ordinary meaning. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 102; 693 NW2d 170 (2005). The word "sewer" is commonly defined as "an artificial conduit, usu. underground, for carrying off waste water and refuse, as in a town or city." *Random House Webster's College Dictionary* (2000), p 1205. Con-

sistent with this definition, "sewage" is itself commonly understood to mean "the waste matter that passes through sewers." *Id*. In this case, the school's water filtration system is primarily used as a potable water delivery system. However, as part of the process of delivering potable water, the system removes waste matter, such as iron and other unwanted sediments. The water containing this waste matter is ultimately discharged into the sewer line, a "conduit . . . for carrying off waste water," during a backwash cycle. *Id*. Because the system collects and disposes of unwanted wastes, and because those unwanted wastes are discharged directly into a sewer line, we hold that the filtration system is properly considered an "instrumentality" "used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes[.]" MCL 691.1416(j). Because the township could show that the water filtration system is a "sewage disposal system" for purposes of the "sewage disposal system event" exception to the GTLA, RPS was not entitled to summary disposition on this ground.

With respect to whether there was a defect in the water filtration system, MCL 691.1416(e) defines a "defect" as "a construction, design, maintenance, operation, or repair defect." As we observed in *Willett*, "[a] 'defect' is defined as 'a fault or shortcoming; imperfection.' " *Willett*, 271 Mich App at 51, quoting *Random House Webster's College Dictionary* (1997).

In this case, as the trial court noted, the parties do not dispute the nature of the flaw in the water filtration system at the time the sewage backup occurred: if electrical power to the system was interrupted during a backwash cycle, the valves remained in the open position after the power was restored, resulting in a large amount of water being discharged into the sewer

line, which overwhelmed the Davies line and led to sewage backups. The trial court correctly held that plaintiff had presented sufficient evidence of a "defect" of some kind, whether in design, construction, or mere operation, in the sewage disposal system, sufficient to avoid governmental immunity. See MCL 691.1416(e); *Willett*, 271 Mich App at 52. Thus, RPS was not entitled to summary disposition based on this ground.

Finally, with respect to whether RPS "knew, or in the exercise of reasonable diligence should have known, about the defect," RPS argues, as it did before the trial court, that it had no prior knowledge of any defects in the water filtration system. However, the record reveals that an almost identical sewage event occurred in September 2010, a year before the event that is the subject of this lawsuit. Although RPS denied that its officials had any knowledge of this previous event, there is evidence to indicate otherwise. Specifically, Gary Seger, a Kent County DPW employee, testified in his deposition that he spoke to Gerry VanCamp, the school's head custodian, in September 2010 following a power outage that resulted in an excessive flow of water being discharged from the middle school into the Davies lift station. During this meeting, which took place at the school, VanCamp accompanied Seger to the boiler room, showed him the water filtration system, explained the problem with the valve system, and indicated that he had manually closed the valves. According to Seger, VanCamp further noted that "they had already talked about [the problem] and were going to do something about it." Seger understood VanCamp to mean that he had spoken to "school officials" about the issue. During his own deposition, VanCamp acknowledged that he was notified about the problem with the school's water filtration system in September 2010, that he had manually

turned the valves off, and that he subsequently notified someone from the maintenance department of his actions. Given this evidence, there is a genuine issue of material fact regarding the extent to which RPS was aware of the defect in its water filtration system before August 20, 2011. The trial court thus appropriately denied summary disposition on this ground.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

SERVITTO, P.J., and BECKERING, J., concurred with BOONSTRA, J.

In re ASF

Docket No. 324821. Submitted July 7, 2015, at Detroit. Decided July 14, 2015, at 9:20 a.m.

Petitioners Samuel and Janet Spann sought to adopt Samuel's granddaughter, ASF. After the superintendent of the Michigan Children's Institute (MCI) denied petitioners consent to adopt, petitioners moved in the Wayne Circuit Court Family Division for a hearing under MCL 710.45 (§ 45 hearing) on the basis of their contention that the superintendent's decision was arbitrary and capricious. Petitioners also claimed that the circuit court's refusal to allow ASF's lawyer-guardian ad litem (LGAL) to fully present her evidence at the hearing constituted a violation of ASF's rights to due process and equal protection. The court, Christopher D. Dingell, J., affirmed the superintendent's denial of consent because petitioners failed to prove by clear and convincing evidence that the denial was arbitrary and capricious. The LGAL appealed, and petitioners cross-appealed.

The Court of Appeals *held*:

1. The trial court properly granted the MCI's motion for involuntary dismissal of petitioners' cross-appeal—without allowing the LGAL to present her evidence—because MCR 2.504(B)(2) authorizes a trial court to dismiss petitioners' claim after the plaintiff (in this case, petitioners) presents his or her evidence, and the court determines, based on the facts and the law, that the plaintiff has no right to relief. The trial court considered the evidence presented by petitioners and determined that they had not proved by clear and convincing evidence that the superintendent's denial of consent to adopt was arbitrary and capricious. The LGAL objected to the dismissal on the basis that it was premature because she had not been permitted to introduce her evidence in its entirety. However, there exists no statutory authority guaranteeing an LGAL the right to fully participate in a § 45 hearing. A petitioner must initiate a § 45 hearing and claim that the superintendent's decision to withhold consent was arbitrary and capricious, and the petitioner bears the burden of proving that the superintendent's denial of consent was arbitrary and capricious. Petitioners failed to satisfy their

burden of proof, and therefore, the trial court was completely within its authority to grant the MCI's motion for involuntary dismissal after the close of petitioners' case.

2. The trial court applied the correct standard to its review of the superintendent's decision to deny petitioners consent to adopt. The proper standard to apply when determining if a superintendent's denial of consent to adopt was arbitrary and capricious is whether the petitioner can prove by clear and convincing evidence that there was no good reason to deny consent. It is of no moment that there existed good reasons for granting the consent; the question is whether there existed a good reason for withholding consent. In this case, the trial court noted several reasons supporting the superintendent's denial of consent: (1) the identification of other suitable relatives as potential adoptive parents, (2) Samuel's and Janet's ages when compared to ASF's age, (3) the possibility that each petitioner could maintain a relationship with ASF and assume the role of a grandparent, (4) the condition of petitioners' health, and (5) Samuel's lack of commitment to parenting ASF. The superintendent had more than one good reason for withholding from petitioners the consent to adopt ASF. When there exist both good reasons to grant consent and good reasons to deny it, a superintendent's decision to withhold consent cannot be considered arbitrary and capricious, even if another person would have decided the matter differently.

3. The trial court properly concluded that the superintendent's denial of consent did not violate petitioners' civil rights because the superintendent's decision was not based solely on petitioners' ages, which is conduct prohibited by the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*. The superintendent noted that Samuel was age 71 and Janet was age 65 at the time of the § 45 hearing, and ASF was age 4. The superintendent also emphasized, as did the trial court, that Samuel himself expressed doubt about petitioners' ability to care for ASF until she reached age 18. Importantly, the superintendent's consideration of petitioners' ages was only one of several reasons he denied petitioners the consent to adopt ASF. Even though the superintendent considered the petitioners' ages in making his decision to deny consent, his decision did not solely rely on their ages, and so did not violate the Civil Rights Act.

Affirmed.

Evelyn K. Calogero for petitioners.

Laura Dunbar Kellett, lawyer-guardian ad litem, and *Hugh R. Marshall* for ASF.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Chantal B. Fennessey*, Assistant Attorney General, for the Michigan Children's Institute.

Before: HOEKSTRA, P.J., and JANSEN and METER, JJ.

PER CURIAM. Petitioners Samuel Spann and Janet Spann, the grandparents of the minor child ASF, sought to adopt ASF after the parental rights of ASF's biological parents were terminated. The superintendent of the Michigan Children's Institute (MCI) withheld consent to adopt. Petitioners challenged the superintendent's decision in circuit court. After conducting a hearing pursuant to MCL 710.45(2) (§ 45 hearing), the circuit court found that the superintendent's decision was not arbitrary and capricious, and accordingly, the circuit court upheld that decision. The lawyer-guardian ad litem (LGAL) for the minor child appeals the circuit court's decision, and petitioners have filed a cross-appeal also challenging the circuit court's decision. Because the trial court did not clearly err by concluding that petitioners failed to present clear and convincing evidence demonstrating that the superintendent's decision was arbitrary and capricious, we affirm.

In January 2011, ASF and her biological sister, SF,[1] were removed from their mother's care for a variety of reasons and they were placed with petitioners, who

[1] Petitioners pursued a guardianship of SF, and that guardianship is not at issue in this appeal. Another of ASF's siblings was adopted at birth by ASF's aunt and resides in Arizona.

became licensed foster parents. Samuel is ASF's maternal grandfather and Janet is his wife, but she is not a blood relative of ASF or SF. ASF was 9 months old at the time of her placement with petitioners, and SF was 11 years old. Although reunification services were provided, ASF's biological parents made no progress in their treatment plans, and their parental rights were terminated in April 2013.

By all accounts, petitioners took excellent care of SF and ASF for a number of years, and once termination of parental rights occurred, the adoption agency began to plan for petitioners' adoption of ASF. In July 2013, however, Samuel contacted the adoption worker and suggested his son, Damon, and daughter-in-law, Julie, as alternate potential adoptive parents, citing his age and his uncertainty about his own ability to provide long-term care for ASF. Damon, who was in his mid-40s, and his wife, Julie, had a young son who was six months older than ASF.

At a family team meeting held a short time later, Samuel reversed his position and indicated that he now wanted to proceed with the adoption of ASF. But in light of the offer of Damon and Julie as adoptive parents for ASF, and their expression of interest, the agency treated the case as a competing-party adoption. Unfortunately, as a result of this conflict, the relationship between petitioners and Damon and Julie became strained.

After conducting an adoption assessment, the adoption worker, Samantha Slack, recommended that petitioners' request for consent to adopt be denied. A case conference was held, but the adoption agency, Bethany Christian Services (BCS), again recommended that consent to adopt be denied. BCS recommended that consent to adopt be given to Damon and Julie. The BCS

recommendation was sent to the MCI superintendent, and he denied petitioners' request for consent to adopt ASF.[2] When considering the request for consent to adopt, the superintendent weighed, among many factors, the following: (1) petitioners' ages, particularly the significant age difference between petitioners and ASF, (2) petitioners' minor health issues, (3) Samuel's vacillation regarding the adoption and his recommendation of Damon and Julie as adoptive parents, (4) ASF's sibling relationship with SF, (5) the potential for a companion relationship between ASF and Damon's son, (6) the psychological ties between ASF and petitioners, and (7) the potential for each petitioner to continue his or her relationship with ASF by assuming the role of a grandparent.

After the superintendent denied consent to the adoption, petitioners filed a motion in circuit court challenging the superintendent's decision. See MCL 710.45. The circuit court conducted a § 45 hearing at which petitioners testified and called the MCI superintendent to testify. The LGAL was permitted to participate in the proceedings by cross-examining witnesses and participating in arguments. After petitioners rested their case, the LGAL was also able to call Slack, the adoption worker, to testify. The MCI moved for involuntary dismissal pursuant to MCR 2.504(B), and the circuit court granted the motion over the LGAL's objection. The court concluded that petitioners failed to demonstrate by clear and convincing evidence that the MCI superintendent's decision to

[2] The superintendent "represent[s] the state as guardian of each child committed" to the MCI following termination of parental rights, MCL 400.203(1), and the superintendent "has the power to make decisions on behalf of a child committed to the [MCI]." MCL 400.203(2). The superintendent's specific authority to consent to the adoption of a child is set forth in MCL 400.209(1).

withhold consent to adopt was arbitrary and capricious. From this decision, the LGAL and petitioners now appeal.[3]

On appeal, the LGAL and petitioners argue that the trial court clearly erred under MCR 2.504(B)(2) by granting the MCI's motion for involuntary dismissal. Petitioners first contend that the trial court's decision must be reversed because the trial court failed to make specific findings of fact and conclusions of law as required by MCR 2.517(A)(1). See MCR 2.504(B)(2). Petitioners further argue that the superintendent's decision to deny consent was arbitrary and capricious

[3] On appeal, the MCI challenges this Court's jurisdiction over the case. As a general matter, this Court has subject-matter jurisdiction over appeals from a trial court's decision on a motion under MCL 710.45. MCL 710.45(10). The MCI claims, however, that the LGAL is not an appropriate party to bring an appeal under MCL 710.45(10), and that because the LGAL lacks statutory standing, this Court lacks jurisdiction. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013). Although the appeal was initiated by the LGAL, petitioners timely filed a cross-appeal. MCR 7.207(A)(2) and (B)(1). A cross-appeal may be prosecuted to its conclusion even if this Court dismisses the initial appeal. MCR 7.207(D). Thus, at a minimum, even supposing the LGAL lacked standing to initiate the present appeal, petitioners' cross-appeal is properly before this Court. See MCL 710.45(10). Moreover, although the LGAL for an adoptee under the age of 14 is not considered an "interested party" in adoption proceedings, MCL 710.24a(1), ASF was appointed an LGAL during child abuse and neglect proceedings, MCL 712A.17c(7), and an LGAL appointed in this manner continues to represent the child's best interests provided that, as in this case, the child remains subject to the supervision of the MCI. MCL 712A.17c(9). During this time, the LGAL must advocate for the child's best interests, and the LGAL is "entitled to full and active participation in all aspects of the litigation . . . ." MCL 712A.17d(1)(b). There is no indication that the LGAL in this case was discharged. Consequently, in connection with petitioners' appeal, we see nothing improper with the LGAL's continued participation insofar as she represents the child's best interests. Therefore, we will consider the LGAL's arguments. See, generally, MCL 710.45(5); MCL 712A.17c(9); MCL 712A.17d.

because there were no "good reasons" to withhold consent, the superintendent failed to consider ASF's individual circumstances, and the denial amounted to discrimination against petitioners based solely on their ages. In addition, the LGAL similarly asserts that the superintendent's decision was arbitrary and capricious because he failed to consider, or to adequately consider, ASF's unique circumstances, including, for example, her attachment to petitioners and to SF, as well as the tension between petitioners and Damon. The LGAL also maintains that granting the MCI's motion for involuntary dismissal was premature because the LGAL was not given a full opportunity to present her own evidence regarding the purportedly arbitrary and capricious nature of the superintendent's decision. According to the LGAL, denying her a full opportunity to participate in the proceedings also denied ASF her rights to due process and the equal protection of the law.

This Court reviews de novo questions of law, including the interpretation and application of court rules and statutes. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007). A trial court's decision to dismiss an action under MCR 2.504 is reviewed for clear error. *Rodenhiser v Duenas*, 296 Mich App 268, 272; 818 NW2d 465 (2012). A trial court's finding is clearly erroneous when, although there is evidence to support it, "the reviewing court . . . is left with the definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). Whether a trial court applied the correct standard to its review of the superintendent's denial of consent to adopt poses a question of law that we review for clear legal error. *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).

Under MCR 2.504(B)(2), involuntary dismissal of a hearing tried without a jury is appropriate when, after the presentation of the plaintiff's evidence, the court determines, based on the facts and the law, that the plaintiff has no right to relief.[4] *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). In full, MCR 2.504(B)(2) states:

> In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

Under this rule, "a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). The plaintiff is not entitled to the most favorable interpretation of the evidence. *Id*.

In the instant action, petitioners sought relief under MCL 710.45, which allows a petitioner to challenge the superintendent's withholding of consent to an adoption. Accordingly, the MCI's motion for involuntary dismissal under MCR 2.504(B)(2) was properly granted if, during their presentation of evidence, peti-

[4] The Michigan Court Rules apply to adoption proceedings, except as modified by MCR 3.801 to MCR 3.807. MCR 3.800(A). Those rules do not contain a specific provision regarding involuntary dismissal.

tioners failed to demonstrate their entitlement to relief under MCL 710.45. In relevant part, MCL 710.45 provides:

> (1) A court shall not allow the filing of a petition to adopt a child if the consent of a representative or court is required by [MCL 710.43(1)(b), (c), or (d)] unless the petition is accompanied by the required consent or a motion as provided in subsection (2).
>
> (2) If an adoption petitioner has been unable to obtain the consent required by [MCL 710.43(1)(b), (c), or (d)] of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. A motion under this subsection shall contain information regarding both of the following:
>
> (a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.
>
> (b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious.
>
> * * *
>
> (7) Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt.
>
> (8) If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall issue a written decision and may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders in accordance with this chapter or [MCL 712A.18] as the court considers appropriate. In addition, the court may grant to the petitioner reimbursement for petitioner's costs of preparing, filing, and arguing the motion alleging the withholding of consent was arbitrary and capricious, including a reasonable allowance for attorney fees.

As these provisions make plain, to obtain relief under MCL 710.45 at a § 45 hearing, petitioners bore the burden of establishing, by clear and convincing evidence, that the superintendent's denial of consent was arbitrary and capricious. MCL 710.45(7). In other words, the family court is not permitted to decide the issue of adoption de novo; rather, "a family court's review of the superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious." *Keast*, 278 Mich App at 423. The clear and convincing evidence standard is "the most demanding standard applied in civil cases . . . ." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Under this standard, evidence is clear and convincing when it

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (quotation marks and citation omitted).]

Whether action is arbitrary and capricious is evaluated as follows:

> The generally accepted meaning of "arbitrary" is "determined by whim or caprice," or "arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned." The generally accepted meaning of "capricious" is "apt to change suddenly; freakish; whimsical; humorsome." [*Keast*, 278 Mich App at 424-425 (quotation marks and citations omitted).]

To decide whether a denial of consent to adopt was arbitrary and capricious, a trial court initially focuses

on the reasons for withholding consent to the adoption. *Id*. at 425. "It is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously." *Id*.

> Thus, the focus is not whether the representative made the "correct" decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not . . . an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption. [*In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994).]

In the present case, among the superintendent's reasons for denial of consent were the following: (1) the identification of Damon and Julie as "suitable" relatives who were "very appropriate" and willing to adopt ASF, (2) the ages of Samuel (age 71) and Janet (age 65) in relation to ASF (then age 4), particularly when Samuel had expressed doubts about petitioners' ability to parent ASF into the future, (3) there remained the possibility that each petitioner could assume a grandparent role to ASF if she were to be adopted by Damon and Julie, (4) petitioners' health conditions, including diabetes and hypertension, as well as SF's health concerns that required "close monitoring," and (5) Samuel's lack of steady commitment to parenting ASF for the next 14 years as evinced by his vacillation on the adoption and

his identification of Damon and Julie as a better alternative.

When reviewing the reasons given by the superintendent, the trial court determined that there was not clear and convincing evidence that these reasons were arbitrary and capricious, and for this reason the trial court granted the MCI's motion for involuntary dismissal. The trial court explained:

> The initial focus is whether the MCI superintendent acted arbitrarily and capriciously. I'm not supposed to focus on what reasons existed to authorize adoptions. I'm deeply impressed that Janet and Sam Spann are wonderful people. They did a wonderful job with the child. But what I have to decide is whether there's the absence of any good reason to withhold consent.
>
> * * *
>
> Well, motion [for involuntary dismissal] granted. [The superintendent] had reasons for doing what he did. I've held four or five now Section 45 hearings, and there are times when I wish he would have considered factors that he didn't and factors that he considered that I didn't think were that important but he did think they were that important. I believe that [the superintendent] acted within the law. He did have a focus on the ages of the parents [sic]. I don't believe it's unconstitutional for him to have considered it but he did.
>
> He was very worried that the abilities of Sam and Janet Spann would not be up to the needs of the child in ten years. He worries about the commitment that Mr. Spann had. And he did have the feeling that the relationship between Sam and Janet Spann would continue in some form. I cannot say there's the absence of any good reason to withhold consent.

In reviewing the trial court's assessment of the superintendent's decision, we initially note that, con-

trary to petitioners' arguments on appeal, the trial court made findings of fact and conclusions of law as required by MCR 2.517. The trial court plainly applied the correct legal standard to its review of the superintendent's decision, recognizing that the focus was on the reasons for denial and whether those reasons were arbitrary and capricious. See *Keast*, 278 Mich App at 425. Further, as a factual matter, the trial court clearly identified the superintendent's primary reasons for denial: Samuel's vacillation on the adoption, petitioners' potential difficulty parenting ASF into the future, and the availability of another relative to adopt ASF that would allow ASF to continue a relationship with petitioners as her grandparents. While the trial court's explanation was relatively concise, the trial court was plainly aware of the issues involved and its "[b]rief, definite, and pertinent findings and conclusions" regarding these issues were sufficient "without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). See also *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). In short, the trial court applied the correct legal standard, and its findings were sufficient to satisfy MCR 2.517.

On appeal, petitioners posit that the circuit court did not comply with MCR 2.517 because the court referred to reasons offered by the superintendent that petitioners believe were contrary to the evidence. For example, petitioners maintain that, contrary to the superintendent's determinations, their relationship with ASF may not continue because their relationship with Damon and Julie is strained, there is no evidence that their age or health will affect their ability to parent ASF, and there is no evidence that Samuel lacked commitment to the adoption of ASF. While petitioners frame these arguments in relation to the trial court's

compliance with MCR 2.517, these arguments actually concern the factual and legal merit of the superintendent's decision, not the adequacy of the trial court's factual findings. That is, the fact that petitioners disagree with the trial court's findings regarding the conflicting evidence does not render the trial court's findings inadequate under MCR 2.517.

In any event, it is clear that the superintendent's opinion and the findings of the trial court were supported by the evidence. For example, evidence was presented that BCS and Slack were aware that Samuel and Damon had an amicable relationship until Damon and Julie were viewed as a prospective adoptive family in lieu of petitioners, at which time the relationship became strained. Given their past amicable relationship, it was not erroneous to conclude that the parties could set aside their differences for ASF's best interests. Further, there was evidence that Samuel lacked commitment to the adoption because he expressed doubts regarding petitioners' long-term ability to care for ASF, and he offered Damon and Julie as alternative adoptive parents. Further, both Damon and Samuel's daughter, Deanna, reported that Samuel did not want to proceed with the adoption. Finally, neither the superintendent nor the trial court concluded that petitioners' ages and health prevented them from caring for ASF. Rather, their age and health were considered as pertinent factors in long-term planning, particularly since Samuel had previously questioned petitioners' ability to permanently plan for ASF in light of Samuel's age. Any conflicts in the evidence were resolved by the superintendent and the trial court, and the trial court's findings were thus supported by the evidence presented.

Recognizing the underlying factual support for the superintendent's determinations, contrary to argu-

ments by petitioners and the LGAL, we also conclude that the trial court did not clearly err when, at the close of petitioners' case, it determined, based on the facts and law, that petitioners were not entitled to relief because they had not shown by clear and convincing evidence that the superintendent's denial of consent was arbitrary and capricious. See MCL 710.45(7); MCR 2.504(B)(2). In particular, petitioners and the LGAL both argue that the superintendent's decision was arbitrary and capricious. They further contend that the decision was discriminatory and a violation of law to the extent that consent to adopt was withheld because of petitioners' ages. We disagree.

Preliminarily, petitioners contend that the superintendent's consideration of their ages violated MCL 722.957(1) and the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. The Foster Care and Adoption Services Act, MCL 722.951 *et seq*., addresses adoption facilitators and the refusal to provide services. MCL 722.957(1) states, in relevant part:

> Except as provided in subsection (2), an adoption facilitator shall not refuse to provide services to a potential adoptive parent based *solely on age*, race, religious affiliation, disability, or income level. A child placing agency shall not make placement decisions *based solely on age*, race, religious affiliation, disability, or income level. [Emphasis added.]

The CRA prohibits a person from "[d]eny[ing] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, *age*, sex, or marital status." MCL 37.2302(a) (emphasis added).

In this case, the record clearly establishes that the MCI superintendent did not violate MCL 722.957(1), because he did not withhold consent to adopt *solely* on the basis of petitioners' ages. The superintendent testified that petitioners' ages were only one factor that he considered. He identified many other factors involved in his decision to withhold consent, including petitioners' health, Samuel's vacillation regarding the adoption and his recommendation of Damon and Julie as adoptive parents, and petitioners' ability to maintain the role of grandparents in ASF's life. Thus, there was no violation of MCL 722.957(1). Further, the superintendent's consideration of petitioners' ages did not violate the CRA. The purpose of the adoption code is to provide the *adoptee* with adoption services, to safeguard the adoptee's best interests, and to achieve permanency for the adoptee. MCL 710.21a. The best interests of the adoptee are the overriding concern, and "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount." MCL 710.21a(b). In this context, the superintendent did not deny petitioners the full and equal enjoyment of a public service because of their ages. See MCL 37.2302(a). Rather, consent for adoption was denied because the superintendent found that adoption by petitioners was not in ASF's best interests in light of a number of factors, including petitioners' ability and willingness to provide long-term care for a then four-year-old child. Indeed, petitioners were first to inject the issue of their ages as a factor to consider. In short, in assessing ASF's best interests, it was not improper, or discriminatory, for the superintendent to consider petitioners' ages relative to their ability to provide for ASF's long-term care.

As we have previously noted, the circuit court did not clearly err by concluding that petitioners did not present clear and convincing evidence to establish that the superintendent's decision was arbitrary and capricious. In a close case such as this one, it is important that we remain mindful of the standard governing our review and that of the circuit court. That is, we are not insensitive to the fact that petitioners indisputably took excellent care of ASF for 3½ years beginning when she was only nine months old, and the fact that ASF is closely bonded to petitioners as well as to her sister, SF. Given ASF's close bond to petitioners and to her sister, who remains in petitioners' care, reasonable minds might well question the wisdom of denying petitioners consent to adopt and of removing ASF from the continuity of a stable family setting. See MCL 710.22(g). But neither this Court nor the circuit court reviews the matter de novo, and it is not for us to say whether the superintendent made the "correct" decision. *Keast*, 278 Mich App at 424-425; *Cotton*, 208 Mich App at 184.

Instead, considering the reasons given for withholding consent, we look at whether the trial court clearly erred by finding that petitioners failed to present clear and convincing evidence that the superintendent acted arbitrarily and capriciously. *Keast*, 278 Mich App at 423-425. "[I]f there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual . . . might have decided the matter in favor of the petitioner." *Cotton*, 208 Mich App at 185. Such is clearly the case here. There may be good reasons why petitioners should have been permitted to adopt ASF. But our focus must be on the reasons given for

denial, and considering those reasons—Samuel's apparent vacillation in his commitment to adoption, petitioners' ages and health in relation to their ability to parent ASF for the long term, as well as the suitability of adoption by Damon and Julie, which will allow for a continued relationship between ASF and petitioners—we cannot find clear error in the trial court's conclusion that petitioners failed to present clear and convincing evidence that the superintendent acted arbitrarily and capriciously.

Moreover, contrary to petitioners' arguments, the superintendent and the trial court considered ASF's individual circumstances, none of which invalidated the denial of consent. See *In re CW*, 488 Mich 935, 936 (2010). Most relevant to the arguments by petitioners and the LGAL, the superintendent acknowledged that petitioners had taken excellent care of ASF for 3½ years, since she was 9 months old. He also recognized that there was a bond between petitioners, SF, and ASF. Neither the superintendent nor the trial court ignored these important facts; rather, in light of other considerations, as previously detailed, the superintendent nonetheless determined that consent to adopt should be denied. While petitioners "may be able to marshal evidence" in opposition to these conclusions, they have not shown by clear and convincing evidence that the superintendent's determinations were "frivolous or fanciful or without factual support." Cf. *Cotton*, 208 Mich App at 186. Under these circumstances, petitioners and the LGAL have not shown that the superintendent acted arbitrarily and capriciously by withholding consent.

When challenging the trial court's grant of the MCI's motion for involuntary dismissal under MCR 2.504(B)(2), the LGAL, in particular, maintains that

the motion was prematurely granted because she was not allowed to present her own case in its entirety before the trial court determined that petitioners were not entitled to relief. Contrary to the LGAL's arguments, a motion under MCR 2.504(B)(2) is properly granted "after the presentation of the *plaintiff's* evidence." (Emphasis added.) The "plaintiff" is the party who commences the action. MCR 2.201(A). A § 45 hearing is commenced by a petitioner who is unable to obtain consent to adopt. MCL 710.45(2). By statute, a "petitioner" is defined as "the individual or individuals who file an adoption petition with the court." MCL 710.22(r). The petitioner initiates a § 45 proceeding by filing a motion alleging that the withholding of consent was arbitrary and capricious, and the petitioner bears the burden of proof during the hearing. MCL 710.45(2) and (7). Samuel and Janet are the petitioners in this case. In contrast, the LGAL is not a "petitioner," and as such, she could not request a § 45 hearing. Further, neither ASF nor the LGAL is an "interested party" in the adoption proceedings. MCL 710.24a(1). The LGAL could not intervene as a party in the proceedings to challenge the withholding of consent. See *In re Toth*, 227 Mich App 548, 555; 577 NW2d 111 (1998); see also MCL 710.21a(e). Instead, petitioners requested the hearing, petitioners were the parties seeking relief, and petitioners bore the burden of proof during the hearing. Consequently, at the close of petitioners' proofs, it was appropriate for the trial court to consider whether petitioners were entitled to relief given the facts and the law, without providing the LGAL an opportunity to present a case separate from petitioners.[5] MCR 2.504(B)(2).

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[5] We do not suggest that an LGAL is entirely prohibited from participating in a § 45 hearing. There is support for the proposition that,

Moreover, we note that in this case, the LGAL specifically complains that she was not allowed to present additional evidence regarding ASF's attachment to petitioners and to SF, including expert testimony on attachment. However, although the LGAL objected to the MCI's motion for involuntary dismissal, the LGAL failed to make an offer of proof in the trial court regarding this evidence. See MRE 103(a)(2); *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291-292; 730 NW2d 523 (2006). Further, based on the minimal information we have regarding the LGAL's proffered expert witness, additional evidence regarding ASF's attachment to petitioners and to SF would not have altered the outcome; the superintendent testified that he was aware of ASF's attachment to petitioners and to SF, and he acknowledged that because of those attachments, a change in placement would have to be very careful and monitored. Thus, the superintendent and the trial court were plainly aware of ASF's circumstances, and the superintendent did, in fact, recognize that ASF's attachment to petitioners favored granting consent to adopt, but he found that other factors provided good reasons to withhold consent. See *CW*, 488 Mich at 935. Given the good reasons for

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when an LGAL has been appointed during child abuse and neglect proceedings, some participation by an LGAL is anticipated during ensuing adoption proceedings that occur during the LGAL's continued representation of the child. See MCL 710.45(5); MCL 712A.17c(9); MCL 712A.17d. See also *In re Row*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 319389); *In re AEG*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599). This participation does not, however, make an LGAL for an adoptee under age 14 an "interested party" or a "petitioner." See MCL 710.22(r); MCL 710.24a(1). Because the LGAL was not a petitioner or an interested party, the trial court could grant a motion for involuntary dismissal under MCR 2.504(B)(2), before the LGAL completed her presentation of evidence.

denying consent despite ASF's attachment to petitioners, it was not sufficient for the LGAL to show that ASF's attachment to petitioners provided a good reason to grant consent, and thus, even assuming that the LGAL's evidence would have established good reasons to grant petitioners consent, such a showing does not establish that the superintendent acted arbitrarily and capriciously by withholding consent for other reasons. See *Cotton*, 208 Mich App at 183-185. Consequently, even if the LGAL should have been permitted to present additional evidence, the LGAL has not shown that ASF was prejudiced by this denial, and substantial justice does not require reversal of the trial court's decision. See MCR 2.613(A); *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253 (2008).

Finally, the LGAL maintains that the trial court violated ASF's rights to due process and equal protection by refusing to permit the LGAL to present evidence and call witnesses at the § 45 hearing. This cursory argument, made without citation to relevant authority or application of the law to the facts, is insufficiently briefed, and we consider it to be abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Further, and without addressing these claims in detail, we note that the LGAL had notice of the hearing, and she participated in the proceedings on ASF's behalf by presenting some evidence and calling a witness to testify. Under these circumstances, we fail to see how ASF's due process rights were violated. See *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Regarding the claim that ASF was denied her right to equal protection, the LGAL failed to even identify a similarly situated group that was treated differently than ASF was treated. Thus, this claim

must also fail. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

Affirmed.

HOEKSTRA, P.J., and JANSEN and METER, JJ., concurred.

FRANKENMUTH INSURANCE COMPANY v POLL

Docket No. 320674. Submitted June 10, 2015, at Lansing. Decided July 21, 2015, at 9:00 a.m.

Frankenmuth Insurance Company brought an action in the Kent Circuit Court against Leonard Poll; Ruth Heubel; Citizens Insurance Company of America; and Hanover Insurance Company, which is a holding company for several insurance companies including Citizens. Citizens insured a vehicle owned by Heubel. Heubel's insurance policy with Citizens, in accordance with MCL 500.3009(2), contained a named-driver exclusion, specifying that her liability coverage would be void if her son, Poll, operated the vehicle. Poll was driving the vehicle when he crashed into the home of Bonnie Gabbert. Frankenmuth, which insured Gabbert's home, paid her $108,260.42 to cover her losses. Frankenmuth then initiated this subrogation action. Heubel and Poll reached a consent judgment with Frankenmuth. Citizens and Hanover moved for summary disposition. The court, Dennis B. Leiber, J., granted summary disposition in favor of Citizens and Hanover, concluding that the named-driver exclusion relieved them from liability. The court denied Frankenmuth's motion for reconsideration. Frankenmuth appealed.

The Court of Appeals *held*:

Generally, an insurer is liable for property protection insurance benefits if (1) there has been accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, (2) none of the possible exceptions to the insurer's liability enumerated in MCL 500.3123 applies, and (3) the insurer insures the owner of the vehicle involved in the accident. An insurer, however, is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. The Legislature, through the enactment of MCL 500.3009(2), has made it possible for insureds and insurers to exclude bad drivers from a policy. The operative effect of a named-driver exclusion is that when a named excluded driver operates the insured vehicle, coverage is void—no one is insured. In this case, applying the plain language of both the insurance

policy's named-driver exclusion and the statute, while Poll drove Heubel's vehicle, the insurance policy was void and, therefore, the security required by MCL 500.3101 was not in effect at the time of the accident. Because Citizens was not an insurer of the vehicle at the time the accident occurred, it was not liable for the damages incurred. Contrary to Frankenmuth's assertion, while the Legislature has made some coverage exceptions applicable only to personal injury benefits and not property damage benefits, it did not do so with regard to the named-driver exclusion; MCL 500.3009(2) applies equally to both personal injury benefits and property damage benefits. Further, the named-driver exclusion is specifically permitted by statute and not contrary to public policy. Accordingly, the trial court properly granted summary disposition in favor of Citizens and Hanover and did not abuse its discretion by denying Frankenmuth's motion for reconsideration.

Affirmed.

INSURANCE — NO-FAULT — EXCLUDED DRIVERS.

The operative effect of a named-driver exclusion in a no-fault automobile insurance policy is that when the named excluded driver operates the insured vehicle, coverage is void—no one is insured; the provider of a no-fault automobile insurance policy cannot be held liable for property damage that occurs when the named excluded driver operates the insured vehicle (MCL 500.3009(2)).

Larry A. Smith and *Dominic Silvestri* for Frankenmuth Insurance Company.

The Hanover Law Group (by *Thomas P. Murray, Jr.*) for Citizens Insurance Company of America and Hanover Insurance Company.

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

PER CURIAM. In this subrogation action under the no-fault act, MCL 500.3101 *et seq*., plaintiff Frankenmuth Insurance Company (Frankenmuth) appeals by right the trial court's orders granting summary disposition in favor of defendants Citizens Insurance Com-

pany of America and Hanover Insurance Company (Citizens/Hanover)[1] and denying Frankenmuth's motion for reconsideration. We affirm.

The underlying facts are undisputed. Frankenmuth is the insurer of a home located in Caledonia, Michigan, owned by nonparty Bonnie Gabbert. Citizens/Hanover is the insurer of a 1999 Lincoln automobile owned by defendant Ruth Heubel. At the time of the accident that is the subject of this appeal, Heubel's insurance policy contained a named-driver exclusion, as permitted by MCL 500.3009(2), which specifically named Heubel's son, defendant Leonard Poll, as an excluded driver and warned that all liability coverage would be void if Poll operated the Lincoln. The policy explicitly warned, *inter alia*, that "[w]hen a named excluded person operates a vehicle, all liability coverage is void — no one is insured" and that one of the "legal consequences" of allowing a named excluded driver to operate the vehicle would be that "the vehicle is considered uninsured under the no-fault statute . . . ."

In September 2011, Poll was driving Heubel's Lincoln when he lost control of the vehicle and crashed into Gabbert's home, causing extensive damage. Pursuant to its homeowner's insurance policy with Gabbert, Frankenmuth paid Gabbert $108,260.42 to cover her losses. Frankenmuth then initiated this subrogation action to recover that amount from Citizens/Hanover, as the primary insurer of the Lincoln, and from Heubel and Poll individually.[2]

[1] Although named separately, the record indicates that Citizens Insurance Company of America and Hanover Insurance Company are the same entity.

[2] Heubel and Poll are not parties to this appeal because of a consent judgment reached between them and Frankenmuth.

Citizens/Hanover moved for summary disposition under MCR 2.116(C)(10), arguing that the named-driver exclusion relieved it from any insurance liability for damages caused while Poll was driving the Lincoln. The trial court agreed and granted the motion. It subsequently denied Frankenmuth's motion for reconsideration.

We review de novo a trial court's ruling on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). We also review de novo issues involving statutory construction and the construction of insurance contracts. *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 196; 826 NW2d 197 (2012). The trial court properly grants a motion for summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *BC Tile*, 288 Mich App at 583. We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

Frankenmuth argues that Citizens/Hanover, as the primary insurer of the involved vehicle, is liable for the property damage irrespective of whether Heubel was personally involved in the accident. Frankenmuth relies on the three-prong test articulated by our Supreme Court in *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28-29; 528 NW2d 681 (1995), under which an insurer is liable for property protection insurance benefits if (1) there has been "accidental damage to tangible property

arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle," MCL 500.3121(1); (2) none of the possible exceptions to the insurer's liability enumerated in MCL 500.3123 applies; and (3) the insurer insures the owner of the vehicle "involved in the accident . . . ." (Quotation marks and citation omitted.) Frankenmuth argues that each prong is met in this case, so Citizens/Hanover is therefore liable despite the fact that Poll was an uninsured driver. However, the named-driver exclusion, as it is written in the contract at issue, negates Frankenmuth's conclusion.

"An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003) (quotation marks and citations omitted). Under MCL 500.3009(2), "[t]he Legislature has made it possible for insureds and insurers to exclude bad drivers from a policy." *Progressive Mich Ins Co v Smith*, 490 Mich 977, 977 n 2 (2011) (YOUNG, C.J., concurring). Specifically:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance:
>
> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable. [MCL 500.3009(2).]

The operative effect of such a named-driver exclusion is that when a named excluded driver operates the

insured vehicle, "coverage is void—no one is insured." MCL 500.3009(2); see also *Bronson*, 298 Mich App at 198.

In this case, the named-driver exclusion in Heubel's car insurance policy contained verbatim the warning set forth in MCL 500.3009(2). We must enforce as written both the plain and unambiguous language of the statute, as well as the clear and unambiguous terms of the insurance policy not in conflict with that statute. *Bronson*, 298 Mich App at 198. Applying the plain language of both the insurance policy's named-driver exclusion and the statute, while Poll drove Heubel's vehicle, the insurance policy was void, and therefore the security required by MCL 500.3101 was not in effect at the time of the accident (i.e., no one was insured). *Bronson*, 298 Mich App at 198. Because Citizens/Hanover was not the insurer of the vehicle " 'involved in the accident,' " *Turner*, 448 Mich at 29 (citation omitted), at the time the accident occurred, it was not liable for the damages incurred.

Frankenmuth attempts to avoid this conclusion by noting, accurately, that *Bronson* dealt with the effect of MCL 500.3009(2) on an insurer's obligation to provide personal injury protection benefits, not property damage benefits. Frankenmuth further points out, also accurately, that there are significant differences between personal injury protection benefits and property damage benefits. However, neither *Bronson* nor MCL 500.3009(2) is applicable solely to personal injury protection benefits. Indeed, Subsection (1) of that statute specifically refers to liability for both property damage and bodily injury. MCL 500.3009(1). As Frankenmuth acknowledges, the Legislature has seen fit in the past to make certain exceptions applicable to only personal injury benefits and *not* property damage

benefits. See MCL 500.3113. The Legislature did not do the same here, indicating its intent to make MCL 500.3009(2) equally applicable to both personal injury protection benefits and property damage benefits.

Frankenmuth finally argues that the named-driver exclusion is void as against public policy. We disagree. An insurance policy provision is invalid as against public policy if it conflicts with a statute. *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 434; 773 NW2d 29 (2009). In this case, however, as already noted, the named-driver exclusion is specifically permitted by MCL 500.3009(2), and MCL 500.3009(2) is a valid exercise of legislative power. See, e.g., *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 639-642; 506 NW2d 920 (1993); *Muxlow v Auto Club Ins Ass'n*, 152 Mich App 817, 819-820; 394 NW2d 121 (1986). Therefore, the named-driver exclusion is not void as against public policy.

The trial court properly granted summary disposition in favor of Citizens/Hanover and, therefore, did not abuse its discretion by denying Frankenmuth's motion for reconsideration. Citizens/Hanover, being the prevailing party, may tax costs. MCR 7.219(A).

Affirmed.

RONAYNE KRAUSE, P.J., and MURPHY and SERVITTO, JJ., concurred.

AFSCME COUNCIL 25 v FAUST PUBLIC LIBRARY

Docket No. 318467. Submitted March 4, 2015, at Lansing. Decided July 23, 2015, at 9:00 a.m.

AFSCME Council 25, a labor organization, petitioned in April 2009 for an election to represent employees of the Faust Public Library. An election was held in August 2009. A majority of the voting employees rejected AFSCME representation, but AFSCME pursued an unfair-labor-practice charge concerning employees who had been dismissed or laid off before the election. The parties reached a settlement, consenting to hold a new election. The settlement agreement provided that four named employees would vote using challenged ballots and that the Michigan Employment Relations Commission (MERC) would determine their eligibility to vote if necessary. The second election was conducted in 2012 and resulted in a tie without consideration of the challenged ballots. Three of the four named employees permitted to do so had cast challenged ballots, which were potentially outcome determinative. In its main argument, the library asserted that all three, who were all department heads, were supervisors and, therefore, properly excluded from the bargaining unit so their votes should not be counted. MERC determined that the position held by Lisa Hausman, head of the library's children's services department, was not supervisory and that, therefore, her ballot should be opened and counted. MERC further concluded that AFSCME had conceded that the other two challenged voters were supervisors and, therefore, were properly excluded from the bargaining unit. The library appealed.

The Court of Appeals *held*:

1. The Legislature has segregated supervisory and executive personnel from other personnel for purposes of collective bargaining. A supervisor is someone who has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. In this case, MERC

concluded that the evidence showed that Hausman did not possess supervisory authority as the head of the children's services department. MERC found that Hausman never disciplined an employee or recommended discipline, was not involved in hiring employees, and was never told that she was expected to participate in hiring, firing, or disciplining employees. There was competent, material, and substantial evidence to support MERC's determination that Hausman did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend such action. Therefore, MERC did not err by determining that Hausman held a nonsupervisory position at the library. MERC's decision, however, contained an order requiring that another election be conducted, but identified no basis for holding another election. The appropriate remedy was, as MERC initially stated, to open and count Hausman's ballot. Accordingly, that portion of MERC's order directing that a new election be held had to be vacated.

2. Secondarily, the library argued that MERC had erred by rejecting its alternative contention that the three department head positions had to be deemed collectively either supervisory or nonsupervisory, and that it should have been permitted to present evidence establishing that the duties and authority of the three department head positions were effectively identical. The administrative law judge who presided over the evidentiary hearing held in this matter precluded the library from presenting evidence concerning the duties and responsibilities of the heads of the adult services and circulation departments because AFSCME did not contest that the persons holding those positions possessed the power to hire and fire other employees. MERC subsequently concluded that the head of children's services was the only position with respect to which supervisory status was in dispute. MERC committed a material and substantial error of law by refusing to permit the library to support its alternative contention. Under MERC's rules, specifically, Mich Admin Code, R 423.148(2), MERC must determine the merits of any challenged ballot and decide whether the person casting the ballot is an eligible voter. MERC's refusal to consider the library's alternative claim also constituted a failure to fulfill MERC's statutory duty, under MCL 423.213, to determine the appropriate bargaining unit. Because the three challenged ballots would have been decisive, given that the remaining unchallenged ballots were evenly split on whether to approve representation by AFSCME, MERC was obligated to separately determine whether the challenged individuals were eligible

voters. And if the evidence were to show, as the library asserted in its alternative argument, that the adult services and circulation department head positions were nonsupervisory, then excluding them from the bargaining unit would have been error because MERC is required to recognize the largest single bargaining unit that includes all common interests. MERC committed a substantial and material error of law by refusing to permit the library to advance its alternative claim, and that portion of MERC's decision had to be vacated and the case remanded for further proceedings. On remand, MERC first had to consider whether the remaining two challenged ballots would be determinative. If they would be determinative, then the parties were entitled to present evidence concerning the duties and authority of the persons holding those positions. After considering the evidence presented, MERC had to determine whether those department head positions were nonsupervisory and, therefore, included within the appropriate bargaining unit such that their ballots should be opened and counted. The determination, however, of whether each position was supervisory had to rise and fall on the facts pertinent to that position, not on a collective determination regarding the department heads.

MERC decision affirmed in part and vacated in part; case remanded for further proceedings.

Tere McKinney for AFSCME Council 25.

Fausone Bohn, LLP (by *Michael M. McNamara*), and *Steven H. Schwartz & Associates, PLC* (by *Steven H. Schwartz*), for the Faust Public Library.

Before: JANSEN, P.J., and METER and BECKERING, JJ.

PER CURIAM. Respondent, the Faust Public Library (Library), appeals by right the decision and order of the Michigan Employment Relations Commission (MERC), which concluded that the position held by librarian Lisa Hausman as the head of the Library's children's services department did not qualify as a statutory supervisor and, therefore, that the chal-

lenged ballot cast by Hausman in a union representation election would be opened and counted with the election results. The Library also challenges MERC's refusal to permit the Library to pursue an alternative claim that if the head of the children's services department is a nonsupervisory position, then the heads of two other departments of the Library, the adult services and circulation departments, are also nonsupervisory positions such that the challenged ballots cast by the employees holding those two positions should also be opened and counted. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

As explained in *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77; 833 NW2d 225 (2013):

> In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Legal questions, which include questions of statutory interpretation and questions of contract interpretation, are reviewed de novo. As a result, an administrative agency's legal rulings are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. [Quotation marks and citations omitted.]

We first address and reject the Library's contention that there was not competent, material, and substantial evidence to support MERC's finding that the head of the children's services department is a nonsupervisory position.

MERC's classification of an employee as supervisory or nonsupervisory involves findings of fact. See *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). "Findings of fact by [MERC] are

conclusive if supported by competent, material, and substantial evidence on the whole record. This Court will reverse a MERC determination of an appropriate bargaining unit only upon a clear showing of error." *Police Officers Ass'n of Mich v Grosse Pointe Farms*, 197 Mich App 730, 735; 496 NW2d 794 (1993) (citation omitted).

"The Legislature has segregated supervisory and executive personnel from other personnel for purposes of collective bargaining." *Mich Ed Ass'n v Clare-Gladwin Intermediate Sch Dist*, 153 Mich App 792, 795; 396 NW2d 538 (1986); see also *Grosse Pointe Farms*, 197 Mich App at 733 ("Generally, supervisory employees are not included in the same bargaining unit as nonsupervisory personnel."). Because the term is not defined in the public employment relations act (PERA),[1] this Court has used the federal statutory definition of "supervisor," which refers to one who has the authority

> "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [*Clare-Gladwin Intermediate Sch Dist*, 153 Mich App at 797, quoting 29 USC 152(11).]

"The existence of any one of these powers, regardless of the frequency of its exercise, is sufficient to confer supervisory status on an employee, as long as the power is real, rather than theoretical." *Muskegon Co Prof Command Ass'n v Muskegon Co*, 186 Mich App 365, 372; 464 NW2d 908 (1990). In other words, "it is not the exercise of authority, but the delegation of

[1] MCL 423.201 *et seq*.

authority, which is indicative of the attributes of a 'supervisor.' " *Clare-Gladwin Intermediate Sch Dist*, 153 Mich App at 797.

In this case, MERC concluded that the evidence showed that Hausman did not possess supervisory authority as the head of the children's services department. MERC found that Hausman never disciplined an employee or recommended discipline, was not involved in hiring employees, and was never told that she was expected to participate in hiring, firing, or disciplining employees. MERC found that Hausman's authority in the children's services department, including assigning work on children's programming, derived from her status as a professional librarian with a master's degree rather than from any labor-relations or human-resources authority.

We conclude that there was competent, material, and substantial evidence to support MERC's determination that Hausman's position as the head of children's services was not supervisory. Hausman testified that she never hired or fired any employees, was never involved in disciplining any employees as the head of children's services, and never recommended any firings or suspensions. Hausman was not involved in interviewing or hiring a new page who was assigned to her in the children's department; the page was instead hired by the library director, who did not consult Hausman. Although the hours of two employees were increased after Hausman had recommended that action, there is no evidence that Hausman's recommendations were adopted without independent investigation. Hausman's work as one of several rotating "Supervisors in Charge" of the Library did not establish that she was a supervisor, given that employees other than department heads also served as the rotat-

ing supervisor in charge, including an administrative assistant, a librarian, and the head of automation. Hausman acknowledged that her performance evaluations of employees in the children's department were used to determine whether an employee received a merit increase when there was no wage freeze in effect, but the director determined what award or raise was warranted and never asked Hausman what raises should be given. Hausman testified that she was not consulted about raises for children's department associates when across-the-board raises were given in 2006. Although Hausman did set schedules for children's department employees before her layoff in 2009, she testified that upon her reinstatement in 2012 the other children's department employees had already established a work schedule, and Hausman merely "plugged" herself into the "holes of that." When children's department employees requested time off, they submitted a form to Hausman, who would check the schedule to make sure the goal of public service was being met and then pass the form on to the library director.

Sheila Collins, the library director, testified that she helped to write a description of the position of department head applicable to all three departments, and this description was approved by the library board on March 14, 2012. According to Collins, a department head runs the department, handles personnel and budgetary issues, manages the scheduling of employees, approves or disapproves requests for time off, and signs employees' time sheets. Collins's description of a department head's powers could reasonably be viewed as merely theoretical given that, as Collins acknowledged, there have been no hiring or disciplinary terminations or suspensions since she became the director. Collins testified that Hausman had provided an e-mail

concerning the number of employees needed for a 40-hour versus a 55-hour week, and that the library board chose a 40-hour week and adopted the department heads' recommendations as best it could within budgetary constraints. But Collins did not testify that the library board adopted Hausman's recommendation without independent investigation. We acknowledge that Collins testified that the rotating supervisors in charge have the authority to approve or disapprove an employee's request to leave early and to deal with an employee or patron problem immediately. However, as explained previously, employees other than department heads serve as supervisor in charge on a rotating basis. Collins stated that performance evaluations could affect whether an employee receives a raise if the budget allowed a raise. But as discussed, Hausman testified that she had never been asked what raises should be given and that she was not consulted about raises that were provided in 2006.

We conclude that there was competent, material, and substantial evidence that Hausman did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend such action. We discern no basis to upset MERC's determination that Hausman lacked supervisory status in her role as the head of the children's services department. MERC did not err by determining that Hausman held a nonsupervisory position at the Library.

The Library next argues that MERC erred by rejecting its alternative contention that the three department head positions must be collectively deemed either supervisory or nonsupervisory, and that the Library should have been permitted to present evidence establishing that the duties and authority of the three

department head positions are effectively identical. We agree with the Library to the extent that it contends it should have been permitted to present evidence concerning the adult services and circulation department head positions in the hearing before the administrative law judge (ALJ).

The Library consistently maintained throughout the administrative proceedings that the three department heads were supervisors and that their ballots should not be opened, *but that in the alternative*, if any of the three department heads was determined not to be a supervisor, then all three of the department heads should be found not to be supervisors and all three ballots should be opened. The Library asserted that the evidence would show that all three department heads had the same essential job duties and responsibilities in their respective departments, and that the differences in their job descriptions were related to their specific departmental functions. Therefore, the Library argued, there was no basis for concluding that one department head was not a supervisor but that the other two department heads were supervisors.

The ALJ rejected the Library's argument on the ground that there was no triable issue or material dispute of fact concerning the supervisory status of the heads of the adult services and circulation departments, given that both the Library and petitioner, AFSCME Council 25 (the Union), asserted that those two positions were supervisory. The Library was therefore precluded from presenting evidence concerning the duties and responsibilities of the heads of the adult services and circulation departments. The Library presented an offer of proof concerning the proposed testimony of Marilyn Kwik and Diane Mehl, the respective heads of the adult services and circulation depart-

ments, indicating their respective responsibilities in their departments. Following the hearing before the ALJ, MERC concluded that the head of children's services was the only position with respect to which supervisory status was in dispute and that no evidence was presented to establish that the heads of adult services and circulation were supervisors.

We conclude that MERC committed a material and substantial error of law by refusing to permit the Library to support its alternative contention. The Union and the Library agreed before the election that Kwik, Mehl, and Hausman could vote by challenged ballot and that MERC would determine their eligibility to vote, if necessary. Under MERC's rules, MERC must determine the merits of any challenged ballot and decide whether the person casting the ballot is an eligible voter. Mich Admin Code, R 423.148(2) provides:

> An authorized observer, the commission, or the election agent, before the time the voter's ballot is cast, or before the time the ballots are counted in the case of a mail ballot election, may challenge for good cause the eligibility of any person to participate in the election. A person challenged as an ineligible voter shall be permitted to vote in secret, and the election agent shall set aside the ballot, with appropriate markings. *If it is determined by the commission or its election agent that the challenged ballot, or ballots, is decisive of the result, then the commission shall determine the merits of any challenged ballot and decide whether or not the person is an eligible voter*. [Emphasis added.]

Before the election, MERC declared that all three department heads would "vote by challenged ballot" and that "[t]he inclusion or exclusion of the [votes of the three department heads] will be determined by the Commission if their ballots are determinative of the

results of the election." Because these three challenged ballots would have been decisive, given that the remaining unchallenged ballots were evenly split on whether to approve representation by the Union, MERC was obligated by Rule 423.148(2) to separately determine whether Hausman, Mehl, and Kwik were eligible voters.

The ALJ stated that there was no material issue of disputed fact concerning the supervisory status of the adult services and circulation department head positions because both the Library and the Union agreed that those positions were supervisory. In so ruling, however, the ALJ ignored that the Library's alternative argument disputed the supervisory status of all three department heads. In general, parties are permitted to plead inconsistent claims and facts in the alternative. See MCR 2.111(A)(2); *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 561; 595 NW2d 176 (1999). Section 75 of the Administrative Procedures Act,[2] MCL 24.275, provides in relevant part that "[i]n a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The ALJ identified no principled basis to exclude evidence offered in support of the Library's alternative argument that the three department head positions must be considered together as either all supervisory or all nonsupervisory. The Library sought to admit the testimony of Kwik and Mehl, the respective heads of the adult services and circulation departments, to establish that their duties were effectively identical to Hausman's

[2] MCL 24.201 *et seq*.

duties, such that any determination that Hausman's position as the head of the children's services department is nonsupervisory should apply equally to Kwik's and Mehl's positions. As discussed in more detail later in this opinion, while we disagree with the Library's position that MERC should have considered all three department heads together, we agree with its position that MERC erred by precluding it from presenting evidence that was relevant to a disputed issue, i.e., the supervisory or nonsupervisory status of Kwik and Mehl.

MERC's refusal to consider the Library's alternative claim also constituted a failure to fulfill MERC's statutory duty to determine the appropriate bargaining unit. The Legislature has delegated to MERC the power to determine appropriate units for collective bargaining. MCL 423.213; *Muskegon Co Prof Command Ass'n*, 186 Mich App at 369.

> In designating appropriate bargaining units, [MERC's] primary objective is to constitute the largest unit which, under the circumstances of the case, is most compatible with the effectuation of the purposes of the law and includes in a single unit all common interests. Consistent with this objective, [MERC's] policy is to avoid fractionalization or multiplicity of bargaining units. The touchstone of an appropriate bargaining unit is a common interest of all its members in the terms and conditions of their employment that warrants inclusion in a single bargaining unit and the choosing of a bargaining agent. This Court abides by [MERC's] policy to constitute the largest bargaining unit compatible with the effectuation of the PERA. [*Id*. at 373-374 (citations omitted).]

"A community of interests includes, among other considerations, similarities in duties, skills, working conditions, job classifications, employee benefits, and the

amount of interchange or transfer of employees." *Grosse Pointe Farms*, 197 Mich App at 736.

In this case, MERC refused to consider the Library's proposed evidence with regard to the heads of adult services and circulation because it failed to recognize that the Library's alternative argument pertained to the status of those positions. In doing so, MERC failed to properly exercise its statutory duty to determine the appropriate bargaining unit. MERC is required to recognize the largest single unit that includes all common interests that warrant inclusion in a single unit. *Id*. If the evidence shows, as the Library asserts in its alternative argument, that the pertinent department heads are nonsupervisory, then excluding those department heads from the presumptive bargaining unit may result in fractionalization.

In sum, we conclude that MERC committed a substantial and material error of law by refusing to permit the Library to advance its alternative claim. We therefore vacate that portion of MERC's decision in which it refused to consider the Library's alternative claim and remand for further proceedings. Because, as already discussed in detail, we affirm MERC's decision regarding Hausman and Hausman's vote will break the existing tie, MERC on remand should first consider, in accordance with Rule 423.148(2), whether Kwik's and Mehl's ballots are determinative of the election in light of Hausman's now-counted vote. If the two challenged ballots would be determinative, then the parties may present evidence concerning the duties and authority of Kwik and Mehl, the heads of adult services and circulation, respectively. After considering the evidence presented, MERC shall determine whether the heads of the adult services and circulation departments are nonsupervisory and therefore included within the ap-

propriate bargaining unit such that their ballots should be opened and counted. We note, however, that whether those positions are supervisory should rise and fall on the facts pertinent to each position. In other words, MERC must make a determination regarding each position separately; it is not bound by the Library's assertion that the positions must be considered in conjunction with each other and with Hausman. MERC is to consider the merits of the two challenged ballots and decide whether each challenged individual is an eligible voter. See Rule 423.148(2). The Library has not cited any authority, nor have we found any, indicating that the three positions at issue must rise and fall collectively, rather than on the individual facts of each position. Indeed, if the positions are similar, such that Kwik and Mehl share "a common interest" in "the terms and conditions of their employment" so as to warrant inclusion in a single bargaining unit, the finding of similarity must be based on the pertinent facts, not on the Library's declaration of similarity. *Muskegon Co Prof Command Ass'n*, 186 Mich App at 373.

With regard to Mehl, we note the Library argues that MERC erred by ruling that Mehl was not in the presumptive bargaining unit regardless of whether she was a supervisor, because she was not a librarian. This issue is not preserved. "Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This issue was not the focus of the proceedings below; rather, it arises from a footnote in the MERC decision, stating: "As a non-librarian, it appears that even if she had not been a supervisor, Mehl would not have been included in the unit as it was defined by the consent election agree-

ment." Despite this footnoted commentary, the issue was not *decided* by MERC. For the reasons described earlier, MERC declined to decide the issue whether Mehl and Kwik were included in the appropriate bargaining unit. MERC's observation in a footnote that it *appears* that Mehl—a nonlibrarian—would not have been included in the bargaining unit as defined by the consent election agreement was not a *decision* that Mehl was excluded from the unit for that reason. Indeed, MERC declined to reach the issue of Mehl's inclusion in the unit for the erroneous reason that Mehl's supervisory status was supposedly undisputed. The issue was not decided below and is not preserved.

In any event, because we are remanding for a continued hearing for the reasons addressed earlier, the failure to consider this issue will not result in manifest injustice. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010). As discussed, no evidence concerning Mehl's job duties has yet been presented, and the record is not sufficiently developed to address whether she is properly included in the bargaining unit. Because the issue whether Mehl's status as a nonlibrarian affects her inclusion in the presumptive bargaining unit was neither litigated nor decided below, review of this issue is not appropriate or feasible at this juncture.

Lastly, we note that MERC's decision contains inconsistent orders. MERC concluded that Hausman's position as head of children's services was not a supervisory position and, therefore, her challenged ballot should be opened and counted with the election results. Yet, MERC attached to its decision and order a document entitled "DIRECTION OF ELECTION" ordering that an election by secret ballot *be conducted* among the employees within the unit. (Emphasis omitted.)

MERC identified no basis in its decision for ordering a new election, and we can discern no basis for holding another election; rather, the appropriate remedy was, as MERC itself initially stated, to open and count Hausman's ballot. Accordingly, we vacate that portion of MERC's order directing that a new election be held.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a public question having been involved.

JANSEN, P.J., and METER and BECKERING, JJ., concurred.

PEOPLE v McKERCHIE

Docket No. 321073. Submitted July 7, 2015, at Lansing. Decided July 28, 2015, at 9:00 a.m.

Michael D. McKerchie, III, was charged in the Lake County Trial Court with prison escape, MCL 750.193. McKerchie had left a facility in the county where he had been placed in a residential reentry program (a program designed to provide special services to parolees to help them transition into the community) while allegations that he had violated his parole by committing several criminal offenses were investigated. Following a preliminary examination, the court, Mark S. Wickens, J., bound McKerchie over for trial. McKerchie moved to quash the bindover and dismiss the charge, arguing that a parole violation cannot serve as the basis for a conviction under MCL 750.193 because MCL 750.193(3) provides that a person violating the conditions of a parole is not be an escapee for purposes of the prison-escape statute. The court, Peter J. Wadel, J., agreed and dismissed the charge. The prosecution appealed.

The Court of Appeals *held*:

1. Under MCL 750.193(1), a person imprisoned in a prison of this state who breaks prison and escapes, breaks prison without escaping, escapes, or leaves prison without being discharged by due process of law is guilty of a felony. A person escapes for purposes of the statute when the person acts to remove himself or herself from the restraint imposed on his or her person and volition. The facility that housed McKerchie constituted a prison, and he acted to remove himself from that facility. Nonetheless, McKerchie argued that he could not be convicted of prison escape for breaking out of the facility because he had been assigned there as a condition of parole and the violation of a parole condition cannot constitute prison escape. A distinction exists between being granted parole and being released on parole: a prisoner can be paroled and yet remain in prison for a time. A parolee may be confined as a condition of parole, as was the case here, or may be confined pending resolution of some other matter. The language in MCL 750.193(3) concerning parolees clarified that a person's violation of a parole condition cannot be used as a substitute for the

elements of the offense of prison escape, that is, that a parole violation does not by itself make the person an escapee. Accordingly, it does not follow that a parolee can never be an escapee or that an act that constitutes a violation of a parole condition cannot also constitute a violation of MCL 750.193. While the Legislature indicated that a violation of a parole condition cannot be used as a substitute for the elements of prison escape, the exception in MCL 750.193(3) does not give parolees immunity from prosecution for prison escape if the escape constitutes the violation of a parole condition. Because the prosecution established the elements of prison escape in this case without relying on the fact that the escape amounted to a violation of a parole condition, the trial court necessarily abused its discretion when it granted McKerchie's motion to quash the prison-escape charge on the basis of its erroneous understanding of the law.

2. McKerchie also argued that he could not be prosecuted for escaping from the facility because his incarceration there was unlawful. Specifically, he maintained that the Department of Corrections could not incarcerate him at the facility without first having conducted a parole-revocation hearing, which it did not do. It was not apparent on the record, however, that McKerchie was entitled to a hearing before he could be sent to and held at the facility. When the department arrests a parolee on a suspected parole violation, MCL 791.238(1) requires it to incarcerate the parolee pending a hearing on the parole-violation charge. The department did not revoke McKerchie's parole, but instead elected to continue it subject to a new condition with which McKerchie agreed: completion of the program at the facility. But even if McKerchie had been entitled to a parole-revocation hearing, the Parole Board's failure to hold a timely hearing would not have entitled him to be released. McKerchie's remedy would have been to seek a writ of mandamus directing the board to hold a hearing. Therefore, it did not appear that his detention was unlawful. Additionally, the existence of a common-law right to escape from allegedly unlawful confinement by the state has not been explicitly recognized. Even assuming that McKerchie had a common-law right to escape unlawful confinement and that his confinement was unlawful, however, his assertion of that right would not constitute an absolute bar to prosecution. Rather, he would be entitled to present that defense at trial. Accordingly, whether and to what extent McKerchie is entitled to assert the illegality of his confinement as a defense necessarily needed to be addressed in the first instance by the trial court.

Reversed and remanded for further proceedings.

CRIMINAL LAW — PRISON ESCAPE — PAROLEES — VIOLATIONS OF PAROLE CONDITIONS.

MCL 750.193(1) provides that a person imprisoned in a prison of this state who breaks prison and escapes, breaks prison without escaping, escapes, or leaves prison without being discharged by due process of law is guilty of a felony; MCL 750.193(3) further provides that a person violating the conditions of a parole is not an escapee for purposes of the statute, but that language only indicates that a person's violation of a parole condition cannot be used as a substitute for the elements of the offense of prison escape, that is, that a parole violation does not by itself make the person an escapee; the exception in MCL 750.193(3) does not give parolees immunity from prosecution for a prison escape if the escape constitutes the violation of a parole condition.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Craig R. Cooper*, Prosecuting Attorney, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

State Appellate Defender (by *Brett DeGroff*) for defendant.

Before: O'CONNELL, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the proper interpretation of the prison escape statute, MCL 750.193, the Attorney General, acting on behalf of the people of the state of Michigan, appeals by right, see MCL 770.12(1), the trial court's order dismissing the charge of prison escape against defendant, Michael David McKerchie, III. We conclude that the trial court erred when it interpreted the statute to provide immunity to parolees who violate parole by escaping from prison. For that reason, we reverse and remand.

I. BACKGROUND AND BASIC FACTS

The Department of Corrections (the Department)

operates a residential reentry program (the Program), "to provide parolees with special services to help them transition into the community." *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket No. 300772), p 2 (quotation marks and citation omitted).[1] The Department administers the program at a facility in Lake County (the Lake Facility), among other places. It operates the facilities consistently with the requirements for a corrections center; the facilities are secured and guarded by the Department's officers 24 hours a day. Further, the inmates are not free to leave and must abide by the Department's rules for prisoner discipline. *Id*. "An offender may be placed into the Program in one of two ways: the offender can be paroled, but required to complete the Program as a condition of parole, or may be entered into the Program after a parole violation while on parole in a community." *Id*.

In December 2012, McKerchie was released into the community on parole. However, in May 2013, officers picked up McKerchie on suspicion that he had violated the conditions of his parole. The officers alleged that McKerchie was a suspect in several vehicle break-ins and had admitted to possessing stolen property and trading the property for drugs and money. While these allegations were being investigated, the Department placed McKerchie in the Program for parolees housed at the Lake Facility.

In July 2013, McKerchie went missing from the Lake Facility. Officers discovered that someone had knocked the screen out of a window in the room referred to as the substance abuse room. There were

[1] Although unpublished opinions are not binding on this Court, see MCR 7.215(C)(1), we find the background discussion provided in *Smith* useful to a proper understanding of this case.

prints that suggested the individual then climbed wire mesh outside the room to the roof. On the roof, officers discovered a laundry bag containing mail addressed to McKerchie and clothing. A blanket had been thrown over the razor wire. It was discovered that a car had been stolen in Lake County. A witness testified at McKerchie's preliminary examination that a man with a shaved head and wearing a white T-shirt, bright orange shorts, tube socks, and Velcro flip-flops got into the car and drove it away. That vehicle was discovered abandoned in Newaygo County. Officers later arrested McKerchie, and the prosecutor charged him as a fourth-offense habitual offender, see MCL 769.12, with prison escape, MCL 750.193, and unlawfully driving away a motor vehicle, MCL 750.413.

The trial court held a preliminary examination in November 2013. At the preliminary examination, McKerchie's lawyer argued that there was no evidence to connect McKerchie with the stolen car. He also noted that the evidence showed that McKerchie was being held at the Lake Facility for a parole violation. Because MCL 750.193(3) provides that a "person violating the conditions of a parole is not an escapee" for purposes of the prison escape statute, McKerchie's lawyer argued that McKerchie could not be guilty of violating MCL 750.193. The trial court agreed that there was insufficient evidence to bind McKerchie over on the charge of unlawfully driving away a motor vehicle, but bound him over on the charge of prison escape.

In February 2014, McKerchie's lawyer moved to quash the bindover and dismiss the charge against McKerchie on the ground that a parole violation cannot serve as the basis for a conviction under MCL 750.193. The trial court held a hearing on the motion in that same month.

At the hearing, McKerchie's lawyer conceded that McKerchie voluntarily accepted incarceration in the Lake Facility as a new condition of his parole after it was alleged that he had violated his earlier parole. He also agreed that his client "changed his mind later on and went over the wire, he left without permission" and, in that way, violated the new condition of his parole. Nevertheless, because a person "violating the conditions of a parole" is defined to not be "an escapee" for purposes of the prison escape statute, MCL 750.193(3), McKerchie's lawyer maintained that McKerchie could not be guilty of prison escape.

The trial court agreed that McKerchie's escape from the Lake Facility could not constitute a violation of MCL 750.193. The court stated that the Legislature probably intended the last sentence of MCL 750.193(3) to apply to a narrower set of circumstances, but felt that it could not "get away from the language of the statute and the strict reading of it." Accordingly, the court quashed the bindover and dismissed the charge of prison escape.

The trial court entered an order dismissing the charge in February 2014. The Attorney General then appealed in this Court.

II. MOTION TO QUASH

A. STANDARDS OF REVIEW

The Attorney General argues that the trial court erred when it interpreted MCL 750.193(3) in such a way as to immunize a parolee from prosecution for prison escape if the parolee's escape would also constitute a parole violation and granted McKerchie's motion to quash on that basis. This Court reviews for an abuse of discretion a trial court's decision on a motion to

quash. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *People v Janes*, 302 Mich App 34, 41; 836 NW2d 883 (2013). Moreover, it is necessarily an abuse of discretion for a trial court to premise its decision to quash on an error of law. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

B. PRISON ESCAPE

The Legislature made it a felony for a "person imprisoned in a prison of this state" to break prison and escape, to break prison even though an escape is not made, to escape, or to leave prison "without being discharged by due process of law . . . ." MCL 750.193(1). A person escapes for purposes of this statute when the person has acted to remove himself or herself from the restraint imposed on his or her person and volition. See *People v Sheets*, 223 Mich App 651, 658; 567 NW2d 478 (1997). There is no dispute that McKerchie acted to remove himself from the Lake Facility and that the Lake Facility constitutes a prison. See *People v Armisted*, 295 Mich App 32, 42-44; 811 NW2d 47 (2011). Nevertheless, relying on the last sentence in MCL 750.193(3), McKerchie contends that he cannot be convicted of prison escape for breaking out of the Lake Facility because he was assigned to the Lake Facility as a condition of parole and the violation of a parole condition cannot constitute prison escape.

With the last sentence of MCL 750.193(3), the Legislature limited who is an escapee for purposes of the prison escape statute: "A person violating the conditions of a parole is not an escapee under this act." At first blush, this sentence appears to provide that a person cannot be convicted of prison escape if the

person is a parolee and the acts serving as the basis of the prison escape are also violations of the conditions of that person's parole. Understood in this way, the parolees housed in the Lake Facility as a condition of their parole could never violate MCL 750.193 by escaping from the facility. But this is not the only possible construction.

As this Court has explained, there is a distinction between being granted parole and being released on parole; a prisoner can be paroled and yet remain in prison for a time. *Armisted*, 295 Mich App at 38-41. A parolee may be confined as a condition of parole, as was the case here, or may be confined pending resolution of some other matter. *Id*. at 39 (noting that the parole board may require a parolee to provide evidence that arrangements have been made for the parolee's employment, education, or care). The use of the participial phrase "violating the conditions of a parole" to modify "person" places the emphasis on the person's status as someone who has violated or is violating a condition of parole rather than the person's status as a parolee. The emphasis on the violation coupled with the reference to the person's status as "not an escapee" suggests that the Legislature intended to clarify that a person's violation of a condition of parole cannot be used as a substitute for the elements of the offense of prison escape—that is, such a violation does not by itself make the person an "escapee." But it does not follow from this that a person on parole can never be an escapee or that an act that constitutes a violation of a parole condition cannot also constitute a violation of MCL 750.193. This construction is, moreover, consistent with the sentence's placement within the overall statutory scheme. See *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014) (stating that courts

must construe a statutory provision in its overall context and consider its placement and purpose in the statutory scheme).

The Legislature divided the prison escape statute into three subsections. In the first subsection, the Legislature established what constitutes prison escape, which generally requires breaking, escaping, or leaving the confines of a particular place. MCL 750.193(1). In the second subsection, the Legislature defined what constitutes a prison. MCL 750.193(2). The Legislature then provided in the third subsection that certain acts will constitute a violation of the statute even though the person committing the act is outside the confines of a prison. See MCL 750.193(3). Thus, a person commits prison escape if he or she escapes from the lawful custody of a guard, prison official, or employee while outside the confines of a prison or escapes from a facility of the Department of Mental Health after having been transferred there from a prison. *Id*. A person also commits prison escape by violating the terms of his or her release to a work-pass program or by failing to return to the place of imprisonment within the time provided. *Id*. It is within that context that the Legislature created the exception from being an "escapee" for persons "violating the conditions of a parole." *Id*.

The "grant of parole generally constitutes permission to leave confinement with certain restrictions." *Armisted*, 295 Mich App at 38-39. Even after a parolee is released into the community, he or she remains in the Department's custody. *People v Kern*, 288 Mich App 513, 521; 794 NW2d 362 (2010); MCL 791.238(1) ("Each prisoner on parole shall remain in the legal custody and under the control of the department."). Because a person can commit prison escape even when

outside the confines of a prison, a parolee might conceivably be found to have committed prison escape under MCL 750.193 by violating a condition of parole. See *Sheets*, 223 Mich App at 658 (stating that a prisoner escapes within the meaning of MCL 750.193 when he or she acts to remove himself or herself from the restraint imposed on his or her person and volition). It appears that the Legislature intended to foreclose just such a possibility by stating that a "person violating the conditions of a parole is not an escapee under this act." MCL 750.193(3). The exception provides that a violation of a condition of parole does not, absent more, constitute prison escape.

This construction is also consistent with the previous version of the statute, which provided: "Any person violating the conditions of his parole shall not be deemed to be an escapee under the amendatory provisions of this act." See 1970 CL 750.193(3). By stating that the person shall not be *deemed* to be an escapee for violating the conditions of parole, the Legislature indicated that a violation of a parole condition cannot be used as a substitute for the elements of the offense; it did not, however, provide immunity from prosecution under 1970 CL 750.193 for persons violating their conditions of parole. In 1978, the Legislature amended the last sentence of MCL 750.193(3) to its present form. See 1978 PA 631. With that revision, the Legislature simplified the exception and made the language more gender neutral, but it did not, we believe, intend thereby to expand the scope of the exception to provide parolees immunity from prosecution for prison escape if the escape would constitute the violation of a parole condition.

Finally, McKerchie's preferred reading would also create an incongruous result: a parolee confined to a

prison as a condition of parole would be immune from prosecution for escape from that prison, whereas a parolee confined in the same prison without such a condition would be subject to prosecution for escape. We do not believe the Legislature intended to differentiate between parolees in this way. Although McKerchie's preferred construction is possible, we do not agree that it is the most plausible. When the last sentence of MCL 750.193(3) is examined in the context of its placement within the statute, *Cunningham*, 496 Mich at 153-154, and in light of the distinction between parolees who have been released into the community and those who remain temporarily incarcerated before release, *Armisted*, 295 Mich App at 38-41, it is evident that the Legislature did not intend to provide persons who violate their parole immunity from prosecution under MCL 750.193. Rather, it intended to preclude the prosecutor from relying on a violation of a condition of parole as the sole basis for a prosecution under MCL 750.193.

The trial court erred when it interpreted the last sentence in MCL 750.193(3) to provide immunity from prosecution under MCL 750.193 for persons whose escape also constitutes a violation of a condition of parole. Because the prosecutor established the elements of prison escape without relying on the fact that the escape amounted to a violation of a condition of parole, the trial court necessarily abused its discretion when it granted McKerchie's motion to quash the charge of prison escape on the basis of its erroneous understanding of the law. *Duncan*, 494 Mich at 723.

III. UNLAWFUL INCARCERATION

On appeal, McKerchie also argues in the alternative that he could not be prosecuted for prison escape from

the Lake Facility because his incarceration there was unlawful. Specifically, he maintains that the Department could not incarcerate him at the Lake Facility without first conducting a parole revocation hearing, which it did not do.

It is not apparent on this record that McKerchie was entitled to a parole revocation hearing before he could be sent to and held at the Lake Facility. Once released into the community, a parolee does have a liberty interest in his or her continued release on parole. *In re Parole of Haeger*, 294 Mich App 549, 574; 813 NW2d 313 (2011). But this liberty interest is limited, and a parolee may be arrested without a warrant "where there exists reasonable cause to believe that he has violated parole." *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003). When the Department arrests a parolee on a suspected violation of parole, it must incarcerate the parolee pending a hearing on the charge of parole violation. MCL 791.238(1). The Department is generally required to hold a revocation hearing within 45 days, MCL 791.240a(3), to protect the parolee's right to due process before being deprived of his or her limited liberty interest. *Jones*, 468 Mich at 652-653.

In this case, the Department apparently did not revoke McKerchie's parole; rather, it elected to continue McKerchie's parole subject to a new condition with which he agreed—namely, that he complete the Program at the Lake Facility. The offer of continued parole with a new condition when coupled with McKerchie's informed consent (assuming he consented) may have satisfied minimum due process. But even if McKerchie were entitled to a revocation hearing, the failure to hold a timely hearing does not entitle him to be released. See *Jones*, 468 Mich at 658 (holding that

the remedy for the Parole Board's failure to conduct an evidentiary hearing within the time set by law is to issue a writ of mandamus requiring the board to hold the hearing). Therefore, it does not appear that his detention was unlawful.

It is also not clear that Michigan law recognizes a right to use self-help to avoid unlawful imprisonment in this state's penal institutions, as opposed to the use of legal (and peaceable) means for challenging an improper incarceration. See *Moses v Dep't of Corrections*, 274 Mich App 481, 485; 736 NW2d 269 (2007) (stating that the writ of habeas corpus is available to determine the legality of the restraint under which a person is held). It is true that this Court has stated that a person may not be convicted under MCL 750.193 for escaping unlawful imprisonment. See *People v Alexander*, 39 Mich App 607, 610-611; 197 NW2d 831 (1972). However, the Court in *Alexander* relied on a decision by our Supreme Court in which it interpreted a different statute. *Id*. at 610, citing *People v Hamaker*, 92 Mich 11; 52 NW 82 (1892). The Supreme Court in *Hamaker* determined that the prosecution had to establish that the prisoner was lawfully detained because the statute made it a crime to aid or facilitate the escape of a prisoner *lawfully* committed or detained. *Hamaker*, 92 Mich at 15-16. The Legislature did not include such an element in MCL 750.193, and our Supreme Court has not yet explicitly recognized a common-law right to escape from allegedly unlawful confinement by the state. Cf. *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012) (recognizing a common-law right to resist an unlawful arrest). In any event, even assuming that McKerchie had a common-law right to escape unlawful confinement and that his confinement was unlawful, his assertion of that right would not constitute an absolute bar to prosecution;

rather, he would be entitled to present that defense at trial. See *People v Hurst*, 59 Mich App 441, 443-445; 229 NW2d 492 (1975).

For these reasons, we decline to address this issue further. Whether and to what extent McKerchie is entitled to assert the illegality of his confinement as a defense is a matter that should be addressed in the first instance by the trial court.

IV. CONCLUSION

The trial court erred when it interpreted the last sentence of MCL 750.193(3) to provide broad immunity from prosecution under MCL 750.193 for any person whose escape from prison also constituted a violation of a condition of parole. Consequently, it abused its discretion when it granted McKerchie's motion to quash the charge of prison escape on that basis.

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

O'CONNELL, P.J., and OWENS and M. J. KELLY, JJ., concurred.

IONIA EDUCATION ASSOCIATION v IONIA PUBLIC SCHOOLS

Docket No. 321728. Submitted July 8, 2015, at Grand Rapids. Decided July 28, 2015, at 9:05 a.m.

The Ionia Education Association (IEA) brought an unfair-labor-practice charge against the Ionia Public Schools in the Michigan Employment Relations Commission (MERC), alleging that the Ionia Public Schools had violated the public employment relations act (PERA), MCL 423.201 *et seq*., by assigning vacant teaching positions without following the procedure set forth in the parties' expired collective-bargaining agreement (CBA). The parties were negotiating a successor CBA when the charge was filed. After oral argument, an administrative law judge (ALJ) denied the IEA's request for an evidentiary hearing on the ground that there were no disputed issues of fact and issued a recommended decision and order dismissing the charge, ruling that a recently added provision of PERA, MCL 423.215(3)(j), prohibited bargaining over decisions pertaining to teacher placement. The IEA filed exceptions to the ALJ's recommended decision and order and requested oral argument and an evidentiary hearing. MERC denied the request, adopted the ALJ's factual findings and interpretation of PERA, and dismissed the IEA's charge. The IEA appealed.

The Court of Appeals *held*:

1. The IEA's unfair-labor-practice charge was correctly dismissed. MCL 423.215(3)(j) provides that collective bargaining between a public school employer and a bargaining representative of its employees may not include any decision made by the public school employer regarding teacher placement or the impact of that decision on an individual employee or bargaining unit. The plain meaning of this broad language indicated that the Legislature intended to remove from the ambit of bargaining any decision concerning the assignment or placement of teachers, and that any decision-making about teacher placement or assignments was to be within the sole discretion of the employer. The broad language used in the statute necessarily included any decision-making process as well; consequently, policies and procedures used to make teacher placement decisions, including

those used by the Ionia Public Schools, fell within the broad reach of the statutory language. Under the plain language of MCL 423.215(3)(j), any decision regarding teacher placement was a prohibited subject of bargaining and could not be the subject of a collective bargaining agreement.

2. MERC did not abuse its discretion by failing to hold an evidentiary hearing because there were no disputed factual issues in the case and all facts alleged by the IEA were accepted as true. The IEA's challenge to the sufficiency of MERC's factual findings was, in essence, a challenge to its legal conclusion. Further, MERC did not err by declining to hold oral argument because the IEA was afforded oral argument before the ALJ and MERC had discretion over whether to hold oral argument under MCL 423.216(b) and Mich Admin Code, R 423.178.

Affirmed.

PUBLIC EMPLOYMENT — EDUCATION — COLLECTIVE BARGAINING — PROHIBITED SUBJECTS OF BARGAINING — TEACHER PLACEMENT.

MCL 423.215(3)(j) provides that collective bargaining between a public school employer and a bargaining representative of its employees may not include any decision made by the public school employer regarding teacher placement or the impact of that decision on an individual employee or bargaining unit; under this provision, any decision regarding teacher placement, including the policies and procedures used to make teacher-placement decisions, is a prohibited subject of bargaining and cannot be the subject of a collective bargaining agreement.

Kalniz, Iorio & Feldstein Co, LPA (by *Fillipe S. Iorio* and *Kurt Kline*), for the Ionia Education Association.

Thrun Law Firm, PC (by *Roy H. Henley*), for the Ionia Public Schools.

Before: SERVITTO, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM. The Ionia Education Association (IEA) appeals as of right the order of the Michigan Employment Relations Commission (MERC) dismissing the unfair-labor-practice charge that the IEA brought

against respondent, Ionia Public Schools (the school district). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

A. THE "BID-BUMP" PROCEDURE

This case primarily involves a matter of statutory interpretation and the pertinent facts are undisputed. The IEA and the school district are parties to a collective bargaining agreement (CBA) that expired on or about August 25, 2011. The expired CBA contained sections that described, among other matters, a procedure for the assignment of vacant teaching positions. The CBA called for a meeting, referred to by the parties as a "bid-bump" meeting or "teacher assignment meeting," that was to take place near the end of the school year, in either April, May, or June. For the sake of simplicity, the purpose of the "bid-bump" meeting, as set forth in the now-expired CBA, was to permit teachers to bid on open positions, on the basis of a number of criteria. According to the IEA, it had used the bid-bump procedure for approximately 27 years.

B. MCL 423.215(3)(j)

The public employee relations act (PERA), MCL 423.201 *et seq*., establishes, among other matters, the duties of public employers and public employees with regard to collective bargaining. MCL 423.215(3) sets forth prohibited subjects of bargaining between a public school employer and the bargaining representative of its employees. The matters described as prohibited subjects of bargaining "are within the sole authority of the public school employer to decide." MCL 423.215(4). Historically, PERA did not include decisions regarding the placement of teachers among the prohibited sub-

jects of bargaining. In 2011, the Legislature enacted a series of amendments to PERA and expanded the list of prohibited subjects of bargaining between public school employers and employees. 2011 PA 103, which became effective July 19, 2011, added several prohibited subjects, including those set forth in MCL 423.215(3)(j). MCL 423.215(3)(j) prohibits bargaining with regard to "[a]ny decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit."[1]

C. UNFAIR-LABOR-PRACTICE CHARGE

In the spring of 2012, the school district did not hold the bid-bump meeting, despite three requests by the IEA. The IEA filed an unfair-labor-practice charge in July 2012, citing the failure to hold a bid-bump meeting as set forth in the CBA.[2] In response, the school district argued that the enactment of MCL 423.215(3)(j) removed any duty to bargain over teacher-placement decisions and gave it unilateral authority to make decisions relating to teacher placement. According to the school district, it was no longer required to employ the bid-bump procedure described

[1] When 2011 PA 103 added § 15(3)(j) to MCL 423.215, it prohibited as a subject of bargaining "[a]ny decision made by the public school employer regarding *the placement of teachers*, or the impact of that decision on an individual employee or the bargaining unit." (Emphasis added.) 2012 PA 45, which became effective March 13, 2012, amended § 15(3)(j), changing the phrase "the placement of teachers" to the phrase "teacher placement." The 2012 version was in effect at the time the IEA filed its claim of unfair labor practice in July 2012; that same version remains in effect today. See MCL 423.215(3)(j).

[2] Although the CBA expired on August 25, 2011, the IEA contended that during negotiations for a successor CBA, the school district was required to maintain the status quo with respect to mandatory subjects of bargaining.

in the now-expired CBA. Following oral argument, the administrative law judge (ALJ) agreed with the school district and issued a recommended decision and order dismissing the unfair-labor-practice charge. Accepting as true the facts alleged by the IEA, the ALJ denied the IEA's request for an evidentiary hearing after finding that there were no disputed issues of fact. The ALJ also found that the language of § 15(3)(j) was clear and that it prohibited bargaining over any decision pertaining to teacher placement, including the bid-bump procedure.

The IEA filed exceptions to the ALJ's recommended decision and order and requested oral argument and an evidentiary hearing. In a written opinion and order, MERC denied the request for oral argument and an evidentiary hearing, finding that neither would aid in its decision. MERC adopted the ALJ's factual summary. As to the interpretation of § 15(j)(3), MERC rejected the IEA's exceptions and concluded that the ALJ had not erred in his interpretation of the statute. MERC dismissed the unfair-labor-practice charge in its entirety. This appeal followed.

II. INTERPRETATION OF MCL 423.215(3)(j)

A. STANDARD OF REVIEW

Our review of MERC's interpretation of MCL 423.215(3)(j) is de novo. *Van Buren Co Ed Ass'n v Decatur Pub Schs*, 309 Mich App 630, 639; 872 NW2d 710 (2015). However, we note that our Supreme Court has explained that "an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative

decisions and interpret statutes according to their plain language." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93; 754 NW2d 259 (2008). This standard requires " 'cogent reasons' " for overruling an agency's interpretation. *Id*. at 103 (citation omitted). "However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*.

B. PERA AND COLLECTIVE BARGAINING

"PERA governs the relationship between public employees and governmental agencies." *Van Buren Co Ed Ass'n*, 309 Mich App at 640. The act imposes upon public employers a mandatory duty to bargain over certain subjects, such as "wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1). See also *Van Buren Co Ed Ass'n*, 309 Mich App at 640. While PERA requires bargaining on some subjects, § 15(3) sets forth prohibited subjects of bargaining. See *Mt Pleasant Pub Schs v Mich AFSCME Council 25*, 302 Mich App 600, 608-609; 840 NW2d 750 (2013). "Except as otherwise provided in subsection (3)(f),[3] 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." MCL 423.215(4). If there is no duty to bargain over the subject matter, the employer can take unilateral action. See *Van Buren Co Ed Ass'n*, 309 Mich App at 649. This Court has explained that, when the list of prohibited subjects of bargaining found in Subsection (3) is read together with

[3] MCL 423.215(3)(f) pertains to decisions to contract with third parties for noninstructional support services and is not implicated in this case.

Subsection (4), the subsections "evince a legislative intent to make public school employers solely responsible for these subjects by prohibiting them from being the subjects of enforceable contract provisions and by eliminating any duty to bargain regarding them." *Mich State AFL-CIO v Mich Employment Relations Comm*, 212 Mich App 472, 487; 538 NW2d 433 (1995).

2011 PA 103 expanded the list of prohibited subjects of bargaining. Pertinent to this case, 2011 PA 103 added § 15(3)(j), which expanded the prohibited subjects of bargaining to include "[a]ny decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit." MCL 423.215(3)(j). The salient issue in this case is whether § 15(3)(j) and the prohibition on bargaining over "[a]ny decision" regarding "teacher placement" applies to the bid-bump procedure.

The starting point for this inquiry is the plain language of the statute. *Van Buren Co Ed Ass'n*, 309 Mich App at 643.

> In interpreting a statute, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As with any statutory interpretation, our goal is to give effect to the intent of the Legislature by focusing on the statute's plain language. [*Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133-134; 860 NW2d 51 (2014) (citations and quotation marks omitted).]

If the statutory language is clear, we must enforce the statute as it is written. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). We may consult a dictionary to determine the plain and ordinary meaning of statutory terms that are undefined. *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 574; 861 NW2d 347 (2014).

C. APPLICATION

Turning to the statute at issue, § 15(3)(j) provides that collective bargaining between a public school employer and a bargaining representative of its employees "shall not include" "[*a*]*ny decision* made by the public school employer *regarding teacher placement*, or the *impact of that decision on an individual employee or bargaining unit*." MCL 423.215(3)(j) (emphasis added). The word "any" is not defined in the statute, but is commonly understood to be all-encompassing, meaning "every" or "all," and can be "used to indicate one selected without restriction" or "to indicate a maximum or whole." *Merriam-Webster's Collegiate Dictionary* (11th ed). The word "decision," meanwhile, is defined to mean "the act or process of deciding." *Id*. The term "placement" as used in the statute is commonly understood to refer to "an act or instance of placing" or "the assignment of a person to a suitable place (as a job or a class in school)." *Id*.

Given the broad language employed in § 15(3)(j), we conclude that the Legislature intended to prohibit an employer from bargaining over any decision, including policies or procedures such as the bid-bump procedure, with regard to teacher placement. The plain language of the statute gives broad discretion to public school employers to make "[a]ny decision," i.e., every decision or all decisions, "unmeasured or unlimited in amount, number or extent," regarding or concerning teacher placement. The statute contains no limitations on the employer. Also, the statute refers to decisions, which include the act or *process* of deciding. By stating that there was no duty to bargain over "[a]ny decision" regarding teacher placement and providing no limitation or explanation thereafter, the Legislature demonstrated its intent to afford public school employers

broad discretion over any type of teacher placement decision or the impact of that decision on individual teachers or the bargaining unit as a whole. Cf. *People v Cunningham*, 496 Mich 145, 155; 852 NW2d 118 (2014) (reasoning that where the Legislature provided courts with the authority to impose "any cost" in MCL 769.1k(1)(b)(*ii*) and thereafter specified with particularity the costs that could be imposed, such language "suggests strongly that the Legislature did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose 'any cost' "). In other words, the Legislature intended to remove from the ambit of bargaining *any decision* concerning the assignment or placement of teachers, and that *any* decision-making about teacher placement or assignments is to be within the sole discretion of the employer. The broad language used in the statute necessarily includes any decision-making process as well; consequently, policies and procedures used to make teacher-placement decisions such as those at issue in the instant case undoubtedly fall within the broad reach of "any decision" regarding teacher placement. Therefore, the plain language of § 15(3)(j) precludes bargaining over the bid-bump procedure, or any other procedure used in teacher placement.

With regard to the IEA's argument about placement policies and procedures, we find that it would make little sense that a public school employer could be compelled to bargain about an overarching placement plan or process, e.g., the bid-bump procedure previously employed in the instant case, yet have no duty to bargain over the placement decisions that result from that plan. Indeed, the decision-making process or plan would be of little import if the employer could simply make any decision it wanted about placement, regardless of the plan or procedure. Also, such a result would

be contrary to the broad language employed in the statute. "When construing a statute, a court should not abandon the canons of common sense." *In re Consumers Energy*, 310 Mich App 614, 624; 874 NW2d 136 (2015) (citations and quotation marks omitted). Here, construing the statute in the manner proposed by the IEA is not appropriate.

The IEA argues that the phrase "teacher placement" limits the scope of an employer's decision-making to decisions involving individual teachers. This argument is not supported by the text of the statute. The term "teacher placement" could equally refer to the placement of a single teacher or to the act of placing multiple teachers, and the IEA provides no cogent argument as to why it should be limited to a single teacher. To read the statute in the manner proposed by the IEA would essentially require this Court to read the statute as applying to "[a]ny decision" applying to *individual teachers regarding specific assignments*, when the Legislature did not see fit to include such language in the statute. This Court cannot do so. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.") (citation and quotation marks omitted). Furthermore, the IEA's attempt to segregate the phrase "teacher placement" from the rest of the language employed in § 15(3)(j) is an inappropriate way to assess the intent of the Legislature. See *Speicher*, 497 Mich at 138 ("An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent."). Rather, the phrase must be construed in context. When viewed in context, the phrase "teacher placement" is intended to refer to the placement of an individual teacher or to the placement

of multiple teachers. As noted, the phrase "teacher placement" follows the phrase "[a]ny decision." To construe the phrase "teacher placement" as applying to only those decisions made about individual teachers would significantly limit and undermine the broad, encompassing phrase "[a]ny decision" used by the Legislature. In addition, § 15(3)(j) provides, in pertinent part, that there is no duty to bargain over teacher placement "or the impact of that decision *on an individual employee or the bargaining unit*." (Emphasis added.) This language does not suggest that "teacher placement" is meant to refer only to decisions about specific teachers, given that it invokes the "bargaining unit" as a whole, as well as individual teachers.

The IEA argues that reading MCL 423.215 in context compels the conclusion that its interpretation of the statute is correct. It notes that several other prohibited subjects of bargaining in § 15 exclude from bargaining decisions "about the development, content, standards, procedures, adoption, and implementation" of the public school employer's policies and procedures in certain areas. See MCL 423.215(3)(k) (providing that a public school employer does not have a duty to bargain with regard to "[d]ecisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position"); MCL 423.215(3)(*l*) (a public school employer does not have a duty to bargain with regard to "[d]ecisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system"); MCL 423.215(3)(m) (a public school employer does not have a duty to bargain with regard to "decisions about the

development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit"); MCL 423.215(3)(p) (a public school employer does not have a duty to bargain about "[d]ecisions about the development, format, content, and procedures of the notification to parents and legal guardians required under [MCL 380.1249a]" regarding teachers who have been rated as "ineffective"). The IEA's argument is unavailing. As noted, the plain language of § 15(3)(j) provides broad, unilateral discretion to the public school employer with regard to "[a]ny decision" regarding teacher placement. The IEA's proposed construction would be inconsistent with that language. And it would make little sense to give an employer this broad authority, yet require the employer to bargain over an overarching policy regarding teacher placement, particularly a policy such as the bid-bump policy employed in the instant case wherein teachers had authority over placement and transfer decisions.

The IEA also argues that an earlier draft of 2011 PA 2013 compels this Court to interpret § 15(3)(j) in the manner it proposes. Courts may consider legislative history, including "the changes in the bill during its passage." *Dep't of Transp v Thrasher*, 196 Mich App 320, 323; 493 NW2d 457 (1992), aff'd 446 Mich 61 (1994). See also *Klida v Braman*, 278 Mich App 60, 70; 748 NW2d 244 (2008). Here, the IEA notes that as initially proposed by the House, § 15(3)(j) provided:

> (j) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policy for placement of teachers required under section 1247 of the revised school code,

> 1976 PA 451, MCL 380.1247,[4] any decision made by the public school employer pursuant to that policy, or the impact of those decisions on an individual employee or the bargaining unit. [2011 HB 4628.]

The IEA finds significant the initial inclusion, but subsequent rejection, of language pertaining to decisions about the "development, content, standards, procedures, adoption, and implementation of the public school employer's policy for placement of teachers . . . ." The IEA argues that 2011 HB 4628 demonstrates that the Legislature initially considered including among the lists of prohibited subjects of bargaining a public school employer's decisions about procedures and standards used in teacher placement decisions, but declined to adopt such a broad policy. Instead, according to the IEA, the Legislature elected to use the phrase "[a]ny decision," which the IEA contends is not as broad in its scope as the language that was initially proposed in 2011 HB 4628, but subsequently rejected.

The IEA's citation to 2011 HB 4628 is unavailing. The plain language of § 15(3)(j) is clear that it applies, without limitation, to "[a]ny decision" regarding teacher placement. That the Legislature considered adding to the statute language pertaining to decisions about policies and procedures for the placement of teachers and any decision pursuant to those policies is of little consequence, given the broad prohibition that

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[4] MCL 380.1247 was repealed by 1995 PA 289, effective July 1, 1996. In pertinent part, MCL 380.1247 provided that "an administrator or administrators, usually called a building principal," "shall," among other things, "[s]ubmit recommendations to the superintendent for the appointment, assignment, promotion, or dismissal of personnel assigned to supervision of the administrator." 1976 PA 451. Legislative history reveals that the Legislature contemplated bringing back and altering the now-defunct MCL 380.1247 at the time it considered the passage of 2011 HB 4628. See House Legislative Analysis, HB 4625-4628, May 10, 2011.

was eventually passed. Indeed, we find the language that the Legislature eventually adopted in § 15(3)(j) is *broader* in scope than the language proposed in 2011 HB 4628, as it applies to "[a]ny decision," without limitation. Decisions about policies and procedures regarding teacher placement would necessarily fall within the ambit of "[a]ny decision" about teacher placement. We will not resort to legislative history to "cloud a statutory text that is clear." *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Indus, Inc)*, 468 Mich 109, 116; 659 NW2d 597 (2003) (citations and quotation marks omitted).

In sum, we hold that the plain meaning of § 15(3)(j) demonstrates the intent of the Legislature to give public school employers discretion regarding a broad spectrum of teacher placement decisions. This broad discretion applies not only to placement decisions themselves, but also to any decision the employer makes in regard to how it decides to go about making those decisions. Any decision regarding teacher placement, which is a prohibited subject of bargaining, cannot be the subject of a CBA. See *Baumgartner v Perry Pub Schs*, 309 Mich App 507, 525; 872 NW2d 837 (2015) (interpreting MCL 423.215(3)(k), which provides that decisions about a school employer's personnel decisions are prohibited subjects of bargaining). There are no cogent reasons for overturning MERC's interpretation of this statute. See *In re Rovas Complaint*, 482 Mich at 103.

The IEA argues that MERC's (and the ALJ's) interpretation of the statute, with which we agree, is a "broad construction" of § 15(3)(j), and the IEA encourages this Court to adopt a narrower construction. Contrary to the IEA's contentions, this interpretation of the statute does not constitute a broad construction;

rather, it constitutes an interpretation of the statute *as it is written*. As written, the statute is broad in its scope and application. We must adhere to the plain language of the statute and the intent of the Legislature as expressed plainly therein. Our role is to interpret the law and to apply statutes as they are written, not to question the Legislature or to alter plain statutory language.[5] See *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

III. REMAINING CHALLENGES

The IEA next raises issues concerning MERC's factual findings, its failure to hold an evidentiary hearing, and its failure to permit additional oral argument. MERC's factual findings are conclusive "if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Van Buren Co Ed Ass'n*, 309 Mich App at 639 (citation and quotation marks omitted). "This evidentiary standard is equal to the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *Mt Pleasant Pub Schs*, 302 Mich App at 615 (citation and quotation marks omitted). With regard to the IEA's argument that MERC erred by failing to hold oral argument or an evidentiary hearing, our review is for an abuse of discretion. See MCL 423.216(b) (explaining that MERC "may"[6] take further testimony or "hear argument" after the hearing before the ALJ);

[5] To the extent that the IEA proffers a public-policy argument, it offers no reason why its vague allusion to public policy should overcome the plain language of the statute.

[6] The use of the term "may" denotes discretion. See *In re Weber Estate*, 257 Mich App 558, 562; 669 NW2d 288 (2003).

Sault Ste Marie Area Pub Schs v Mich Ed Ass'n, 213 Mich App 176, 182; 539 NW2d 565 (1995).

A. MERC'S FACTUAL FINDINGS

The IEA first contests the sufficiency of MERC's factual findings, arguing that those findings failed to accurately describe the bid-bump procedure. In evaluating this issue, we note that both the ALJ and MERC accepted as true the facts alleged by the IEA and that they both described the facts in this case as being undisputed. Rather than disputing any particular findings, the IEA states that "MERC's factual finding that Article X [of the CBA, which is the provision that describes the bid-bump procedure,] constitutes an unenforceable 'prohibited subject' is not supported by any evidence in the record and therefore should be reversed." Although styled as a challenge to MERC's factual findings, this is essentially an argument that MERC's legal interpretation of § 15(3)(j) is incorrect. As noted earlier, that position is without merit.

B. EVIDENTIARY HEARING

We also conclude that MERC did not abuse its discretion when it declined to hold an evidentiary hearing. There have never been any disputed factual issues in this case and all facts alleged by the IEA were accepted as true. The only salient issue in this case was and continues to be an issue of law, i.e., whether the newly amended § 15(3)(j) applied and prohibited the bid-bump procedure at issue in this case. Once again, we find that the IEA's argument is essentially a challenge to the pertinent *legal* issue in this case, not to any factual issue. MERC did not abuse its discretion by declining to hold an evidentiary hearing. See *Sault Ste Marie Area Pub Schs*, 213 Mich App at 182 (ex-

plaining that "[i]n the absence of a factual dispute, the MERC did not abuse its discretion in declining to hold an evidentiary hearing").

C. ORAL ARGUMENT

Lastly, the IEA argues that MERC erred by declining to hold oral argument. The IEA was granted oral argument before the ALJ; however, MERC denied the IEA's request for further argument when it ruled on the IEA's exceptions to the ALJ's recommended decision and order. In *Smith v Lansing Sch Dist*, 428 Mich 248, 250, 259-260; 406 NW2d 825 (1987), our Supreme Court reversed a MERC decision in which the charging parties were not given an opportunity to present oral argument. In that case, the hearing referee sua sponte issued a decision recommending that MERC summarily dismiss the unfair-labor-practice charge. *Id*. at 251-252. The charging parties filed an exception with MERC, which denied the unfair-labor-practice charge without holding either a hearing[7] or oral argument. tk;3The Court held that the failure to afford the charging parties oral argument required remand. *Id*. at 254. In doing so, the Court examined MCL 423.216(a), which provides that in the event of an unfair-labor-practice charge under PERA, " 'the commission, or any agent designated by the commission for such purposes, may issue and cause to be served upon the person a complaint stating the charges . . . *and containing a notice of hearing* . . . .' " *Id*. at 254, quoting MCL 423.216(a) (emphasis added). The Court also

[7] The Court in *Smith*, 428 Mich at 251, held that conducting an evidentiary hearing in that case was unnecessary because "all alleged facts of the charging party are to be taken as true" when summarily dismissing a case. Here, as noted, all of the facts alleged by the IEA were taken as true and there were no disputed issues of fact. Therefore, no evidentiary hearing was required. *Id*.

noted that MCL 423.216(a) provided, as it does now, that "[a]ny proceeding" under § 16(a) "shall be conducted pursuant to" §§ 71 to 87 of the Administrative Procedures Act, MCL 24.271 through MCL 24.287. *Id*. at 254-255. See also MCL 423.216(a). Pertinent to the issue of oral argument, the Michigan Administrative Procedures Act provides that, in a contested case, "[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MCL 24.272(3). See also *Smith*, 428 Mich at 259. Because the charging parties in *Smith* were never afforded the opportunity to present oral arguments, the Court remanded the case to MERC for further proceedings and to afford the charging parties an opportunity to present oral argument. *Id*. at 259-260.

We note that the issue in *Smith* was not the same as the issue raised in the instant case. In *Smith*, the charging party *was never* afforded oral argument. Here, the IEA was afforded oral argument before the ALJ, but not before MERC. Proceedings before MERC are first generally held before a referee or ALJ or other MERC designee, pursuant to MCL 423.216(a). See, generally, *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554-555; 517 NW2d 240 (1994). If a party takes exception to the recommended decision and order, then the matter proceeds before "the commission," i.e., MERC, under the procedure set forth in MCL 423.216(b). See *North Dearborn Hts Federation of Teachers v North Dearborn Hts Sch Dist*, 382 Mich 105, 107; 168 NW2d 219 (1969). In pertinent part, MCL 423.216(b) provides: "The testimony taken by the commissioner, agent, or the commission shall be reduced to writing and filed with the commission. Thereafter the commission upon notice may take further testimony or hear argument." As our Supreme

Court stated in *North Dearborn Hts*, 382 Mich at 107, this requirement "is obviously for the reason that such a provision is to cover the situation . . . where the entire board does not hear the matter itself, but permits a hearing examiner to conduct the hearing, and then acts as a reviewing body of the examiner's report and recommended order." Significant to the case at bar, § 16(b), unlike § 16(a), does not require MERC to grant oral argument, but instead gives MERC discretion. Indeed, § 16(b) states that after testimony is taken by the ALJ or MERC (acting in the same capacity as an ALJ) in an earlier proceeding, MERC "upon notice may take further testimony *or* hear argument."[8] Accordingly, while oral argument is required under § 16(a), it is not mandated by § 16(b).

Additionally, we note MERC's administrative rules related to hearings before an ALJ and to those before MERC. As the Court recognized in *Smith*, 428 Mich at 255, MERC has authority to promulgate its own rules. Mich Admin Code, R 423.173 provides that, at the close of a hearing before an ALJ, "[a] party *is entitled* upon request to a reasonable period at the close of the hearing for oral argument, which shall be made part of the record." (Emphasis added.) Thus, in accordance with *Smith* and MCL 423.216(a), a party is entitled to oral argument before the ALJ. With regard to proceedings before MERC after a matter has already been heard by an ALJ or other designee of MERC, Mich Admin Code, R 423.178 provides as follows:

> If a party desires to argue orally before the commission, a written request shall accompany the exceptions, cross

[8] "In general, the disjunctive term 'or' refers to a choice or alternative between two or more things[.]" *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 92-93; 811 NW2d 4 (2011) (citation and quotation marks omitted).

> exceptions, or the brief in support of the decision and recommended order, and at the same time, the request shall be served on all other parties. The request must indicate "oral argument requested" in bold capital letters on the first page of the pleading under the caption. The commission, on its own motion, may also direct oral argument. The commission shall notify the parties of the time and place of oral argument. The commission may limit the time for oral argument by each party.

Unlike a hearing before an ALJ, Rule 423.178 does not mandate oral argument; rather, it simply states that a party may *request* oral argument. The idea that a party is to request oral argument suggests that MERC has discretion whether to grant oral argument at this stage. In addition, the rule does not require or guarantee oral argument.

Turning to the instant case, the IEA's citation to *Smith* is unavailing. Unlike in *Smith*, the IEA was afforded oral argument before the ALJ. It was only denied oral argument before MERC. This was permitted under MCL 423.216(b) and Mich Admin Code, R 423.178. Consistent with Rule 423.178, the language employed in MCL 423.216 indicates that MERC has discretion over whether to grant oral argument after the matter has been heard by the ALJ. There is no merit to the IEA's contention that it is entitled to reversal because MERC concluded that additional oral argument would be unnecessary to its review of the case.[9]

Affirmed.

SERVITTO, P.J., and BECKERING and BOONSTRA, JJ., concurred.

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[9] Moreover, the IEA fails to explain how additional oral argument would have made a difference in this case, or what arguments it would have made had it been granted another round of oral argument.

DENHOF v CHALLA

Docket No. 321862. Submitted July 14, 2015, at Grand Rapids. Decided July 28, 2015, at 9:10 a.m. Leave to appeal sought.

Stanley G. Denhof filed suit in Ottawa Circuit Court against Jennell L. Challa, the Ottawa County Friend of the Court (FOC). He alleged that Challa committed fraud and obstructed justice during family division proceedings involving his obligation to pay child support to his ex-wife. Denhof and his ex-wife divorced in 2003. In March 2008, Denhof was arrested and charged with first-degree criminal sexual conduct (CSC-I) for sexually abusing his daughter. He was convicted by a jury and sentenced in August 2008. Denhof notified the FOC office of his incarceration, and an order suspending his child support obligation was entered in November 2008; the order was endorsed by the FOC. The order was later amended to reflect that suspension of Denhof's child support obligation should have started in September 2008, rather than November 2008. The discrepancy resulted in Denhof's overpayment of child support, and his ex-wife was ordered to reimburse him the amount he had overpaid. The FOC stopped its efforts to collect from Denhof's ex-wife the remainder she owed Denhof because Challa determined that Denhof's child support obligation should never have been suspended. According to Challa, incarceration does not suspend the obligation to pay child support when the underlying offense is criminal sexual conduct against a child who is a beneficiary of the support. As a result, the FOC petitioned to reinstate Denhof's obligation to pay child support. The trial court disagreed with Challa's position and ordered that Denhof's obligation to pay child support was to remain suspended. Denhof filed the instant civil lawsuit based on his claims that Challa prevented his attorney from accessing the FOC file during the attorney's preparation for the hearing on the petition to reinstate Denhof's child support. Denhof further claims that when Challa finally permitted his attorney to review the file, she informed the attorney that a document from June 2002 had been destroyed. Denhof maintains that the document would have assisted him in proving his innocence of the CSC charge. After Denhof filed his complaint against Challa, the

Ottawa Circuit Court judges recused themselves because Challa was an employee of the Ottawa Circuit Court. The State Court Administrative Office (SCAO) assigned a judge from the Kent Circuit Court to preside over the lawsuit. Challa filed a motion for summary disposition of Denhof's claims, and Denhof responded with motions to adjourn the hearing on Challa's motion for summary disposition, to change venue, and to disqualify the judge assigned by SCAO. After a hearing on all the motions, Christopher P. Yates, J., the acting Ottawa Circuit Court judge, ruled that Challa's position as Friend of the Court provided her with absolute quasi-judicial immunity from liability, and the court granted Challa's motion for summary disposition. Denhof appealed.

The Court of Appeals *held*:

1. The trial court properly granted Challa's motion for summary disposition because Challa was protected from liability by both branches of the common-law doctrine of quasi-judicial immunity. The first branch of quasi-judicial immunity applied because the conduct at issue occurred during the performance of Challa's job-related duties, roles, or functions, and because of the close working relationship between the circuit court and the FOC. The FOC is an arm of the family court, and the judicial process in domestic relations matters could not properly and effectively function in the FOC's absence. The FOC performs functions integral to the judicial process, and it provides critical assistance to the circuit court related to the ultimate disposition of disputes. The second branch of quasi-judicial immunity—sometimes referred to as the judicial proceedings privilege—also applied to shield Challa from liability because the statements she made with which Denhof takes issue were relevant, pertinent, and material to the proceedings in family court.

2. Denhof's allegation that Challa's destruction of evidence constituted obstruction of justice fails because Denhof neglected to address one of the two bases forming the trial court's decision to dismiss the obstruction of justice count, and because Denhof simply failed to state a claim on which relief could be granted. Even if Challa was not immune from liability with regard to Denhof's obstruction of justice claim, Denhof failed to address on appeal one of the trial court's bases for dismissing the claim. The Court need not consider granting the relief a party seeks when the party fails to dispute the basis of a lower court's ruling. Moreover, even if the obstruction of justice claim was viable,

Denhof failed to allege facts that would adequately support a causal connection between Challa's conduct and actual damages related to his CSC-I convictions. Finally, the trial court properly noted that no civil action could arise from a violation of MCL 750.483a(5), the criminal obstruction of justice statute.

3. Denhof's remaining arguments on appeal—that he was not notified that the Ottawa Circuit Court judges recused themselves, the sitting trial court was biased in Challa's favor, and summary disposition was premature because discovery had not yet been completed—also fail. There was no harm or prejudice in the presumed lack of notice, and the refusal to vacate the opinion and order on that basis was not inconsistent with substantial justice. There was no evidence that the trial judge was biased in Challa's favor or prejudiced against Denhof. Finally, because Challa was protected by quasi-judicial immunity, there was no reasonable likelihood that further discovery would have supported Denhof's claims.

Affirmed.

1. IMMUNITY — QUASI-JUDICIAL IMMUNITY — FRIEND OF THE COURT — JOB-RELATED DUTIES, ROLES, AND FUNCTIONS.

The Friend of the Court (FOC) is protected from liability by quasi-judicial immunity because the FOC's job-related duties, roles, and functions are intimately related and essential to the family court's judicial process; an FOC's statutorily based duties include fact-finding, providing information, performing evaluations, preparing reports, making recommendations, and aiding the family court in separating truth from falsity; the FOC is an arm of the family court, and the judicial process in domestic relations matters could not properly and effectively function in the FOC's absence; the FOC performs functions integral to the judicial process, and it provides critical assistance to the court's ultimate resolution of disputes.

2. IMMUNITY — JUDICIAL PROCEEDINGS PRIVILEGE — FRIEND OF THE COURT — AS PARTICIPANT IN JUDICIAL PROCEEDINGS.

The FOC is protected from liability by the judicial proceedings privilege when a complaint against the FOC is based on the FOC's relevant, material, or pertinent participation in judicial proceedings; even falsity or malice does not abrogate the judicial proceedings privilege applicable to relevant, material, or pertinent statements made by witnesses during the course of judicial proceedings.

Stanley G. Denhof *in propria persona*.

Silver & VanEssen, PC (by *Douglas VanEssen*), for Jennell L. Challa.

Before: MARKEY, P.J., and MURPHY and STEPHENS, JJ.

MURPHY, J. Plaintiff Stanley G. Denhof appeals as of right an opinion and order issued by the trial court granting summary disposition in favor of defendant Jennell L. Challa, who is the Ottawa County Friend of the Court.[1] Acting *in propria persona*, Denhof initiated a civil action against Challa, alleging multiple counts of fraud and a single count of obstruction of justice. Denhof's complaint was based on statements made and actions taken by Challa during family division proceedings concerning Denhof's payment of child support to his ex-wife. Denhof commenced the lawsuit from prison, where he is serving a 14- to 75-year term of imprisonment for convictions of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (victim under 13 years of age), after sexually abusing his young daughter.[2] The trial court determined that Challa was shielded from liability on the basis of quasi-judicial, absolute immunity, and summarily dismissed the lawsuit. We affirm.

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[1] Under MCL 552.502(n), the " '[f]riend of the court' means *the person* serving . . . as the head of the office of the friend of the court [FOC]." (Emphasis added.) Challa, therefore, is the FOC for the county. To avoid any confusion in this opinion, when speaking of Challa in her role as the FOC, we shall continue to refer to her by her surname, and when speaking in general terms of the office of the FOC, we shall use the acronym.

[2] In *People v Denhof*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2010 (Docket No. 287720), this Court affirmed the convictions. Denhof's application for leave to appeal this Court's ruling was denied by our Supreme Court. *People v Denhof*, 489 Mich 899 (2011).

I. BACKGROUND

A. UNDERLYING CHILD SUPPORT LITIGATION

Denhof and his ex-wife had two children, a boy and a girl. The Denhofs divorced in 2003. Denhof was ordered to pay child support for the two children. In March 2008, Denhof was arrested on the CSC-I charges. In July 2008, he went to trial in the criminal case and was convicted by a jury. Denhof was sentenced in August 2008. In September 2008, he notified the FOC by letter about his incarceration. In light of Denhof's imprisonment, an order was entered in November 2008, with the FOC's endorsement, suspending Denhof's child support obligation.[3] There was an existing balance due and owing for past unpaid child support, and in March 2009, Denhof's federal income tax refund was garnished, covering most, if not all, of the arrearage. The record also contains a December 2010 order to remit prisoner funds for child support, directing the Department of Corrections (DOC) to "collect 50% of all funds received by the prisoner

[3] In *Pierce v Pierce*, 162 Mich App 367, 370-371; 412 NW2d 291 (1987), this Court held as follows with respect to child support and an imprisoned parent:

> After giving careful consideration to this matter, we adopt the view . . . that where a noncustodial parent is imprisoned for a crime other than nonsupport that parent is not liable for child support while incarcerated unless it is affirmatively shown that he or she has income or assets to make such payments.
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> [I]f an incarcerated parent with an arrearage has assets or income while in prison, then those assets or the income may properly be applied against the outstanding child support obligation. We conclude that a noncustodial parent's support arrearage which accrued while the parent was imprisoned should be discharged unless there is some showing that the parent became incarcerated in order to avoid his support obligation.

[Denhof] over $50.00 each month." It does not appear that any child support was collected by the DOC under this order.

In February 2011, the court amended the November 2008 order to provide that the suspension of child support should have commenced even earlier, in September 2008, shortly after Denhof's conviction and sentencing. The FOC proceeded to notify Denhof that given the amended order, Denhof's ex-wife had effectively been overpaid child support in the amount of $558, but the FOC demanded that Denhof still pay $218 in FOC fees. A court order was entered shortly thereafter requiring Denhof's ex-wife to reimburse him the $558, and requiring Denhof to continue paying "the amount of $0 per week for support" in light of the suspension of child support due to his incarceration. The order was silent regarding the $218 in FOC fees, and the FOC continued to seek payment of the fees. In August 2011, Denhof filed a grievance with Challa complaining that two FOC employees had made various errors with respect to calculating Denhof's child support obligation, and that one of the employees had intentionally supplied the family court with false information regarding support. Challa rejected the grievance, but she agreed to seek a court order authorizing the FOC to take steps to obtain reimbursement from Denhof's ex-wife for the $558 support overpayment. And, if and when payment was obtained, the FOC would forward the funds to Denhof, minus the $218 in FOC fees that Denhoff still owed.

Unhappy with Challa's position, Denhoff allegedly sent letters about the matter to the family court, the Michigan Attorney General, and the Governor. Subsequently, in September 2011, Challa informed Denhof that the FOC fees actually amounted to only $134, not

$218, the result of an error associated with calculating the suspension period tied to Denhof's imprisonment. And Challa agreed to waive the $134 FOC fees, leaving Denhof with no debt related to child support. In November 2011, it appears that $300 was garnished from the paycheck of Denhof's ex-wife to reimburse Denhoff for overpaid child support. However, the FOC ceased efforts to obtain further payment from Denhof's ex-wife because Challa came to the conclusion, as she conveyed to Denhof, that child support "suspensions [due to imprisonment] are not provided if the underlying offense is criminal sexual conduct against a child upon which the child support obligation is established." However, this Court did not carve out such an exception in *Pierce v Pierce*, 162 Mich App 367; 412 NW2d 291 (1987). Challa believed that the FOC had been mistaken in agreeing to the suspension of child support based on Denhof's imprisonment.

Given the change in Challa's stance, the FOC petitioned the family court for reinstatement of suspended support. Denhof alleged that his attorney, in order to prepare for the hearing on the FOC petition, sought to review the entire FOC file concerning the family law litigation between Denhof and his ex-wife, but Challa denied his attorney access. A hearing was conducted over two days, April 23 and 30, 2012, on the petition for reinstatement of suspended child support and on a motion by Denhof seeking an order requiring the FOC to allow Denhof access to the FOC file. Denhof alleged that Challa falsely informed the family court that Denhof's counsel had been able to review the FOC file on two occasions before the hearing, and that she falsely told the court that she had just recently learned of the nature of Denhof's convictions.[4] Denhof further alleged

[4] We have no transcript of the hearing.

that Challa, during the hearing in family court, trumpeted *Pierce*, 162 Mich App 367, and insisted that it had been unnecessary to suspend child support payments during Denhof's incarceration, and that the court could continue to assess child support at a minimum monthly threshold, considering that Denhof's conviction involved the commission of CSC against a child who was the beneficiary of the support.

In May 2012, the family court entered an order indicating that the court did not agree with Challa and the FOC's new position. The order provided that Denhof's support obligation would "not be retroactively modified and [would] remain suspended." The order additionally provided that Denhof's ex-wife's "obligation to repay . . . [Denhof was] set to zero." The order did not speak directly to the issue of Denhof's effort to access the FOC file. Denhof acknowledged that several weeks later, his attorney was finally permitted to view the FOC file, at which time Challa advised his counsel that a document concerning a June 2002 meeting had been destroyed because the issue that formed the subject matter of the meeting had been resolved. Denhof maintained that the destroyed document had indicated that he had taken "his children to counseling at the YWCA," information that, according to Denhof, would have assisted him in proving his innocence in the CSC prosecution.

B. DENHOF'S CIVIL LAWSUIT — FRAUD AND OBSTRUCTION OF JUSTICE

In August 2013, Denhof filed the instant lawsuit against Challa. In Count I of his complaint, Denhof alleged that Challa committed fraud when she misrepresented to the family court that Denhof's attorney had viewed the FOC file before the April 2012 hearing.

Denhof claimed that the fraud confused the court into believing that his attorney "was well-prepared." In Count II of his complaint, Denhof alleged that Challa committed fraud when she misrepresented to the family court in April 2012 that she had just recently learned of Denhof's CSC-I convictions, when she had actually been aware of the nature of the convictions three years earlier. In Count III of his complaint, Denhof alleged that Challa committed fraud by essentially misquoting *Pierce* to the family court and by otherwise presenting legally inaccurate arguments during the April 2012 hearing. Finally, in Count IV of his complaint, Denhof alleged that Challa engaged in obstruction of justice under MCL 750.483a(5) by withholding and destroying the June 2002 FOC document, which purportedly constituted exculpatory evidence relative to the CSC case.[5]

After Denhof filed his civil complaint against Challa, the judges of the Ottawa Circuit Court recused themselves and entered an order of disqualification because Challa was employed by the Ottawa Circuit Court.[6] The State Court Administrative Office (SCAO) assigned a judge of the Kent Circuit Court to serve as a judge of the Ottawa Circuit Court for purposes of presiding over Denhof's suit against Challa. Subsequently, Challa filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Challa initially argued

[5] MCL 750.483a(5) provides that a person shall not "[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding." We note that Challa denied as untrue Denhof's allegation that she had informed Denhof's counsel that the FOC document had been destroyed. We further mention that by April 2012, the trial and appellate processes in the criminal case had long been concluded.

[6] MCL 552.503(4) provides that "[t]he friend of the court is an employee of the circuit court in the judicial circuit served by the friend of the court."

that there were "numerous pleading problems with the Complaint," including the failure to allege (1) that monetary damages flowed from the alleged fraud, (2) that the June 2002 FOC document was not destroyed in the normal course of business, (3) that the information in the document could not have been established by way of other evidence at the criminal trial, and (4) how that information could possibly have established Denhof's innocence in the criminal case. However, Challa's primary argument was that Denhof had failed to plead in avoidance of "governmental and quasi-judicial immunity." Challa argued that, for purposes of governmental immunity and the alleged intentional torts, Denhof had failed to allege any conduct on Challa's part that was objectively unreasonable. Challa additionally contended that her role as head of the FOC provided her with quasi-judicial, absolute immunity. Challa further maintained that the alleged wrongdoing pertained to matters within a judicial proceeding—the family court support litigation—and therefore the judicial proceedings privilege shielded her from liability. Challa argued that Denhof's lawsuit was ill-conceived and a wrongful attempt to relitigate the child support and criminal cases.

Denhof filed a response to Challa's motion for summary disposition; in addition, Denhof filed motions to adjourn the summary disposition hearing, for change of venue, and to disqualify the SCAO-appointed trial court. The trial court conducted a hearing on all of the motions and denied Denhof's adjournment, disqualification, and venue motions in short explanatory orders.[7] The trial court granted Challa's motion for summary disposition in a written opinion and order.

[7] The trial court denied the adjournment motion because both sides had fully briefed the issues related to summary disposition and were prepared to proceed. The court accurately noted that it had allowed and heard

The trial court had been able to review transcripts of the family court hearing that took place in April 2012.[8] The trial court ruled that quasi-judicial, absolute immunity applied and barred Denhof's suit. The trial court noted that, at the family court hearing in April 2012, Challa "most assuredly was acting in her official capacity as a representative of the court." The trial court concluded its opinion, stating:

> In sum, because Defendant Challa was acting in her official capacity as the [FOC], she can avail herself of absolute immunity from all of Plaintiff Denhof's claims arising from the manner in which she discharged her duties. Thus, the [c]ourt must award summary disposition to Defendant Challa pursuant to MCR 2.116(C)(7) on all of the claims set forth in Plaintiff Denhof's complaint.[9]

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extensive oral arguments on the scheduled hearing date. The trial court denied the change-of-venue motion because Ottawa County was "the most logical venue for this litigation," and other possible venues could not be regarded as being more appropriate or convenient. The trial court denied the disqualification motion because it had no "knowledge of, or contact with, either party" and simply took the case upon SCAO's invitation.

[8] Referring to the transcripts, the trial court noted that, as to April 23, 2012, Denhof's attorney had pressed the family court to allow access to the FOC file, which the FOC had denied given that no court order permitted access. The family court put the matter over until April 30, 2012. According to the trial court, Challa appeared before the family court on April 30 and informed the family court that Denhof's counsel had been afforded access to nonconfidential parts of the FOC file, but he was not entitled to view confidential aspects of the file regarding a custody investigation. In further reference to the transcripts, the trial court indicated that Challa had advised the family court that she had only recently discovered that Denhof's child was the victim of the CSC offenses and that, because of that fact, the FOC should never have endorsed suspension of Denhof's child support obligation. Finally, the trial court noted that the family court concluded that its decision to eliminate all child support obligations of both Denhof and his ex-wife rendered file access unnecessary.

[9] The trial court additionally ruled that the obstruction of justice claim under MCL 750.483a(5) could not survive summary disposition because "the [c]ourt [could not] recognize a private cause of action for a violation of that criminal statute."

Denhof's various motions for reconsideration with regard to summary disposition, judicial disqualification, and change of venue were denied, as was a subsequent new motion for judicial disqualification. Denhof appeals as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of immunity is a question of law that is likewise reviewed de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). "We also review de novo as a question of law the applicability of a privilege." *Oesterle v Wallace*, 272 Mich App 260, 263; 725 NW2d 470 (2006).

B. GOVERNING PRINCIPLES WITH RESPECT TO MCR 2.116(C)(7)

MCR 2.116(C)(7) provides for summary disposition when "[a] claim is barred because of . . . immunity granted by law . . . ." *Snead*, 294 Mich App at 354 (citation and quotation marks omitted). The movant may submit " 'affidavits, depositions, admissions, or other documentary evidence' " in support of the motion if the evidence is substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (citation omitted). " 'The contents of the complaint are accepted as true unless contradicted' by the evidence provided." *Id*. (citation omitted). This Court must consider the documentary evidence in the light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If

there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id*. When, however, a relevant factual dispute does exist, summary disposition is not appropriate. *Id*.

C. DISCUSSION

We hold that Denhof's fraud claims fail as a matter of law because Challa was shielded from liability under the common-law doctrine of quasi-judicial immunity.[10] The doctrine of quasi-judicial immunity as developed by the common law has at least two somewhat distinct branches: one branch focuses on the nature of the job-related duties, roles, or functions of the person claiming immunity, and one branch focuses on the fact that the person claiming immunity made statements or submissions in an underlying judicial proceeding. The latter branch is sometimes referred to as the judicial proceedings privilege. In pursuing summary disposition, Challa had argued in support of both variations of quasi-judicial immunity. The trial court ruled that quasi-judicial immunity protected Challa from liability because she had been "acting in her official capacity as the Friend of the Court." The trial court concluded that Challa was entitled to quasi-judicial immunity in light of her job-related duties and not necessarily because she had made statements or submissions in a judicial proceeding. We conclude that both branches of quasi-judicial immunity were implicated and applicable to the fraud claims in this case.

We shall begin by examining the form of quasi-judicial immunity that served as the basis for the trial court's ruling, concentrating on the nature of Challa's FOC duties. We initially emphasize that our analysis is

[10] We shall separately address the obstruction of justice claim.

not grounded in MCL 691.1407(5), which provides that "[a] judge . . . [is] immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial . . . authority." Challa is not a judge and thus does not fall within the parameters of MCL 691.1407(5).[11] However, in *Diehl v Danuloff*, 242 Mich App 120, 127-128; 618 NW2d 83 (2000), this Court observed that "Michigan courts have . . . recognized the [common-law] doctrine of quasi-judicial immunity in various circumstances."

In *Diehl*, the plaintiff filed suit against the defendant, a licensed psychologist, alleging that the defendant was professionally negligent in the manner in which he had performed court-ordered psychological testing and a custody evaluation. Although this Court found that MCL 691.1407 did not afford the defendant immunity from suit, it did apply quasi-judicial immunity as developed through pertinent caselaw. *Id*. at 127-135.[12] The Court explained:

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[11] This is not to say that MCL 691.1407 has no relevance in this case. Challa is a governmental employee and "MCL 691.1407(3) . . . grants immunity to governmental employees from intentional-tort liability to the extent allowed by the common law before July 7, 1986." *Odom*, 482 Mich at 461. The *Odom* Court stated:

> A governmental employee must raise governmental immunity as an affirmative defense and establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature. [*Id*.]

The trial court did not address Challa's argument concerning general governmental immunity and *Odom*, Challa did not submit any documentary evidence that would have allowed for a proper analysis under *Odom*, and we find it unnecessary to reach the issue in this appeal.

[12] The Court held that while the "defendant was not entitled to governmental immunity under MCL 691.1407[,] . . . summary disposition was nonetheless proper because defendant enjoyed quasi-judicial immunity from suit." *Diehl*, 242 Mich App at 124.

> Here, the trial court appointed defendant to assist in the custody determination by evaluating the children's familial unit, following any procedure he deemed appropriate. . . . Plaintiff's allegations stem directly from defendant's role in the custody proceeding. *In acting pursuant to his court appointment, defendant served as "an arm of the court" and "performed a function integral to the judicial process."* Thus, we hold that a court appointed psychologist, such as defendant, ordered to conduct a psychological evaluation and submit a recommendation to the trial court in a custody proceeding is entitled to absolute quasi-judicial immunity. The trial court did not err in granting summary disposition to defendant.
>
> Our conclusion that defendant was protected by quasi-judicial immunity is also well supported by a number of public policy considerations, including (1) the need to save judicial time in defending suits, (2) the need for finality in the resolution of disputes, (3) to prevent the threat of lawsuit from discouraging independent action, and (4) the existence of adequate procedural safeguards. [*Id*. at 132-133 (citations omitted; emphasis added).]

The Court stated that "[m]ost importantly, . . . if these individuals are subject to lawsuits, they will be much less willing to serve the court." *Id*. at 134. The Court also recognized that, "[w]ith virtual uniformity, courts in other jurisdictions have granted quasi-judicial immunity to individuals who perform functions analogous to those performed by defendant in the present case." *Id*. at 129.

The *Diehl* panel relied in part on *Martin v Children's Aid Society*, 215 Mich App 88; 544 NW2d 651 (1996),[13] in which this Court granted absolute immunity to the Children's Aid Society (CAS), a private organization that was under contract with the state to provide services for abused and neglected children. *Id*. at 91. In *Martin*, the plaintiffs had alleged causes of action

[13] See *Diehl*, 242 Mich App at 128 n 1.

against the CAS and others that included negligence, bad faith, and breach of statutory and contractual duties arising out of child protective proceedings. *Id*. at 93. The plaintiffs maintained that they were separated from their daughter on the basis of unfounded claims of abuse. *Id*. at 93. The Court stated that providing immunity was vital to avoiding overly cautious, trepid, and restrained decision-making in safeguarding the lives of children. *Id*. at 97-98. The *Martin* panel, quoting the CAS's brief, asserted that undaunted " '[p]rofessional assistance to the . . . Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children.' " *Id*. at 97. The Court noted that "the immunity we afford to the CAS . . . does not arise from . . . [MCL 691.1407]." *Id*. at 95-96 n 5.

In the Friend of the Court Act (FCA), MCL 552.501 *et seq*., the Legislature expressed the multiple purposes of the FCA, stating as follows:

> The purposes of this act are to enumerate and describe the powers and duties of the friend of the court and the office of the friend of the court; to ensure that procedures adopted by the friend of the court will protect the best interests of children in domestic relations matters; to encourage and assist parties voluntarily to resolve contested domestic relations matters by agreement; to compel the enforcement of parenting time and custody orders; and to compel the enforcement of support orders, ensuring that persons legally responsible for the care and support of children assume their legal obligations and reducing the financial cost to this state of providing public assistance funds for the care of children. This act shall be construed to promote the enumerated purposes and to facilitate the resolution of domestic relations matters. [MCL 552.501(2).]

"The intent of the Legislature in enacting the [FCA] . . . was to create an investigative and fact-

finding *arm of the circuit court* in domestic relations matters." *Marshall v Beal*, 158 Mich App 582, 590; 405 NW2d 101 (1986) (citation omitted; emphasis added); see also *D'Allessandro v Ely*, 173 Mich App 788, 800; 434 NW2d 662 (1988). The nomenclature itself used by the Legislature denotes the close working relationship envisioned between an FOC office and a family court, i.e., "friend of the court." The duties assigned to an FOC office all "involve either the dissemination of information to the parties or the investigation and compilation of facts for use by the circuit court judge." *Marshall*, 158 Mich App at 590.

The FCA enumerates the duties that the FOC must perform, including, in part, the following duties found in MCL 552.505(1):

> (g) To investigate all relevant facts, and to make a written report and recommendation to the parties and to the court, regarding child custody or parenting time, or both, if ordered to do so by the court. If custody has been established by court order, the court shall order an investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances. The investigation may include reports and evaluations by outside persons or agencies if requested by the parties or the court, and shall include documentation of alleged facts, if practicable. If requested by a party, an investigation shall include a meeting with the party. A written report and recommendation regarding child custody or parenting time, or both, shall be based upon the factors enumerated in the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31.
>
> (h) To investigate all relevant facts and to make a written report and recommendation to the parties and their attorneys and to the court regarding child support, if ordered to do so by the court. The written report and recommendation shall be placed in the court file. The investigation may include reports and evaluations by

> outside persons or agencies if requested by the parties or the court, and shall include documentation of alleged facts, if practicable. The child support formula developed by the bureau under section 19 shall be used as a guideline in recommending child support. The written report shall include the support amount determined by application of the child support formula and all factual assumptions upon which that support amount is based.

An FOC office also engages in enforcing support orders, MCL 552.511, enforcing orders for the payment of healthcare expenses, MCL 552.511a, and enforcing custody and parenting-time orders, MCL 552.511b.

Just as with the psychologist who performed court-ordered custody evaluations in *Diehl* and with the CAS when it provided services to abused and neglected children in *Martin*, we hold that Challa was entitled to quasi-judicial immunity. We reach this conclusion because an FOC office is an arm of the family court, and the judicial process in domestic relations matters could not properly and effectively function absent the FOC. The FOC performs functions integral to the judicial process, and it provides critical assistance to the court related to the ultimate resolution of disputes. These points are evident considering an FOC's indispensable and legally mandated involvement in (1) encouraging and assisting parties in resolving disputed domestic relations matters, (2) performing investigations, along with compiling, finding, and assessing facts, as well as preparing reports, recommendations, and evaluations, all relative to custody, parenting time, and support, (3) seeking and pursuing the enforcement of custody, parenting-time, and support orders, and (4) generally providing invaluable assistance to the family court.

Our conclusion is buttressed by the following footnote in *Diehl*:

> We additionally note that defendant was appointed by the trial court to act as a factfinder and provide information essential to the decision-making process. In contrast to a psychologist who is appointed by the court to render treatment to a party or individual, a remedial function arguably unrelated to the fact-finding and decision-making processes of the court, a psychologist appointed by the court to evaluate a family and make a recommendation in a custody dispute is performing a function intimately related and essential to the judicial process. Indeed, defendant's focus in performing evaluations, providing reports, and making recommendations was not necessarily on the best interests of the subject being evaluated or the parties involved in the litigation, but on aiding the court to separate truth from falsity. In this context, the need for absolute immunity is compelling. [*Diehl*, 242 Mich App at 133 n 3 (citations omitted).]

As reflected above, an FOC's statutorily based role entails fact-finding, providing information, performing evaluations, preparing reports, making recommendations, and aiding the family court in separating truth from falsity, all of which are intimately related and essential to the judicial process and decision-making by the family court.

Our ruling also finds support in an opinion issued by the United States Court of Appeals for the Sixth Circuit in *Johnson v Granholm*, 662 F2d 449 (CA 6, 1981), in which the plaintiff filed an action for damages against two former Michigan friends of the court related to the manner in which they had dealt with the plaintiff's ex-husband's failure to make child support payments under a divorce judgment. The Sixth Circuit held:

> Our examination of the Michigan statutes which prescribe the duties and responsibilities of friends of the court leads us to the conclusion that the acts of the defendants[,] . . . which form the basis of the plaintiff's claims[,] were performed by these defendants within the scope of their

> official quasi-judicial duties. Therefore, they were . . . entitled to immunity. [*Id*. at 450.]

Challa pleaded the affirmative defense of immunity as required by MCR 2.111(F)(3)(a). There can be no reasonable dispute that Challa was acting within the scope of her authority or official duties when she addressed the family court at the April 2012 hearing and when she had any communication with Denhof's counsel concerning the FOC file. We conclude that the quasi-judicial immunity afforded Challa's position, role, and duties as the county FOC shielded her from liability in regard to the fraud claims.

Turning to the second branch of quasi-judicial immunity, the *Diehl* panel stated that our courts have "recognized the doctrine of quasi-judicial immunity *in various circumstances*," citing *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), in support of this statement. *Diehl*, 242 Mich App at 127-128, 128 n 1 (emphasis added). In *Maiden*, one plaintiff sued a medical examiner for gross negligence because the plaintiff was inculpated for murder based on an allegedly flawed medical theory stated during the medical examiner's preliminary examination testimony. In the context of discussing the concepts of duty and witness immunity, the *Maiden* Court made the following observations later cited in *Diehl*:

> Further, *witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity*. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function. Witnesses who are an integral part of the judicial process are wholly immune from liability for the consequences of their testimony or related evaluations. Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, mate-

> rial, or pertinent to the issue being tried. *Falsity or malice on the part of the witness does not abrogate the privilege*. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [*Maiden*, 461 Mich at 134 (citations and quotation marks omitted; emphasis added).]

In a similar vein, this Court in *Couch v Schultz*, 193 Mich App 292, 294-295; 483 NW2d 684 (1992), stated:

> In this case, we are concerned with the absolute privilege for statements made during the course of judicial proceedings. Statements made by witnesses during the course of such proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. 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. The judicial proceedings privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [Citations omitted.]

The immunity or judicial proceedings privilege extends to "relevant, material, or pertinent" statements made by judges, attorneys, and witnesses during the course of judicial proceedings. *Oesterle*, 272 Mich App at 264. The Michigan Supreme Court applied the doctrine when it affirmed the dismissal of a case involving an action for false imprisonment and assault and battery that arose after the two defendant doctors opined that the plaintiff required commitment to a hospital and executed supporting certificates that were submitted to the lower court, which resulted in the plaintiff's involuntary commitment. *Dabkowski v Davis*, 364 Mich 429, 430-431, 434; 111 NW2d 68 (1961).

Here, the statements made by Challa to the family court in April 2012 to which Denhof takes offense were

relevant, pertinent, and material, and Denhof does not argue otherwise. Rather, Denhof alleges that Challa's statements to the family court constituted misrepresentations and were fraudulent. However, falsity or malice does not abrogate the immunity or privilege. *Maiden*, 461 Mich at 134. Accordingly, quasi-judicial immunity arising from the judicial proceedings privilege also shielded Challa from liability with respect to the fraud claims.

Denhof argues that quasi-judicial immunity cannot shield Challa from liability for a constitutional violation. However, Denhof did not allege any constitutional claims in his complaint; there were simply three counts of fraud and the single count of obstruction of justice. Denhof further maintains that Challa's conduct constituted gross negligence and precluded the application of quasi-judicial immunity. Denhof, however, did not allege a negligence claim, nor would such a claim have survived Challa's quasi-judicial immunity. An allegation of gross negligence pertains to an effort to counter the application of governmental immunity and has no relevance here. See MCL 691.1407(2)(c).

As touched on by Challa in her summary disposition brief, we voice serious doubts about the soundness of Denhof's allegations and whether his claims for fraud or misrepresentation were even sufficiently pleaded or could withstand factual scrutiny.[14] However, given our

[14] In *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), our Supreme Court enunciated the requisite elements for establishing a fraud claim such as the one pursued by Denhof:

> The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in

holding on quasi-judicial immunity, there is no need to explore our doubts concerning the viability of Denhof's complaint in regard to the fraud counts.

Assuming that immunity does not protect Challa from Denhof's claim that she obstructed justice when she destroyed the 2002 document, Denhof entirely fails to address one of the two bases forming the trial court's decision to dismiss the obstruction of justice count—that is, a civil cause of action for damages cannot arise out of MCL 750.483a(5). When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Moreover, even assuming its general viability, Denhof simply failed to state a claim for obstruction of justice, MCR 2.116(C)(8), because he failed to allege facts that would adequately support a causal connection between Challa's conduct and actual damages tied to his CSC-I convictions. He further failed to allege that Challa lacked legal authority to destroy the 2002 FOC document or that she acted knowingly, assuming the document was actually destroyed. See MCL 750.483a(5) (requiring the destruction to be accomplished "knowingly and intentionally").

We now address some other arguments posed by Denhof. He complains that he was not notified that the judges of the Ottawa Circuit Court recused themselves and that SCAO assigned the case to another judge.

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reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [Citation and quotation marks omitted.]

Denhof's complaint appears problematic when considered in conjunction with the elements that must be pleaded in a fraud action.

Assuming this to be true, we fail to see the harm or prejudice in the presumed failure of notice. Moreover, our refusal to vacate the trial court's opinion and order on this basis is not "inconsistent with substantial justice." MCR 2.613(A) (harmless-error rule). The judges of the Ottawa Circuit Court absolutely took the proper step in recusing themselves, considering Challa's employment with that court, and SCAO appropriately reassigned the case.

Next, we reject as entirely baseless Denhof's argument that reversal is warranted because the trial court was biased. There is absolutely no indication in the record that the trial court was biased in favor of Challa or prejudiced against Denhof, nor was there a serious risk of actual bias or an appearance of impropriety. MCR 2.003(C)(1)(a) and (b). At the hearing on the motions for summary disposition, change of venue, disqualification, and adjournment, the trial court displayed remarkable patience and thoughtfulness in carefully listening to and addressing all of the arguments presented by Denhof regardless of their questionable merit. Essentially, Denhof is dissatisfied with the trial court's ruling on immunity. But "[t]he mere fact that a judge ruled against a litigant . . . is not sufficient to require disqualification," and the trial court's opinion on immunity did not reflect "deep-seated favoritism or antagonism that would make fair judgment impossible . . . ." *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009) (citation and quotation marks omitted). Denhof fails to overcome the heavy presumption of judicial impartiality. *Id*.

Finally, Denhof argues that summary disposition was premature because discovery had not been completed. Given the legal nature of the quasi-judicial

immunity recognized by us today, "there is no fair likelihood that further discovery [would] 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). Accordingly, summary disposition was properly granted in favor of Challa.

III. CONCLUSION

The trial court did not err in granting summary disposition in favor of Challa on Denhof's complaint encompassing the three counts of fraud, considering that she was shielded from liability on the basis of quasi-judicial immunity. With regard to the claim of obstruction of justice, Denhof fails to address a ground given by the trial court in support of summary dismissal of that count, and further, Denhof failed to state a claim for obstruction of justice.

Affirmed. Having fully prevailed on appeal, Challa is awarded taxable costs under MCR 7.219.

MARKEY, P.J., and STEPHENS, J., concurred with MURPHY, J.

HOWARD & HOWARD ATTORNEYS PLLC v JABBOUR

Docket No. 320291. Submitted July 15, 2015, at Detroit. Decided July 30, 2015, at 9:00 a.m.

Howard & Howard Attorneys PLLC brought an action in the Oakland Circuit Court against Peter Jabbour. Jabbour had been appointed as a receiver in a separate action and had hired Howard & Howard to provide legal services related to the receivership. The parties to the underlying business dispute subsequently settled their claims, but despite having been ordered to do so, those parties failed to pay the entirety of the legal fees owed to Howard & Howard. Howard & Howard then brought this action against Jabbour personally, seeking to recover the fees. Jabbour filed a counter-claim, alleging breach of contract. Howard & Howard moved for summary disposition. In response, Jabbour asserted that he was entitled to summary disposition under MCR 2.116(I)(2). With regard to the claims brought by Howard & Howard, the court, Leo Bowman, J., granted summary disposition in favor of Jabbour and denied Howard & Howard's motion for summary disposition. The court dismissed defendant's counter-claim. Howard & Howard appealed.

The Court of Appeals *held*:

An agent who contracts with a third party on behalf of a disclosed principal is generally not liable to the third party in the absence of an express agreement to be held liable. A court-appointed receiver is an officer or agent of the court. Accordingly, the general rule is that an allowance of attorney fees in cases of this nature is properly made to the receiver and not directly to the attorneys, and that the attorneys must look to the receiver for their compensation, but they cannot hold the receiver personally liable. In this case, the parties' contract explicitly and unambiguously stated that all legal services were being performed pursuant to Jabbour's appointment by the trial court as receiver. There was no plausible dispute regarding the fact that he was lawfully acting within the scope of his receivership authority at all relevant times and that Howard & Howard was aware of that fact. Given these facts, Jabbour could not be held personally

liable for the amount owed to Howard & Howard. The trial court properly granted summary disposition in favor of Jabbour.

Affirmed.

ATTORNEY FEES — RECEIVERSHIPS — RECEIVERS — PERSONAL LIABILITY.

An attorney who knowingly contracts with a receiver to provide legal services related to the receivership must look to the receiver for his or her compensation, but as a general rule cannot hold the receiver personally liable.

Howard & Howard Attorneys PLLC (by *Brad A. Rayle* and *John C. Louisell*) for plaintiff.

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

PER CURIAM. Plaintiff appeals by right the trial court's denial of its motion for summary disposition and grant of summary disposition in favor of defendant. Defendant was appointed by the trial court as a receiver to oversee certain businesses involved in an underlying lawsuit; as part of his receivership, he retained plaintiff to perform legal services in connection with the receivership. The receivership appointment order specified that the receivership estate was to pay the receiver's fees and expenses, including compensating plaintiff. However, the parties to the underlying lawsuit settled and, despite being ordered to do so, never paid the entirety of plaintiff's fees. Plaintiff commenced the instant suit against defendant personally, which the trial court deemed impermissible. We affirm.

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010).

A person who retains an attorney is, of course, ordinarily obligated to compensate that attorney pur-

suant to their contract. However, an agent who contracts with a third party on behalf of a disclosed principal is generally not liable to the third party in the absence of an express agreement to be held liable. *Nat'l Trout Festival, Inc v Cannon*, 32 Mich App 517, 521; 189 NW2d 69 (1971); *Huizenga v Withey Sheppard Assoc*, 15 Mich App 628, 633; 167 NW2d 120 (1969). A court-appointed receiver is an officer or agent of the court. See *In re Kennison Sales & Engineering Co, Inc*, 363 Mich 612, 617-618; 110 NW2d 579 (1961). The order of appointment explicitly states this. In accord is authority stating:

> One contracting with the court through the receiver becomes, in effect, a party to the receivership proceedings in respect of the court's future dealings with him or her and his or her rights under the contract. [75 CJS, Receivers, § 165, pp 509-510.]

Similarly:

> The general rule is that an allowance of attorney's fees in cases of this nature is properly made to the receiver and not directly to the attorneys, and that the attorneys must look to the receiver for their compensation, but they cannot hold the receiver personally liable. [65 Am Jur 2d, Receivers, § 225, pp 780-781.]

The parties' contract in this case explicitly and unambiguously stated that all legal services were being performed pursuant to defendant's appointment by the trial court as receiver. There is no plausible dispute regarding the fact that defendant was lawfully acting within the scope of his receivership authority at all relevant times and that plaintiff was aware of that fact.

Defendant did agree that plaintiff is entitled to be paid. However, the evidence shows that defendant did not concede that *he* was obligated to make that pay-

ment personally. Plaintiff apparently believes that defendant's concession established an account stated. See *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 554-555; 837 NW2d 244 (2013) (explaining that an open account is converted into an account stated when the parties agree to a sum due from one to another). Defendant, though, did not agree that he owed the sum; only that plaintiff was owed it. In any event, defendant's alleged liability is predicated on the agreement to pay for services rendered to him as receiver under the retainer agreement and, as already discussed, defendant is not personally liable for those services.

The trial court properly granted summary disposition in favor of defendant and properly denied summary disposition to plaintiff. In light of our conclusion that defendant cannot be held personally liable for the amount due plaintiff on these facts, we need not address the remaining issues plaintiff raises on appeal. Affirmed.

WILDER, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

ADAM v BELL

Docket No. 319778. Submitted April 8, 2015, at Detroit. Decided August 11, 2015, at 9:00 a.m.

Cynthia Adam brought an action in the Oakland Circuit Court against Susan Bell, Minerva Bell, and State Farm Mutual Automobile Insurance Company. Adam was injured when she was struck by a vehicle driven by Susan Bell and owned by Minerva Bell. Adam brought a separate action against State Farm for personal protection insurance (PIP) benefits under the no-fault act. That claim was settled, and a stipulated order of dismissal was entered in that action. Adam subsequently brought this action, alleging that Susan Bell acted negligently; that Minerva Bell, as the owner of the vehicle, was liable for Susan's negligent acts; and that State Farm had breached its contract with her for uninsured motorist benefits. State Farm moved for summary disposition, asserting that the claim against it was barred by the doctrine of res judicata. The court, Rae L. Chabot, J., granted summary disposition in favor of State Farm. The court subsequently entered a default judgment against the Bell defendants. Adam appealed the court's order granting summary disposition in favor of State Farm.

The Court of Appeals *held*:

In Michigan, the doctrine of res judicata is applied broadly to bar 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. The doctrine of res judicata bars a subsequent action when (1) the prior action was decided on the merits and resulted in a final decision, (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. In this case, the parties disputed whether the two actions arose from the same transaction such that Adam could have raised her contractual claim during the prior action. 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.

Although Adam's two lawsuits both arose from the same automobile accident, the actions had significant differences and they would not have formed a convenient trial unit. The Legislature has provided for the swift payment of PIP benefits without regard to fault. On the other hand, the Legislature has severely limited the right to bring third-party tort claims that might form the basis for an uninsured-motorist contractual claim. These limitations make it difficult to bring a third-party tort claim within the time frame that one must bring a claim for PIP benefits. Accordingly, an uninsured-motorist contractual claim may not yet be ripe for litigation until after a PIP claim must be filed. A claim for PIP benefits also differs fundamentally from a claim for uninsured motorist benefits in the nature of the proofs and the motivation for the claim. Applying res judicata to essentially require mandatory joinder of a mere potential uninsured-motorist contractual claim with a PIP claim would be inconsistent with the very divergent statutory treatment of these two very different types of no-fault claims. Res judicata may not be applied when to do so would subvert the intent of the Legislature. Applying res judicata to the facts of this case would not have promoted fairness and would have been inconsistent with the Legislature's intent.

Reversed and remanded.

INSURANCE — NO-FAULT — CLAIMS FOR UNINSURED MOTORIST BENEFITS — PRIOR ACTION FOR PERSONAL PROTECTION INSURANCE BENEFITS — APPLICABILITY OF THE DOCTRINE OF RES JUDICATA.

A contractual claim for uninsured motorist benefits is not barred by the doctrine of res judicata given the existence of a prior no-fault action for personal protection insurance benefits arising from the same accident.

Bagley & Langan, PLLC (by *Patrick J. Bagley*), for Cynthia Adam.

Moffett, Vitu, Lascoe & Packus, PC (by *Kenneth P. Williams* and *Christina E. Horn*), for State Farm Mutual Automobile Insurance Company.

Before: HOEKSTRA, P.J., and MARKEY and DONOFRIO, JJ.

PER CURIAM. Plaintiff Cynthia Adam appeals by right the trial court's order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company (State Farm) on the ground that plaintiff's claims were barred by res judicata. We reverse and remand for further proceedings.

This Court reviews de novo a decision to grant a motion for summary disposition. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(7), this 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 question presented in this appeal, whether the doctrine of res judicata bars a claim, is a question of law we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

On July 3, 2011, plaintiff was injured when she was struck by a vehicle driven by Susan Bell and owned by Minerva Bell. In March 2012, plaintiff filed a lawsuit against State Farm for personal protection insurance (PIP) benefits under the no-fault act. See MCL 500.3105 (insurer liability) and MCL 500.3107 (allowable expenses). That claim was settled on October 15, 2012, with plaintiff signing a release of all claims for no-fault benefits "up to the date of [the] Release . . . ." A stipulated order of dismissal with prejudice as to plaintiff's claims "for benefits up to 10-15-12 only" was entered on November 5, 2012.

On January 16, 2013, plaintiff filed a third-party complaint alleging negligence against Susan Bell, a claim of owner liability against Minerva Bell, and a

claim of breach of contract against State Farm with respect to uninsured motorist (UM) benefits. State Farm filed a motion for summary disposition on April 5, 2013, asserting plaintiff's UM claim was barred by the doctrine of res judicata. The trial court heard the parties' arguments on this motion on July 24, 2013. The trial court ruled that plaintiff's UM "claim clearly could have been filed in the prior matter and was not, therefore, the claim is barred by res judicata." The court's order granting State Farm summary disposition was entered on August 22, 2013. Subsequently, on December 13, 2013, the trial entered a default judgment in plaintiff's favor against the Bell defendants in the amount of $250,000. This last order was a final order closing the case and permitting plaintiff to appeal by right the order granting State Farm summary disposition.

In Michigan, the doctrine of res judicata is applied broadly to bar "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 v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). The doctrine is "employed to prevent multiple suits litigating the same cause of action." *Id*. Specifically, the doctrine of res judicata is a judicially created doctrine that serves to relieve parties of the cost and aggravation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions. *Pierson Sand & Gravel*, *Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Importantly, res judicata is intended to "promote fairness, not lighten the loads of the state court by precluding suits whenever possible." *Id*. at 383. Accordingly, res judicata will not be applied when to do so would

subvert the intent of the Legislature. *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630; 808 NW2d 471 (2010).

The doctrine of res judicata bars a subsequent action when "(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*, 470 Mich at 121. In addition, the prior action must also have resulted in a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

There is no dispute here that the prior action for PIP benefits involved the same parties and was decided on the merits. The action was dismissed with prejudice pursuant to a stipulated order. See *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997) (holding that a voluntary dismissal with prejudice acts as an adjudication on the merits for purposes of res judicata). The only dispute remaining in this case is whether the two actions arose from the same transaction such that plaintiff in the exercise of reasonable diligence could have raised this UM claim during the prior action. See *Adair*, 470 Mich at 121.

Michigan's broad interpretation of the third element of the res judicata doctrine has been referred to as a "same transaction test," as distinguished from a "same evidence test." *Adair*, 470 Mich at 123-125. Under the same-evidence test, the issue is whether the same evidence is required to prove the claimed theory of relief. *Id*. Under the same-transaction test, the question is more pragmatic, with claims viewed in factual terms regardless of the number of variant legal theories that might support relief. *Id*. The fact that differing claims may require different evidence might be relevant to deciding if the claims arise from the same

transaction, but it is not dispositive. *Id*. at 124-125. Rather, quoting 46 Am Jur 2d, Judgments, § 533, p 801, and adding emphasis, our Supreme Court has stated, " 'whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time*, *space*, *origin or motivation*, [and] whether they form a convenient trial unit . . . .' " *Adair*, 470 Mich at 125 (alteration in original). 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.

In reaching this conclusion we find instructive and persuasive *Miles v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2014 (Docket No. 311699), which addressed the exact question presented in this case.[1] The facts of *Miles* are not identical but are very close to those in the present case. Anderson Miles was injured when struck by a motor vehicle in July 2008; he sued State Farm for PIP benefits under his mother's insur-

[1] "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1), they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citation omitted).

ance policy as a resident relative. That suit was settled in April 2010 and dismissed in July 2010. Miles filed a new complaint in June 2010 for additional PIP benefits and also asserted that State Farm wrongfully refused to pay him uninsured motorist benefits. The trial court granted State Farm's motion for partial summary disposition, ruling that the UM claim could have been brought with the first PIP claim and was therefore barred by res judicata. We quote at length the majority opinion in *Miles*, which reversed the trial court, and we adopt its reasoning as our own:

> It is plain that both Miles' claim for PIP benefits and his claim for uninsured motorist 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 uninsured motorist 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 uninsured motorist benefits. Finally, an injured person's claim for uninsured motorist 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.

The record shows that within a short time of [the] accident State Farm took the position that medical ail-

> ments were not causally related to the accident at issue and denied his request for PIP benefits on that basis. Because Miles could assert a PIP claim without the need to prove fault and without having to establish the full extent of his injuries, he could assert his PIP claim within a short time of State Farm's decision to deny his claims. Indeed, because he required those benefits for his care and recovery, he had a powerful motivation to bring the claims as soon as practical. Further, in order to establish those claims, he only had to present evidence that his claims arose from the accident and met the other criteria provided under MCL 500.3107.
>
> Miles, however, could not establish his claim for uninsured motorist benefits without being able to prove that [the driver of the vehicle that struck him] would be liable in tort for his injuries and that he met the serious impairment threshold. Because his claim for uninsured motorist benefits required evidence to establish the nature and extent of his injuries and proof that the injury affected his ability to lead his normal life and the original dispute involved only whether Miles' injuries were causally related to the accident at issue, we conclude that it was not practical for Miles to bring his claim for uninsured motorist benefits in his original suit.
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> Because Miles' claim for uninsured motorist benefits was not one that could have been litigated during the time of his original lawsuit, his failure to bring his claim for uninsured motorist benefits did not implicate the doctrine of res judicata. *Adair*, 470 Mich at 125. [*Miles*, unpub op at 4-5.]

This conclusion is also supported by the fact that PIP claims have a base one-year limitations period unless the insurer receives written notice of injury within that time or the insurer has previously made a payment of PIP benefits for the injury. MCL 500.3145(1). Even then, the one-year-back rule limits recovery to allowable expenses incurred within the year preceding the filing of an action for benefits. *Id.*;

Joseph v Auto Club Ins Ass'n, 491 Mich 200, 208; 815 NW2d 412 (2012); *Linden v Citizens Ins Co*, 308 Mich App 89, 95; 862 NW2d 438 (2014). This Court has opined that a contractual one-year limitation period for a UM claim was unreasonable because (1) the insured may not have sufficient information about his or her own physical condition to warrant filing a claim within that time frame, (2) the insured may not know the insurance status of the at-fault driver, and, thus, "(3) the action may be barred before the loss can be ascertained." *Rory v Continental Ins Co*, 262 Mich App 679, 686; 687 NW2d 304 (2004), rev'd 473 Mich 457 (2005). Although this Court's opinion in *Rory* was reversed by our Supreme Court, the Office of Financial and Insurance Services (OFIS)[2] found its reasoning "compelling." *In re Uninsured Motorist Coverage*, OFIS Order of Prohibition (Order No. 05-060-M), entered December 16, 2005, p 3.[3] Relying on this Court's reasoning, and in light of the statutory limits on claiming noneconomic damages under MCL 500.3135 and the Secretary of State's inability to confirm whether a person was insured on the day of an accident, the OFIS ruled under the authority of MCL 500.2236(5) that a limitation on UM claims of fewer than three years is unreasonable. *Id*. at 4; see also *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 312, 317-319; 792 NW2d 408 (2010). Under the reasoning of *Rory*, 262 Mich App 679, and OFIS Order No. 05-060-M, we must conclude that a UM claim may not yet be ripe for litigation until after a PIP claim must be filed. Consequently, applying res judicata to essentially require mandatory joinder of a mere potential UM claim with a PIP claim would be inconsistent

[2] Now called the Department of Insurance and Financial Services.

[3] Available at <www.michigan.gov/documents/Prohibition_Order_121605_145496_7.pdf> (accessed August 3, 2015) [perma.cc/5RJ4-VZ9L].

with the very divergent statutory treatment of these two very different types of no-fault claims. See, e.g., *Bennett*, 289 Mich App at 630.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

HOEKSTRA, P.J., and MARKEY and DONOFRIO, JJ., concurred.

MURPHY-DUBAY v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

Docket Nos. 321380 and 321749. Submitted August 5, 2015, at Lansing. Decided August 18, 2015, at 9:00 a.m. Leave to appeal sought.

Nathan Murphy-DuBay brought an action in the Ingham Circuit Court against the Department of Licensing and Regulatory Affairs (Bureau of Health Care Services, Professional Licensing Section) and its director, seeking a writ of mandamus and a declaratory judgment to compel defendants to take action on his application for a limited license to practice medicine. Plaintiff had graduated from a medical school in the Netherland Antilles. He subsequently applied to enter postgraduate clinical training programs (commonly known as "residencies") in the United States but was unable to secure a position. MCL 333.17031(1) requires an applicant for a license to practice medicine to have completed both the requirements for a degree in medicine and a period of postgraduate education to attain proficiency in the practice of the profession as prescribed by the board of medicine's rules. Accordingly, without completion of a residency, plaintiff would be unable to obtain a full license to practice medicine. Using a form he created himself, plaintiff submitted an application to defendants on June 18, 2013, seeking a limited license to practice medicine in Michigan under MCL 333.16182(1). He later requested an opportunity to be heard under MCL 333.16232. On September 30, 2013, after plaintiff had filed his complaint, the manager of the Professional Licensing Section of the Bureau of Health Care Services sent him a letter explaining that the Michigan Board of Medicine did not issue limited licenses to individuals upon request and that limited licenses were typically issued for a group of licensees who have restrictions on the location in which they may practice or for disciplinary purposes for someone who had previously held a full license. In addition, the manager explained that MCL 333.16232 does not authorize a hearing for someone whose education or training does not meet the requirements for licensure as a physician, but applies to initial licensure applicants who meet the educational and training requirements but are denied licensure for various reasons related to fitness to practice, giving them an opportunity to

demonstrate that, despite their history, they currently possess good moral character and can practice their profession safely. Plaintiff then filed an appeal in the Ingham Circuit Court, seeking judicial review of the letter rejecting his application for a limited license and request for a hearing. Defendants moved for summary disposition of plaintiff's complaint. Following the statutory changes to the Court of Claims' jurisdiction and makeup in late 2013, plaintiff's complaint for mandamus and a declaratory judgment was transferred to the Court of Claims pursuant to MCL 600.6404(3), while the appeal of the agency's decision remained in the circuit court. The Court of Claims, DEBORAH A. SERVITTO, J., granted defendants summary disposition on plaintiff's complaint. The circuit court, William E. Collette, J., subsequently affirmed the agency's September 30, 2013 decision. Plaintiff appealed both orders, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Plaintiff argued that defendants misinterpreted and misapplied the Public Health Code, MCL 333.1101 *et seq*., when they failed to issue him a limited license to practice medicine as permitted by MCL 333.16182(1). MCL 333.16182(1) provides that a health profession board, such as the board of medicine, may grant a limited license to an individual if the board determines that the limitation (1) is consistent with the individual's ability to practice the health profession in a safe and competent manner, (2) is necessary to protect the health and safety of patients or clients, or (3) is appropriate to promote the efficient and effective delivery of healthcare services. The various boards, however, have broad discretion with respect to the licensing of applicants to practice the specific health profession. The Legislature did not provide in the statute that the board of medicine must grant a limited license to practice medicine to someone in plaintiff's particular situation. Accordingly, defendants did not misinterpret or misapply the relevant portions of the Public Health Code.

2. Plaintiff also argued that if the licensing rules at issue do not authorize at least a limited medical license for individuals who have demonstrated competence through the testing process, they are an unconstitutional exercise of the state's authority to regulate health professions because they violated his due-process and equal-protection guarantees. The right to engage in a business such as practicing medicine, however, is subject to the state's police powers to enact laws in furtherance of the public health, safety, welfare, and morals. A person challenging legislation on due-process and equal-protection grounds because of its

interference with economic or business activity must establish either that the legislation serves no legitimate public purpose or that no rational relationship exists between the provisions and a legitimate public purpose. The statute here serves a legitimate public purpose: protecting the public by ensuring that medicine is practiced in a safe and competent manner. At issue, then, was whether a rational relationship exists between the postgraduate-residency requirement and this legitimate public purpose. The requirement ensures that those who practice medicine possess a certain amount of medical education and training and have adequately demonstrated their fitness and capacity to practice medicine in a safe and competent manner by completing a residency. Accordingly, because the requirement of a period of postgraduate education before a license may be issued is rationally related to a legitimate public purpose, it neither violates due process nor constitutes a denial of equal protection, and plaintiff's constitutional claims failed.

3. The board of medicine did not exceed its authority under MCL 333.17031(1). Pursuant to that statute, the board adopted rules, Mich Admin Code, R 338.2316(4)(a) and 338.2317(4), requiring applicants to satisfactorily complete two years of postgraduate clinical training in a program approved by the board in a board-approved hospital or institution. In Mich Admin Code, R 338.2313, the board adopted by reference the standards for approving postgraduate clinical training programs of the Accreditation Council for Graduate Medical Education (ACGME) and designated any program approved by the ACGME as a program approved by the board. Plaintiff argued that by adopting the ACGME standards, the board enlarged its authority by requiring something that the Public Health Code does not. Because the Public Health Code invests broad discretion in the board and MCL 333.17031(1) unambiguously instructs the board to exercise that discretion in setting the postgraduate-education standards, the board's adoption of the ACGME standards did not conflict with the Legislature's intent.

4. Contrary to plaintiff's assertion, the Public Health Code's regulatory scheme requiring admission to a postgraduate program to obtain a license did not constitute the improper subdelegation of licensing decisions. An administrative agency may not subdelegate the exercise of discretionary acts unless the Legislature expressly grants it authority to do so. While the admissions committees of the board-approved programs determine the individuals who are admitted to those programs, which undoubtedly affects the likeli-

hood of full licensure, that decision is only one of many indirect influences on a person's ability to achieve the goal of licensure.

5. The postgraduate-clinical-training rule did not violate antitrust law. MCL 445.773, part of the Michigan Antitrust Reform Act, MCL 445.771 *et seq*., prohibits engaging in anticompetitive conduct in the marketplace. MCL 445.774(4), however, provides an exemption for transactions or conduct specifically authorized under the laws of this state or the United States or specifically authorized under laws, rules, regulations, or orders administered, promulgated, or issued by a regulatory agency, a board, or an officer acting under statutory authority of the state or the United States. Because the anticompetitive conduct challenged here (requiring two years of postgraduate clinical training before a medical license may be issued) is undertaken pursuant to a regulatory scheme authorized by the Public Health Code, the MCL 445.774(4) exemption applies.

6. Denying plaintiff a license did not constitute a regulatory taking of private property in violation of state or federal law. While both the United States and Michigan Constitutions prohibit the taking of private property without due process or just compensation, one who asserts an uncompensated-taking claim must first establish that a vested property right was affected. A vested property right is an interest that is more than a mere expectation. It requires a legitimate claim of entitlement. Although plaintiff might have had an expectation that his education, examination results, and experience would enable him to obtain a residency and ultimately a full license to practice medicine, that expectation was not a vested property right.

7. Plaintiff was not denied his due-process right to an administrative hearing because no life, liberty, or property interest was at stake. Plaintiff was also not denied his statutory right to an administrative hearing. MCL 333.16232(1) requires the Department of Licensing and Regulatory Affairs to provide an opportunity for a hearing in connection with the denial, reclassification, limitation, reinstatement, suspension, or revocation of a license or a proceeding to reprimand, fine, order restitution, or place a licensee on probation. In this case, however, defendants did not actually deny plaintiff a license. Rather, they informed him that the limited license he sought did not exist and was not authorized by statute or rules, rejected his self-made application for the nonexistent license, and refunded his money. This was not the denial of a license, and plaintiff did not have a right to a hearing under those circumstances.

Affirmed.

Mark D. DuBay for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Bridget K. Smith*, Assistant Attorney General, for defendants.

Before: SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM. In Docket No. 321380, plaintiff appeals as of right an opinion and order of the Court of Claims granting defendants' motion for summary disposition on plaintiff's complaint for a writ of mandamus and declaratory judgment; plaintiff had sought to compel the Department of Licensing and Regulatory Affairs to take action on his purported application for a limited license to practice medicine. In Docket No. 321749, plaintiff appeals as of right a final order of the circuit court affirming the decision of the Department of Licensing and Regulatory Affairs, Bureau of Health Care Services, Professional Licensing Section, which had rejected the application. We affirm.

I. FACTS

Plaintiff attended Saba University School of Medicine, located on the island of Saba in the Netherland Antilles. He completed two years of coursework, followed by two years of clinical rotations through Dalhousie University in Nova Scotia, Canada. After his clinical rotations, plaintiff returned to Michigan and began seeking entrance into postgraduate clinical training programs (commonly known as "residencies"), but was unable to secure a position.[1]

[1] Plaintiff has also taken and passed Step 3 of the United States Medical Licensing Examination (USMLE), which is typically taken after one has completed a residency.

On June 18, 2013, plaintiff submitted an application on a form he created himself, seeking a "limited license" to practice medicine within the state of Michigan pursuant to MCL 333.16182(1). On July 29, 2013, plaintiff sent defendants a follow-up letter, asking for a favorable response or, in the event of a denial, an opportunity to be heard pursuant to MCL 333.16232. On September 23, 2013, plaintiff filed a complaint for a writ of mandamus and declaratory judgment in the Ingham Circuit Court seeking an order directing defendants to take action on his June 18, 2013 application and entry of a judgment declaring the rights of the parties regarding medical licensure under applicable constitutional, statutory, and administrative law.

On September 30, 2013, the manager of the Bureau of Health Care Services, Professional Licensing Section, sent plaintiff a letter explaining that the Michigan Board of Medicine does not issue limited licenses to individuals upon request and that limited licenses are "typically issued for a group of licensees who either have restrictions to the location in which they may physically practice such as with an educational limited license or for disciplinary purposes for someone who has previously held a full license." In addition, the manager explained that MCL 333.16232 does not authorize a hearing for someone whose education or training does not meet the requirements for licensure as a physician, but applies to initial licensure applicants who meet the educational and training requirements, but are denied licensure for reasons related to past criminal convictions, previous disciplinary actions, or other issues that might affect or relate to their overall good moral character and ability to practice safely and legally in the state of Michigan, giving those individuals the opportunity for a hearing to demonstrate that, despite their history, they currently pos-

sess good moral character and can practice their profession safely. On October 18, 2013, plaintiff filed an appeal in the Ingham Circuit Court seeking judicial review of defendants' September 30, 2013 letter rejecting his application for a limited license and request for a hearing.[2]

On October 28, 2013, defendants filed a motion for summary disposition of plaintiff's complaint for a writ of mandamus and declaratory judgment pursuant to MCR 2.116(C)(8) and (10). On November 1, 2013, plaintiff filed a response. On January 23, 2014, following statutory changes, plaintiff's writ of mandamus and request for declaratory judgment claims were transferred to the Court of Claims pursuant to MCL 600.6404(3), while the appeal of the agency decision remained in circuit court.

On April 1, 2014, the Court of Claims issued an opinion and order granting defendants' motion for summary disposition on plaintiff's complaint for a writ of mandamus and declaratory judgment pursuant to MCR 2.116(C)(8). On April 28, 2014, the Ingham Circuit Court issued a final order affirming the September 30, 2013 agency decision.

II. INTERPRETATION OF MCL 333.16182

Plaintiff first asserts that defendants misinterpreted and misapplied the Public Health Code, MCL 333.1101 *et seq*., when they failed to issue him a

[2] Although plaintiff characterizes the agency's action as "denying" him a license, the agency's action is more accurately characterized as rejecting his application (again, the application form was created by plaintiff himself because the agency had not and does not recognize the type of license plaintiff believed he was entitled to under MCL 333.16182(1)). The agency refunded the application fee plaintiff included with his application.

"limited license" to practice medicine, which he contended was permitted by MCL 333.16182(1). We disagree.[3]

MCL 333.16182 states as follows:

> (1) A board may grant a limited license to an individual if the board determines that the limitation is consistent with the ability of the individual to practice the health profession in a safe and competent manner, is necessary to protect the health and safety of patients or clients, or is appropriate to promote the efficient and effective delivery of health care services.
>
> (2) In addition to the licenses issued under subsection (1), a board may grant the following types of limited licenses upon application by an individual or upon its own determination:
>
> (a) Educational, to an individual engaged in postgraduate education.
>
> (b) Nonclinical, to an individual who functions only in a nonclinical academic, research, or administrative setting and who does not hold himself or herself out to the public as being actively engaged in the practice of the health profession, or otherwise directly solicit patients or clients.
>
> (c) Clinical academic, to an individual who practices the health profession only as part of an academic institution and only in connection with his or her employment or other contractual relationship with that academic institution. For an individual applying for a limited license under this subdivision to engage in the practice of medicine under part 170 [MCL 333.17001 to MCL 333.17084], "academic institution" means that term as defined [MCL 333.17001].

Specifically, plaintiff asserts that the first part of Subsection (1), which authorizes a limited license

[3] This issue of statutory interpretation presents a question of law reviewed de novo. *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011).

when "consistent with the ability of the individual to practice the health profession in a competent manner," is applicable here and that "[i]t is this provision that authorizes the Agency to issue Plaintiff a limited license which it refuses to do."

Subsection (1) permits a limited license to be issued if any of its three criteria are met, including the condition of being "consistent with the ability," the criterion on which plaintiff relies. However, the Legislature, through the Public Health Code, invested in the various licensing boards broad discretion with respect to the licensing of applicants to practice health professions. It did not, as plaintiff asserts, unambiguously provide in Subsection (1) that the board of medicine must grant a limited license to practice medicine to someone in plaintiff's particular situation.

For example, MCL 333.16174(1) permits a board to enact rules that promote safe and competent practice and informed consumer choice:

> An individual who is licensed or registered under this article [MCL 333.16101 to MCL 333.18838] shall meet all of the following requirements:
>
> * * *
>
> (c) Have a specific education or experience in the health profession or in a health profession subfield or health profession specialty field of the health profession, or training equivalent, or both, as prescribed by this article or rules of a board necessary to promote safe and competent practice and informed consumer choice.

MCL 333.16141(3) makes it clear that it is the boards that set the standards: "The department may promulgate rules to promote the effective and consistent administration of this article. However, the department shall not promulgate rules that constitute the

licensure, registration, or examination of health professionals." Likewise, MCL 333.16148(1) provides that

> the department, in consultation with a board, may promulgate rules to establish standards for the education and training of individuals to be licensed or registered, or whose licenses or registrations are to be renewed, for the purposes of determining whether graduates of a training program have the knowledge and skills requisite for practice of a health profession or use of a title.

MCL 333.16146(2)(b) permits a board to "[r]eclassify licenses on the basis of a determination that the addition or removal of conditions or restrictions is appropriate." And MCL 333.16145(3) states that "[o]nly a board or task force shall promulgate rules to specify requirements for licenses, registrations, renewals, examinations, and required passing scores."

In MCL 333.16175, the Legislature directed a board or its task forces to "consider" various factors in developing the standards:

> In developing minimum standards of educational prerequisites for licensure or registration, a board and its task forces shall consider equivalency and proficiency testing and other mechanisms, and where appropriate grant credit for past training, education, or experience in health and related fields. Standards may include those for formal education, practice proficiency, and other training, education, or experience which may provide equivalence to completion of formal educational requirements.

This statute does not restrict a board in its decisions that follow these considerations. Rather, it reflects a grant of power and discretion.

Finally, it is evident from viewing the entire regulatory scheme (rather than only looking at MCL 333.16182 in isolation), that Subsection (1) was provided so that a board or task force may, in its discre-

tion, issue limited licenses in disciplinary proceedings. See *Nolan v Dep't of Licensing & Regulation*, 151 Mich App 641, 652-653; 391 NW2d 424 (1986); MCL 333.16108(1) and (4) (defining "reinstatement" as "the granting of a license or certificate of registration, with or without limitations or conditions, to an individual whose license or certificate of registration has been suspended or revoked" and "reclassification" as "an action by a disciplinary subcommittee by which restrictions or conditions, or both, applicable to a license are added or removed"); MCL 333.16106(4) and (5) (defining "limitation" as "an action by which a board imposes restrictions or conditions, or both, on a license" and "limited license" as "a license to which restrictions or conditions, or both, as to scope of practice, place of practice, supervision of practice, duration of licensed status, or type or condition of patient or client served are imposed by a board"); MCL 333.16226 (instructing disciplinary subcommittees to order a limited license as a sanction for certain violations); MCL 333.16245 ("[A]n individual whose license is limited, suspended, or revoked under this part may apply to his or her board or task force for a reinstatement of a revoked or suspended license or reclassification of a limited license pursuant to [MCL 333.16247] or [MCL 333.16249]."); MCL 333.16247(1) ("[A] board or task force may reinstate a license or issue a limited license to an individual whose license has been suspended or revoked under this part if after a hearing the board or task force is satisfied by clear and convincing evidence that the applicant is of good moral character, is able to practice the profession with reasonable skill and safety to patients, has met the criteria in the guidelines adopted under [MCL 333.16245(6)], and should be permitted in the public interest to practice."); MCL 333.16249 ("[A] disciplinary subcommittee may reclas-

sify a license limited under this part to alter or remove the limitations if, after a hearing, it is satisfied that the applicant will practice the profession safely and competently within the area of practice and under conditions stipulated by the disciplinary subcommittee, and should be permitted in the public interest to so practice.").

Plaintiff's argument that defendants misinterpreted and misapplied the relevant portions of the Public Health Code fails. Plaintiff's argument that the availability of medical care would be enhanced by issuance of the type of limited license he seeks should be directed to the Legislature and the appropriate agencies for consideration as a matter of policy.

III. CONSTITUTIONAL ARGUMENTS

Plaintiff next argues that if the licensing rules at issue do not authorize at least a limited medical license for individuals who have demonstrated competence through the testing process, i.e., by passing Step 3 of the USMLE, those rules should be declared an unconstitutional exercise of the state's authority to regulate the professions because they violate his due-process and equal-protection guarantees. We disagree.[4]

"That the State through the legislature may provide for the licensure and regulation of professions, like the healing arts in which the public interest is very great, is not open to question." *Fowler v Bd of Registration in Chiropody*, 374 Mich 254, 256; 132 NW2d 82 (1965). This is because the right to engage in business is subject to the state's police powers to enact laws in furtherance of the public health, safety, welfare, and

[4] This Court reviews constitutional questions de novo. *In re Ayers*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

morals. *Grocers Dairy Co v Dep't of Agriculture Director*, 377 Mich 71, 75; 138 NW2d 767 (1966). Accordingly, when legislation is challenged on due-process and equal-protection grounds because of its interference with economic or business activity, the challenger must establish either that no legitimate public purpose is served by the legislation or that there is no rational relationship between the provisions and a legitimate public purpose. *Stanfield v Dep't of Licensing & Regulation*, 128 Mich App 207, 211-212; 339 NW2d 876 (1983). Thus, there is a two-step inquiry: (1) whether there is a legitimate public purpose and, if so, (2) whether there is a rational relationship between the legislation and the public purpose sought to be achieved.

In this case, there is a legitimate public purpose served by the legislation: to protect the public by ensuring that medicine is practiced in a safe and competent manner. The real dispute is over whether there is a rational relationship between the postgraduate-residency requirement and this legitimate public purpose.

We conclude that the Public Health Code's requirement that a period of postgraduate education must be completed before a license may be issued is rationally related to ensuring that medicine is practiced in a safe and competent manner. The requirement that a residency must be completed before a person can be licensed to practice medicine is rationally related to this public purpose because it ensures that those who practice medicine possess a certain amount of medical education and training and that they have adequately demonstrated their fitness and capacity to practice medicine in a safe and competent manner by completing a residency. Although plaintiff may be correct that

there is a physician shortage and extensive areas of the state are medically underserved, that fact is of little relevance. The legitimate public purpose that must be rationally related to the residency requirement is ensuring the safe and competent practice of medicine, not reducing physician shortage and eliminating medical underservice. The residency requirement helps ensure that all licensed physicians attain proficiency in the practice of medicine. Although eliminating this requirement might reduce physician shortage and medical underservice, it would also frustrate the board of medicine's ability to ensure that all licensed physicians have attained the requisite proficiency. Accordingly, because the Public Health Code's requirement that a period of postgraduate education must be completed before a license may be issued is rationally related to a legitimate public purpose, it neither violates due process nor constitutes a denial of equal protection and plaintiff's constitutional claims fail.

IV. ACTS IN EXCESS OF STATUTORY AUTHORITY AND UNLAWFUL SUBDELEGATION

Plaintiff next argues that the board of medicine exceeded its authority under MCL 333.17031(1) and that the Public Health Code's regulatory scheme results in the improper subdelegation of the licensing decision. We disagree.[5]

MCL 333.17031(1) states: "[A]n applicant [for a license], in addition to completing the requirements for the degree in medicine, *shall complete a period of postgraduate education to attain proficiency in the practice of the profession*, as prescribed by the board [of

[5] Whether a decision by an agency exceeds the agency's statutory authority or jurisdiction is reviewed for clear error. *Huron Behavioral Health*, 293 Mich App at 496.

medicine] in rules . . . ." (Emphasis added.) Pursuant to this statute, the board of medicine adopted a rule requiring applicants to satisfactorily complete two years of postgraduate clinical training in a program approved by the board in a board-approved hospital or institution. Mich Admin Code, R 338.2316(4)(a) and 338.2317(4). Regarding approved programs and facilities, the board adopted the following standards:

> (2) The board [of medicine] approves and adopts by reference the standards for accrediting hospitals which were adopted in April, 1986, by the joint commission on accreditation of hospitals and which were effective January 1, 1987. The board shall consider any hospital or institution that is accredited by the joint commission on accreditation of hospitals as a hospital or institution approved by the board.
>
> (3) The board approves and adopts by reference the standards for approving postgraduate clinical training programs which were adopted in 1987 by the accreditation council for graduate medical education and which were effective July 1, 1987, entitled "The Essentials of Accredited Residencies in Graduate Medical Education," and the board shall designate any program of postgraduate clinical training approved by the accreditation council for graduate medical education as a program approved by the board. [Mich Admin Code, R 338.2313.]

Plaintiff asserts that, in adopting these rules, the board of medicine exceeded its statutory authority because the goal of MCL 333.17031(1) is ensuring "proficiency" and the Accreditation Council for Graduate Medical Education (ACGME) has declared its purpose to be the preparation of physicians for practice in a medical specialty. According to plaintiff, while "specialization" in the medical profession may be viewed as a worthy goal, it is not an objective expressed in the Public Health Code. Thus, according to plaintiff, by

adopting the ACGME standards, the board enlarged its authority by requiring something that the Public Health Code does not.

As discussed above, the flaw in plaintiff's argument is that the Legislature, through the Public Health Code, invested in the board of medicine broad discretion with respect to the licensing requirements of applicants to practice medicine. Indeed, that the board has discretion to determine what satisfies the requirement of completing a period of postgraduate education to attain proficiency in the practice of the profession is evident in the text of MCL 333.17031(1) itself: An applicant for a license must complete the requirements for the degree in medicine and must complete a period of postgraduate education to attain proficiency in the practice of the profession "*as prescribed by the board in rules* . . . ." (Emphasis added.) Although plaintiff characterizes it as "exceeding statutory authority," the real question is whether the board's adoption of these standards conflicts with the Legislature's intent as expressed in the language of the statute. Again, given that the Public Health Code invests broad discretion in the board and MCL 333.17031(1) unambiguously instructs the board to exercise that discretion in setting the postgraduate-education standards, we conclude that the board's adoption of the above standards does not conflict with the Legislature's intent as expressed in the language of the statute. Accordingly, plaintiff's argument is without merit.

Plaintiff also asserts that the regulatory scheme at issue, which requires admission to a postgraduate program to obtain a license, effectively enables the admissions committees of the programs to deny a license to practice medicine and is therefore an improper subdelegation of the licensing decision. "It is

well settled that an administrative agency may not subdelegate the exercise of discretionary acts unless the Legislature expressly grants it authority to do so." *Edmond v Dep't of Corrections (On Remand)*, 143 Mich App 527, 536; 373 NW2d 168 (1985).

Although it is true that the admissions committees of the programs determine the individuals who are admitted to the programs, which undoubtedly affects the likelihood of the ultimate goal of full licensure, such a decision is one of many indirect influences on the person's ability to achieve the goal of licensure. Indeed, the same argument could be made concerning the admissions committees of medical schools. We find no impermissible subdelegation of authority.

V. ANTITRUST ARGUMENTS

Plaintiff next argues that the postgraduate-clinical-training rule violates antitrust law. We disagree.[6]

The Michigan Antitrust Reform Act, MCL 445.771 *et seq*., makes it unlawful to engage in anticompetitive conduct in the marketplace:

> The establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful. [MCL 445.773.]

The act contains an exemption for state agencies and boards:

> This act shall not apply to a transaction or conduct specifically authorized under the laws of this state or the

[6] Whether the rule requiring the completion of two years of postgraduate clinical training in a program approved by the ACGME violates antitrust law presents a question of law reviewed de novo. *Huron Behavioral Health*, 293 Mich App at 497.

> United States, or specifically authorized under laws, rules, regulations, or orders administered, promulgated, or issued by a regulatory agency, board, or officer acting under statutory authority of this state or the United States. [MCL 445.774(4).]

Plaintiff's argument fails because the challenged anticompetitive conduct he complains of (requiring the completion of two years of postgraduate clinical training in a program approved by the ACGME before a license may be issued) is undertaken pursuant to a regulatory scheme that, as discussed above, is authorized by the Public Health Code. Thus, the exemption in MCL 445.774(4) applies.

Regarding federal antitrust law, plaintiff did not raise this issue in his complaint or argue it before the trial court, and we could very well deem it waived. See *Admire v Auto-Owners Ins Co*, 494 Mich 10, 17 n 5; 831 NW2d 849 (2013) (noting that Michigan generally follows the "raise or waive" rule of appellate review).[7] In any event, the policy complained of (again, requiring the completion of two years of postgraduate clinical training in a program approved by the ACGME before a license may be issued) is equally exempt from federal antitrust laws under the "state action" doctrine because it is clearly articulated and affirmatively expressed as state policy and the policy is actively supervised by the state. *North Carolina State Bd of Dental Examiners v FTC*, 574 US ___, ___; 135 S Ct 1101, 1110; 191 L Ed 2d 35 (2015).

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[7] Plaintiff asserts that he raised the federal antitrust issue in ¶ 48G of his complaint. He did not. All he did was cite a case from this Court and indicate in a parenthetical that this Court was citing the United States Supreme Court. The paragraph repeatedly refers to "Michigan law" and "Michigan's antitrust act" and never cites or mentions any specific federal law.

VI. REGULATORY TAKING

Plaintiff next argues that denying him a license is a regulatory "taking" of private property in violation of state and federal law. We disagree.[8]

"The constitutions of both the United States and the State of Michigan provide that private property shall not be taken without due process or just compensation." *In re Certified Question*, 447 Mich 765, 787; 527 NW2d 468 (1994). "One who asserts an uncompensated taking claim must first establish that a vested property right is affected." *Id*. at 787-788. "Without a property right, a plaintiff has no basis for challenging a statute on the ground that it constitutes a confiscatory taking without due process of law." *Id*. at 788. A vested property right is an interest that is more than a mere expectation. *Id*. Rather, it requires a "legitimate claim of entitlement." *Berkowitz v Dep't of Licensing & Regulation*, 127 Mich App 556, 563; 339 NW2d 484 (1983).

In this case, although plaintiff might have had an expectation that his education, examination results, and experience would enable him to obtain a residency and ultimately a full license to practice medicine, that is not a vested property right. See *id*. at 562-563 (holding that the appellant had no property interest protected by due process in obtaining a psychology license because he did not have a legitimate claim to being licensed pursuant to the rules promulgated under the former Psychologist Registration Act); *Nolan*, 151 Mich at 655 ("We conclude that appellant's expectation of obtaining a physician's assistant license when his interim license expired was not an interest protected by the Due Process Clause.") (citations omitted).

[8] This Court reviews constitutional questions de novo. *Ayers*, 239 Mich App at 10.

Because plaintiff cannot establish that a vested property right is affected, his uncompensated-taking claim fails. *Certified Question*, 447 Mich at 788.

VII. DUE-PROCESS OR STATUTORY RIGHT TO AN ADMINISTRATIVE HEARING

Lastly, plaintiff argues that he was denied his due-process and statutory right to an administrative hearing. We disagree.[9]

No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV, § 1; Const 1963, art 1, § 17. In this case, plaintiff did not have a due-process right to an administrative hearing because, as discussed above, plaintiff cannot establish that a vested property right was affected and therefore he was not deprived, or at risk of being deprived, of a life, liberty, or property interest protected by due process. Due-process protections are only required when a life, liberty, or property interest is at stake.

Plaintiff also asserts that he was entitled to a hearing pursuant to MCL 333.16232, which states:

> (1) The department shall provide an opportunity for a hearing in connection with the denial, reclassification, limitation, reinstatement, suspension, or revocation of a license or a proceeding to reprimand, fine, order restitution, or place a licensee on probation.
>
> (2) The department shall provide an opportunity for a hearing in connection with the denial, limitation, suspen-

[9] This Court reviews constitutional questions de novo. *Id*. Likewise, whether plaintiff had a right to an administrative hearing under MCL 333.16232(1) is an issue of statutory interpretation, which presents a question of law reviewed de novo. *Huron Behavioral Health*, 293 Mich App at 497.

> sion, revocation, or reinstatement of a registration or a proceeding to reprimand, fine, order restitution, or place a registrant on probation.
>
> (3) A disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings examiner to impose a penalty.
>
> (4) Only the department shall promulgate rules governing hearings under this article [MCL 333.16101 to MCL 333.18838], article 7 [MCL 333.7101 to MCL 333.7545], or article 8 [MCL 333.8101 to MCL 333.8511] and related preliminary proceedings.

The statute does state that "[t]he department shall provide an opportunity for a hearing in connection with the denial . . . of a license . . . ." MCL 333.16232(1). However, in the instant dispute, defendants did not actually deny plaintiff a license. Rather, they informed plaintiff that the "limited license" he sought did not exist and was not authorized by statute or rules, rejected his self-made "application" for the nonexistent license, and refunded his money. This was not a "denial . . . of a license," because no such license exists and no such license is authorized under the Public Health Code. Plaintiff did not have a right to a hearing under these circumstances, in which he filed an application for a nonexistent license.

Affirmed.

SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ., concurred.

PEOPLE v AL-SHARA

Docket No. 320209. Submitted May 8, 2015, at Detroit. Decided August 18, 2015, at 9:05 a.m. Leave to appeal denied 498 Mich ___.

Salah Al-Shara pleaded *nolo contendere* to domestic violence in the 19th District Court. The district court, Mark W. Somers, J., entered defendant's plea and imposed sentence. Defendant filed a timely motion in the district court to withdraw his plea, claiming that the district court failed to advise him of his rights under *People v Jaworski*, 387 Mich 21 (1972) before taking his plea. The district court denied defendant's motion, and he appealed in Wayne Circuit Court. The circuit court, Richard M. Skutt, J., vacated defendant's plea and remanded the case to the district court for trial. The circuit court concluded that the district court had failed to substantially comply with the plea-taking procedure in MCR 6.610(E) and that defendant was entitled to withdraw his plea. The prosecution appealed by leave granted.

The Court of Appeals *held*:

The circuit court properly ruled that the district court failed to adequately communicate to defendant or otherwise acknowledge at defendant's plea hearing the three constitutional rights he would be waiving by entering a plea to the charge against him. The three constitutional rights—the right to a jury trial, the right to confront accusers, and the right to remain silent—are referred to as the *Jaworski* rights, and a defendant must knowingly and understandingly waive those three rights in order to tender a valid plea. A defendant may be informed of his or her *Jaworski* rights on the record at the plea hearing or in a writing, and a district court must assure that the defendant has been apprised of the rights before taking his or her guilty or *nolo contendere* plea. The district court may satisfy this obligation in one of two ways: (1) the district court may enumerate the rights on the record at a defendant's plea hearing, or (2) when a defendant has been apprised of these rights in a writing, the district court may refer to the writing and confirm that the defendant read and understood the rights and wishes to waive them. It was undisputed that defendant was given, and that he signed, an advice-of-rights form. When a written advice-of-rights form is involved,

the district court is not required to repeat the individual rights on the record. It needs only to verify the defendant's knowledge and understanding of the rights, and to confirm the defendant's desire to waive the rights. In this case, the district court failed to substantially comply with either of the two methods. The district court did not enumerate the rights on the record at defendant's plea hearing, and the district court did not refer to the written advice-of-rights form to determine whether defendant had read and understood the rights listed on the form. Because the omission of even one *Jaworski* right entitles a defendant to withdraw his or her plea, the circuit court properly vacated defendant's plea and remanded the case for trial in the district court.

Affirmed.

SAWYER, J., dissenting, concluded that defendant was not entitled to withdraw his plea because the district court substantially complied with the plea-taking requirements of MCR 6.610(E). Defendant was given, and he signed, an advice-of-rights form containing the required *Jaworski* rights. The district court did not refer to the written form at the plea hearing, and the district court did not enumerate the individual rights on the record, but these omissions do not justify defendant's plea withdrawal because any deviation from the procedure prescribed by MCR 6.610(E) did not affect defendant's substantial rights. The signed advice-of-rights form is evidence of defendant's knowledge of his *Jaworski* rights. In addition, MCR 6.610(E)(7) authorizes a district court to take a defendant's plea without having the defendant appear in court. Because the court rule allows for a plea to be taken wholly in writing, without a colloquy about a defendant's *Jaworski* rights, the district court's failure to conduct such a colloquy in this case should not invalidate defendant's plea. The propriety of allowing defendant to withdraw his plea under these circumstances should be determined by application of the substantial compliance doctrine and consideration of whether the district court's decision to deny defendant's motion to withdraw his plea constituted a clear abuse of discretion resulting in a miscarriage of justice.

CRIMINAL PROCEDURE — PLEA HEARING — ADVICE OF RIGHTS — RIGHT TO WITHDRAW PLEA.

A defendant is entitled to withdraw a plea of *nolo contendere* in district court when the district court fails to substantially comply with its obligation to assure that the defendant knows and understands he or she has the right to a jury trial, the right to confront

> his or her accusers, and the right to remain silent; although a district court need not enumerate these rights on the record at a defendant's plea hearing when the defendant has signed a written advice-of-rights form, the district court must refer to the form on the record and engage in a colloquy with the defendant to determine whether he or she is knowingly and understandingly waiving those rights before accepting the defendant's plea.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, and *Margaret Gillis Ayalp*, Assistant Prosecuting Attorney, for the people.

Cecilia Quirindongo Baunsoe for defendant.

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

HOEKSTRA, P.J. The prosecution appeals by leave granted a circuit court order vacating defendant's *nolo contendere* plea. Because the district court failed to advise defendant of his *Jaworski*[1] rights during the plea proceedings as required by MCR 6.610(E)(4), the district court abused its discretion when it denied defendant's motion to set aside defendant's plea, and the circuit court properly reversed the district court's decision. We affirm.

As a result of an incident with his wife at a restaurant on May 27, 2013, defendant was charged with one count of domestic violence under MCL 750.81(2). The prosecution offered defendant a plea agreement, which he accepted. Under this agreement, defendant would plead no contest to one count of domestic violence in exchange for a sentence consisting of one year of probation with credit for two months of probation

[1] *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972).

already served, and no jail time. It is uncontested that, on May 31, 2013, defendant signed a written "Pre-Trial Conference Summary" form detailing the terms of the plea agreement.[2] This form, signed by defendant, also included the following waiver of defendant's trial rights:

> I HEREBY ACCEPT THE ABOVE AGREEMENT AND WAIVE THE FOLLOWING RIGHTS:
>
> 1. THE RIGHT TO A JURY TRIAL OR TRIAL BY THE COURT.
>
> 2. THE RIGHT TO BE PRESUMED INNOCENT UNLESS PROVEN GUILTY BEYOND A REASONABLE DOUBT.
>
> 3. THE RIGHT TO CONFRONT AND QUESTION THE WITNESSES AGAINST ME.
>
> 4. THE RIGHT TO HAVE THE COURT COMPEL WITNESSES TO COME TO COURT AND TESTIFY FOR ME.
>
> 5. THE RIGHT TO TESTIFY AT MY TRIAL. THE RIGHT TO REMAIN SILENT AND NOT HAVE MY SILENCE USED AGAINST ME.
>
> 6. THE RIGHT TO BE REPRESENTED BY A LAWYER, AND THE RIGHT TO HAVE THE COURT APPOINT A LAWYER TO REPRESENT ME IF I AM INDIGENT AND MEET CERTAIN CONDITIONS.

On May 31, 2013, the district court held a hearing during which the parties indicated that they had come to a resolution in the case and that defendant wished to enter a no-contest plea. After recounting the terms of the agreement and confirming that defendant realized the plea would constitute a violation of a previous

[2] Although we do not have the benefit of the district court file, this document appears as an exhibit to the prosecution's application for leave to appeal in this Court. The parties do not contest that this document was signed by defendant.

order of probation entered in another case, the district court concluded that there was factual support for defendant's plea in the contents of an incident report dated May 27, 2013. In terms of advising defendant of the rights he waived by entering a plea, the district court engaged in the following brief colloquy with defendant:

> [*District Court*]: Mr. Al-Shara are you giving up your Constitutional Rights to a trial by judge or jury in this case?
>
> [*Defendant*]: Yes, Your Honor.
>
> [*District Court*]: Is anybody forcing you into this in any way whatsoever, Mr. Al-Shara?
>
> [*Defendant*]: No, Your Honor.
>
> [*District Court*]: Very well. The Court will accept the plea of no contest on 13S01020[;] we will enter a finding of a probation violation on 12S0273.

Once the district court accepted defendant's plea, it heard the victim's impact statement, and it immediately proceeded to sentence defendant in accordance with the plea agreement reached by the parties.

On August 9, 2013, defendant filed a timely motion in the district court to withdraw his plea. In relevant part, defendant asserted that he should be permitted to withdraw his plea because the district court failed to advise defendant of his rights as required by MCR 6.610(E). According to defendant, this obvious error affected his substantial rights and merited setting aside his plea.

The district court disagreed and denied defendant's motion. The district court reasoned that the proceedings as a whole did not so deviate from the court rule that defendant's substantial rights were affected, and that to allow defendant's plea to stand would not

constitute a miscarriage of justice as required to set aside defendant's plea after conviction and sentencing. See *People v Ward*, 459 Mich 602, 614; 594 NW2d 47 (1999). In reaching this conclusion, the district court characterized any deviation from the court rules as a mere "technical failure." The district court further reasoned that defendant was not harmed by this technical failure because defendant signed a written form advising him of his rights, defendant was "not a stranger to court proceedings," and defendant had failed to provide an affidavit attesting to the fact that he actually failed to understand his rights. The district court further suggested that defendant's real motivation in seeking to set aside his plea was simply to avoid the probation violation consequences arising in his other case. Under these circumstances, the trial court concluded that defendant had not shown a miscarriage of justice arising from the plea proceedings and was therefore not entitled to have his plea set aside.

After the district court denied defendant's motion, defendant filed a claim of appeal in the Wayne Circuit Court, again asserting that his plea should be set aside because the district court failed to comply with MCR 6.610(E). The circuit court applied a substantial compliance standard to its review and concluded that the plea-taking process in this case was "clearly defective" because defendant had not been advised of his rights on the record, and because the district court had failed to refer to the form signed by defendant to confirm that defendant had read and understood the form's content as required by MCR 6.610(E)(4). Because the rights omitted by the district court included the constitutional rights set forth in *Boykin*[3] and *Jaworski*, the

[3] *Boykin v Alabama*, 395 US 238, 243; 89 S Ct 1709; 23 L Ed 2d 274 (1969).

circuit court concluded that defendant's plea was invalid, that the error could not be corrected on remand, and that defendant was therefore entitled to withdraw his plea. For these reasons, the circuit court vacated defendant's plea and remanded to the district court for trial. Following the circuit court's decision, the prosecutor filed an application for leave to appeal in this Court, which we granted.[4]

On appeal, the prosecutor argues that the circuit court erred by vacating defendant's plea because the district court substantially complied with MCR 6.610(E), and defendant has not shown that any deviation from the court rule affected his substantial rights. Instead, according to the prosecution, any errors committed by the district court were minor and the combination of written and oral waivers during the proceedings served to adequately advise defendant of his rights. Because there is no indication that defendant failed to actually understand his rights, the prosecutor maintains that defendant has not shown error affecting his substantial rights or a miscarriage of justice. Under these circumstances, the prosecutor asserts that the district court did not abuse its discretion by denying defendant's motion to withdraw his plea.

A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). A trial court also necessarily abuses its discretion when it makes an error of law. *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010). To the

[4] *People v Al-Shara*, unpublished order of the Court of Appeals, entered April 18, 2014 (Docket No. 320209).

extent resolution of this case poses questions of constitutional law or requires interpretation of court rules, our review is de novo. *People v Clement*, 254 Mich App 387, 389-390; 657 NW2d 172 (2002).

"There is no absolute right to withdraw a guilty plea once the trial court has accepted it." *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). Nonetheless, when there has been a defect in the plea-taking process, a defendant may seek to set aside his or her plea. See *Brown*, 492 Mich at 693; *City of Livonia v Jasik*, 393 Mich 439, 442-443; 224 NW2d 838 (1975). The withdrawal of a plea entered in district court is governed by MCR 6.610(E)(8), which states:

> (a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.105[G](2).
>
> (b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.
>
> (c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries.

As this rule makes plain, a defendant may seek to withdraw his or her district court plea for noncompliance with the plea-taking requirements set forth in the

court rules, but to succeed on such a motion, a defendant must demonstrate that a deviation affecting substantial rights occurred. See MCR 6.610(E)(8)(b). Given the requirements of the court rule for setting aside a plea, the question before us in this case is twofold: (1) whether the trial court deviated from the court rules governing the plea-taking process, and (2) if so, whether this deviation entitles defendant to set aside his plea.

The process for accepting a plea in district court is set forth in MCR 6.610(E). Under this rule, before accepting a plea of guilty or *nolo contendere*, the district court has an obligation to determine that the plea is "understanding, voluntary, and accurate." MCR 6.610(E)(1). See also *Brown*, 492 Mich at 688-689. For a plea to be voluntary and understanding, a defendant must be aware of the rights he or she waives by entering the plea as well as the direct consequences of the plea. See *People v Cole*, 491 Mich 325, 332-333; 817 NW2d 497 (2012). A defendant must be sufficiently aware of his or her trial rights and the direct consequences of his or her plea before a defendant can make " 'a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " See *id*. at 333, quoting *North Carolina v Alford*, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970).

"A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers."[5]

[5] These constitutional rights also exist in the context of misdemeanor offenses. See, e.g., *Berkemer v McCarty*, 468 US 420, 433; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (applying the constitutional prohibition against compelled self-incrimination, as safeguarded through the provision of *Miranda* warnings, to misdemeanors as well as felonies); *District of Columbia v Clawans*, 300 US 617, 630-631; 57 S Ct 660; 81 L Ed 843

Cole, 491 Mich at 332. Because a defendant waives these rights by entering a plea, "the defendant must be informed of these three rights, for without knowledge he cannot understandingly waive those rights." *Jaworski*, 387 Mich at 29. While there are other rights about which a defendant must also be informed, these three rights, often referred to in Michigan as the *Jaworski* rights, were given preeminent importance in plea proceedings by the United States Supreme Court in *Boykin*, 395 US at 243. And, in *Jaworski*, 387 Mich at 31, the Michigan Supreme Court later determined that a felony conviction entered pursuant to a plea must be set aside if the defendant was not advised of all three rights—his or her rights to a jury trial, to confront his or her accusers, and to remain silent. As a matter of policy, these advice-of-rights requirements were imported into the district court context in 1988 via the court rules so that a district court must, like a circuit court, advise a defendant pleading to a misdemeanor of these *Jaworski* rights at the plea proceedings. See *People v Yost*, 433 Mich 133, 140; 445 NW2d 95 (1989).

In particular, among other rights and information, MCR 6.610(E)(3) specifically requires the district court to inform a defendant of the *Jaworski* rights he or she will waive by entering a plea. The rule states:

> (3) The court shall advise the defendant of the following:

(1937) (requiring reversal when the misdemeanor defendant's opportunity for cross-examination was restricted); *People v Antkoviak*, 242 Mich App 424, 480-482; 619 NW2d 18 (2000) (recognizing the constitutional right to a jury trial for misdemeanor offenses in Michigan under Const 1963, art 1, § 20). See also *Pointer v Texas*, 380 US 400, 405; 85 S Ct 1065; 13 L Ed 2d 923 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

> (a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,
>
> (b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:
>
> (i) the right to have witnesses called for the defendant's defense at trial,
>
> (ii) the right to cross-examine all witnesses called against the defendant,
>
> (iii) the right to testify or to remain silent without an inference being drawn from said silence,
>
> (iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt. [MCR 6.610(E)(3).]

Regarding the manner in which this information may be imparted, MCR 6.610(E)(4) directs that a defendant may be informed of these rights as follows:

> (a) on the record,
>
> (b) in a writing made part of the file, or
>
> (c) in a writing referred to on the record.
>
> If the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

Given the plain language of MCR 6.610(E)(4), it is clear that a defendant may be advised of his or her rights either in writing or on the record. Either manner is sufficient. However, whatever manner is used, the rule makes plain that there must be some colloquy with a defendant on the record regarding his or her rights to ensure that the defendant has been advised of

those rights. That is, even if a defendant is advised of his or her rights in writing, the rule mandates that "*the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights*." MCR 6.610(E)(4) (emphasis added). The trial court need not necessarily reiterate each of the individual rights on the record, but it must, at a minimum, verify that the defendant did in fact read and understand those rights. *Id*. In the absence of such a colloquy on the record, intelligent waiver of these important rights cannot be presumed. See *Jaworski*, 387 Mich at 29.

When considering whether a trial court complied with the court rules governing plea proceedings and whether any deviation entitles a defendant to reversal of his or her plea, we review under the doctrine of substantial compliance[6] whether the trial court ob-

[6] When reviewing defendant's motion to set aside his plea in this case, the district court mistakenly relied on *Ward*, 459 Mich at 613-614, in which the Court did not apply the doctrine of substantial compliance but instead emphasized that withdrawal of a guilty plea after conviction and sentencing is disfavored and subject to a showing of a miscarriage of justice. Like the circuit court, we conclude that the instant dispute is controlled not by *Ward* but by *People v Saffold*, 465 Mich 268; 631 NW2d 320 (2001). That is, *Ward* was decided before MCR 6.610, MCR 7.104, and MCR 7.105 were amended to include time constraints for challenging plea-based convictions entered in district court. See *Ward*, 459 Mich at 614-615. The foundation of *Ward*'s reasoning was that "long delayed direct appeals" were to be "deemed collateral." *Id*. at 614 (appeal was brought more than 12 months after judgement). Collateral attacks on a plea-based conviction—of the type described in *Ward*—have long been disfavored because the procedural safeguards provided for in *Boykin* and *Jaworski* "must at some point be balanced with considerations of finality and administrative consequences in order to best achieve proceedings that are consistent with the rudimentary demands of fair procedure." *People v Ingram*, 439 Mich 288, 298; 484 NW2d 241 (1992). Because the present case involves a timely motion to set aside a plea in accordance with the

served the court rules detailing the plea-taking procedure. *People v Saffold*, 465 Mich 268, 273; 631 NW2d 320 (2001). Under this doctrine, literal or "talismanic" compliance with the court rules is not required. See *id*. at 280; *Guilty Plea Cases*, 395 Mich 96, 124; 235 NW2d 132 (1975). Instead, reviewing courts consider the record to determine whether "the judge informed the defendant of the constitutional and other rights delineated in the rule in such manner as reasonably to warrant the conclusion that the defendant understood what a trial is and that by pleading guilty he was knowingly giving up his right to a trial and the rights and incidents of a trial." *Guilty Plea Cases*, 395 Mich at 124. However, when applying the doctrine of substantial compliance, there must be consideration of the preeminence given the *Jaworski* rights, and it remains the rule in Michigan that failure to advise a defendant of his or her *Jaworski* rights during plea proceedings mandates automatic reversal and the setting aside of the defendant's plea. See *Saffold*, 465 Mich at 273, citing *Jaworski*, 387 Mich 21. See also *People v Plumaj*, 284 Mich App 645, 649; 773 NW2d 763 (2009). Omission of a *Jaworski* right requires automatic reversal because a valid waiver of these important *Jaworski* rights cannot be presumed from a silent record, *Jaworski*, 387 Mich at 29, and this type of "*Jaworski* defect cannot be corrected on a remand," *Guilty Plea Cases*, 395 Mich at 121. Consequently, when considering the plea proceedings "[t]o determine if there was substantial compliance with the court rule, the first question is whether the right omitted or misstated is a '*Jaworski* right.' " *Saffold*, 465 Mich at 273.

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temporal restraints set forth in MCR 6.610(E)(8), the present case is not a collateral attack subject to review under *Ward*. This case is instead properly considered under the principles of *Saffold*.

> If a *Jaworski* right is omitted from the plea proceedings, then reversal is mandated. However, the omission fromthe plea proceedings of one or another of the rights attendant to a trial, other than a *Jaworski* right, or the imprecise recital of any such right, including a *Jaworski* right, does not necessarily require reversal. [*Saffold*, 465 Mich at 273-274.][7]

In this case, defendant's *Jaworski* rights are clearly implicated. At the plea hearing, the district court appropriately referenced defendant's right to a jury trial but wholly failed to inform defendant of his right to remain silent and his right to confront his accusers. See MCR 6.610(E)(3)(b). The district court also failed to make any reference to defendant's execution of a written advice-of-rights form or to verify that defendant actually read and understood the rights communicated on the form he signed. See MCR 6.610(E)(4). Moreover, these rights were not mentioned on the record by anyone else within earshot of the district court judge and defendant. See *Saffold*, 465 Mich at 278-280; *Guilty Plea Cases*, 395 Mich at 114-115. Given

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[7] Although *Saffold* and *Guilty Plea Cases* applied the doctrine of substantial compliance when analyzing the procedure for taking felony pleas in circuit courts, we think it appropriate to also apply this doctrine by analogy to the acceptance of misdemeanor pleas in district court under MCR 6.610. While MCR 6.610 is not identical to its circuit court counterpart, MCR 6.302, the two rules nonetheless share many common features and the same overarching aim to inform a defendant of the rights waived by entering a plea, as well as the consequences of a plea. Hence, we are persuaded that, like a circuit court under MCR 6.302, a district court need not conduct the colloquy described in MCR 6.610 verbatim, but it must substantially comply with the rule. And as in the circuit court, whether reversal is required will depend on the nature of the noncompliance, bearing in mind that omission of a *Jaworski* right requires automatic reversal because such a defect is intrinsically harmful and cannot be corrected on remand. See, generally, *Guilty Plea Cases*, 395 Mich at 121; *Plumaj*, 284 Mich App at 649. Where a *Jaworski* right is not implicated, whether a deviation occurred is judged under the substantial compliance doctrine, and under MCR 6.610(E)(8), a defendant is only entitled to relief if the deviation affected his or her substantial rights.

the total omission of two of the three *Jaworski* rights from the record of defendant's plea proceedings, it follows that defendant is automatically entitled to have his plea set aside. See *Saffold*, 465 Mich at 273-274; *Jaworski*, 387 Mich at 31.

In contrast to this conclusion, the prosecutor maintains that defendant's plea should not be automatically set aside because defendant's uncontested signature on a written form advising him of these rights satisfies the substantial compliance standard with respect to MCR 6.610(E)(4). The obvious flaw with this substantial compliance argument is that it would, in effect, obviate the requirement that the court refer to defendant's *Jaworski* rights on the record in some manner—either by enumerating those rights or by verifying that defendant had read and understood a written advice of those rights. In other words, under MCR 6.610(E)(4), if a written form is used to inform a defendant of his or her rights, two requirements are mandatory: (1) the writing must detail the rights in question, and (2) the court must conduct an oral colloquy with the defendant, on the record, regarding that writing. When a court completely abdicates its obligation to personally discuss the writing with a defendant on the record, and the rights contained in the writing are not otherwise imparted to a defendant on the record during the plea proceedings, we fail to see how the district court can be said to have substantially complied with MCR 6.610(E)(4).[8] Under these circum-

[8] Interestingly, this Court has historically rejected the contention that overt record references by the trial court to a written advice-of-rights form satisfy the requirement that a trial court personally address a defendant when apprising him or her of rights waived by entering a plea. See, e.g., *People v Napier*, 69 Mich App 46, 47-48; 244 NW2d 359 (1976), and cases cited therein. Such procedures are undoubtedly permissible under today's court rules. See MCR 6.302(B)(5);

stances, the issue is not one of wording or phraseology to which substantial compliance applies. See, e.g., *Guilty Plea Cases*, 395 Mich at 123. Rather, the issue is one of omission. Because the district court failed to enumerate defendant's rights, or in lieu of itemizing those rights, to refer to the form executed by defendant, the district court wholly failed to apprise defendant of his *Jaworski* rights at the plea proceedings.

In contrast to the prosecutor and the district court, we cannot characterize the district court's failure as merely being an unimportant technical defect that does not entitle defendant to relief. The requirement that the court personally address defendant on the record regarding the waiver of trial rights is not a meaningless formality. Rather, the court's obligation to assume the principal role of imparting the required information is a central component of the plea-taking process, and it serves a number of important purposes. See *Guilty Plea Cases*, 395 Mich at 114. First, it preserves the integrity of the process by which pleas are offered and creates a clear record for appellate review. Second, it provides the trial court with an opportunity to observe a defendant's demeanor and response to the imparted information, thereby facilitating the trial court's assessment of the defendant's understanding of the information. Finally, it serves to impress upon a defendant the gravity and import of his or her plea at "the solemn moment of passage from

MCL 6.610(E)(4). However, it is clear from the language in the court rules that the requirement nonetheless remains that a court must personally address a defendant on the record to determine whether the defendant read and understood the written rights, and that this express requirement is distinct from, and cannot be satisfied solely by, a written form. Indeed, as we observe in this opinion, to allow a writing to satisfy both requirements would obviate the plain language of the court rules by effectively eliminating all necessity of an in-court reference to the written form during the plea proceedings.

presumed innocence to conviction . . . ." See *id*. at 114, 120-122; *Jaworski*, 387 Mich at 31; *Napier*, 69 Mich App at 48-49. As more fully articulated by our Supreme Court in *Guilty Plea Cases*, 395 Mich at 121:

> That a defendant may have been tried by a jury in another case or learned of his rights in an earlier plea-taking proceeding would no more negate his right to be informed of the right to and incidents of a trial at the time a plea of guilty is offered than would proof that he had seen Perry Mason on television or read Erle Stanley Gardner.
>
> Many defendants have been made aware at one time or another of the right to and incidents of a trial and the consequences of a plea of guilty. Nevertheless, whatever the personal history of the accused and the quality of his representation, the appearance of justice and the integrity of the process by which pleas of guilty are offered and accepted require, in the solemn moment of passage from presumed innocence to conviction and potential imprisonment, that the judge apprise every defendant of the rights he is waiving and consequences of his plea and make the other determinations required by the rule.

In this solemn context, a written advice of rights alone—signed by a defendant off the record and outside of the court's presence, and unreferenced by the court or anyone else during the plea hearing—cannot satisfy, substantially or otherwise, a trial court's obligation under MCR 6.610(E)(4) to ensure that the defendant's plea is understandingly and voluntarily made with knowledge of his or her *Jaworski* rights. Thus, even when a written advice-of-rights form has been signed by a defendant, there cannot be a total omission of any reference during the in-court proceedings to either the enumerated rights in question or to the form itself signed by defendant off the record.[9] See

[9] We do not hold that literal compliance with MCR 6.610(E)(4) is required. That is, we do not suggest that a talismanic wording is

Saffold, 465 Mich at 280. Moreover, when the rights implicated by the plea-taking procedure include a defendant's *Jaworski* rights, the defendant is automatically entitled to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to a written document, is omitted from the in-court plea proceedings. See *Saffold*, 465 Mich at 273, 281; *Jaworski*, 387 Mich at 31.

Consequently, in this case, because the district court failed to substantially comply with MCR 6.610(E) and the deviation implicated defendant's *Jaworski* rights, defendant was automatically entitled to set aside his plea. Therefore, the district court abused its discretion by denying defendant's motion to set aside his plea. For this reason, we affirm the circuit court's order reversing the district court and remanding for trial.

Affirmed.

BORRELLO, J., concurred with HOEKSTRA, P.J.

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

Defendant argues, and the majority agrees, that he is entitled to withdraw his plea because the district court failed to fully and strictly comply with MCR 6.610(E). But reversal is mandated only if a *Jaworski*[1]

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required in the in-court waiver colloquy with a defendant. See *Saffold*, 465 Mich at 280. Rather, a trial court may substantially comply with the personal address requirement in a number of ways, provided that there is a discussion of a defendant's rights—or a discussion of the signed advice-of-rights form—at any point during the in-court proceedings, even by someone other than the trial judge. See *id.*; *Guilty Plea Cases*, 395 Mich at 114-115, 124. For example, it might satisfy the court rule if, in the presence of the trial court and a defendant, the prosecutor or defense attorney made reference to the fact that the defendant previously signed a form advising defendant of his or her rights. See *Guilty Plea Cases*, 395 Mich at 114-115.

[1] *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972).

right is omitted from the plea proceedings.[2] As is acknowledged by everyone in this case, the *Jaworski* rights were not omitted from the proceedings—defendant was advised of them in a writing, which he signed. The only failure in this case concerned the requirement that, when a defendant is advised of his or her rights in writing, the trial court also must engage in a colloquy with the defendant on the record to establish that the defendant has read and understood those rights.[3] I would classify this failure as a deviation that "did not affect substantial rights," and therefore, withdrawal of the plea was not required.[4] Rather, I would apply the substantial compliance requirement under *Saffold*.

In *Saffold*, the Michigan Supreme Court reiterated the principles established in *Guilty Plea Cases*,[5] and described the doctrine of substantial compliance with regard to "[t]he procedures governing the acceptance of a guilty plea" under MCR 6.302. The Court stated:

> To determine if there was substantial compliance with the court rule, the first question is whether the right omitted or misstated is a "*Jaworski* right." In *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972), this Court held that a plea of guilty must be set aside where the record of the plea proceedings shows that the defendant was not advised of all three constitutional rights involved in a waiver of a guilty plea: 1) the right to trial by jury, 2) the right to confront one's accusers, and 3) the privilege against self-incrimination, relying on *Boykin v Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969). *If a* Jaworski *right is omitted from the plea proceedings, then*

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[2] *People v Saffold*, 465 Mich 268, 273; 631 NW2d 320 (2001).

[3] MCR 6.610(E)(4).

[4] MCR 6.610(E)(8)(b).

[5] *Guilty Plea Cases*, 395 Mich 96, 122; 235 NW2d 132 (1975).

> *reversal is mandated*. However, the omission from the plea proceedings of one or another of the rights attendant to a trial, other than a *Jaworski* right, or the imprecise recital of any such right, including a *Jaworski* right, does not necessarily require reversal. *Guilty Plea Cases*, [395 Mich] at 122.[6]

The majority's conclusion that "the district court failed to substantially comply with MCR 6.610(E) and the deviation implicated defendant's *Jaworski* rights" is unsupported by the court rule. Specifically, MCR 6.610(E)(7) provides for a process by which a district court plea may be entered in writing, without the defendant's actual appearance in court. While this case did not involve the written plea procedure under the court rule, the fact that this rule exists belies the majority's conclusion that there must be strict compliance with the colloquy requirements of MCR 6.610(E)(4). That is, MCR 6.610(E)(7) provides for a process by which a plea may taken without such a colloquy; therefore, it cannot be concluded that the failure to engage in such a colloquy requires that defendant be allowed to withdraw his plea. Rather, I would suggest that we must look to the question of substantial compliance and determine whether the district court's decision to not allow defendant to withdraw his plea constituted "a clear abuse of discretion resulting in a miscarriage of justice."[7]

The district court explained its reasoning for denying defendant's motion to withdraw his plea as follows:

> The motion filed on behalf of Mr. Al-Shara, at the top of page two, suggest [sic] the reason for the motion is

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[6] *Saffold*, 465 Mich at 273-274 (emphasis added). See also *People v Plumaj*, 284 Mich App 645, 649; 773 NW2d 763 (2009).

[7] *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993).

> "defendant would not have accepted the plea agreement had he been aware of the effect that it would have on his probation in the unrelated case,["] that is, stated as the motivation and reason for the filing of the motion.
>
> With regard to advice of his rights, the defense concedes that [sic] page one of their brief, that Mr. Al-Shara signed a waiver of rights. That concession is again contained at page five of the defense brief where it states in the first full paragraph, while Mr. Al-Shara concedes that he did sign an Advice of Rights sheet in connection with this case and then it goes on from there so again, he has acknowledged signing the Advice of Rights.
>
> The file does contain a written waiver of rights so he would have had both the Advice of Rights at the Arraignment stage of the proceedings and again, a signed waiver of rights in connection with the plea proceeding itself. There is no indication in the body of the motion or by way of affidavit from Mr. Al-Shara that he actually failed to understand his rights. That allegation is conspicuously absent of [sic] the motion. . . . There is no suggestion anywhere in the motion that Mr. Al-Shara was either not advised of or did not understand his rights in full and the effect of waiving those rights by proceeding with a plea at the time, that is, just conspicuously absent from the motion.

"A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law."[8] I cannot say that the district court's decision falls outside the range of principled outcomes. Defendant was advised of his *Jaworski* rights in writing. It is uncontested that he signed that writing. As the district court noted, there is no allegation that defendant did not read or understand those rights. Rather, defendant merely appears to be latching onto a technical failure in the plea-

[8] *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted).

taking process because he is now unhappy with the collateral consequences of his plea on his probation status in another case.

I would reverse the circuit court and reinstate defendant's plea and sentence.

TRAHEY v CITY OF INKSTER

Docket Nos. 320161 and 324564. Submitted August 11, 2015, at Detroit. Decided August 18, 2015, at 9:10 a.m.

Terrance Trahey brought an action in the Wayne Circuit Court against the city of Inkster, challenging an increase in the city's water and sewer rates implemented in July 2012. Plaintiff also challenged a bill he received that same month for earlier water and sewer services for which the city claimed it had underbilled him. Plaintiff claimed, in part, that the city's decision to raise the water and sewer rates violated § 14.3 of the Inkster Charter, which required just and reasonable rates, and that the city would be unjustly enriched if it were allowed to collect the amount it claimed it had underbilled him. Plaintiff filed the case as a class action, but it was never certified as one. Rather, the city's attorney advised the court that if the court determined that the city's water and sewer rates were unreasonable that any rate reduction would be credited to all city residents. Following a bench trial, the court, Robert L. Ziolkowski, J., determined that the water and sewer department was in debt, but because of past improper borrowing between various city funds, at least some of the water and sewer department's debt was not attributable to past water and sewer costs. The court concluded that the debt component of the water and sewer rate should, therefore, be reduced by 50% under a theory of unjust enrichment, which would reduce the water and sewer rate of $14.64 by $2.68 per unit. After plaintiff's counsel informed the court that the water and sewer rates had again increased effective July 1, 2013, the trial court determined that the debt component of that new rate should also be reduced by 50% and refunded to the city's residents. With respect to plaintiff's claim regarding his July 2012 water bill, the trial court determined that the city was equitably estopped from collecting any charge for past unpaid water usage because when plaintiff purchased his home in 2011, he received information that the title company handling the closing for the sale found no outstanding water bill with the city. Therefore, the trial court determined that the city would be unjustly enriched if it was allowed to collect for the past unpaid usage from plaintiff. On January 23, 2014, the court entered a judgment requiring the

city to refund to residents, through a water and sewer credit, the difference between the amount owed given the rates set by the court and the amount the residents had paid. The court also ordered the city to issue plaintiff a $3,389.14 credit to his water and sewer account for the improper July 2012 water bill. The city appealed the court's judgment in Docket No. 320161. While that appeal was pending, plaintiff moved for a show-cause order, contending that the city was not in compliance with the judgment. The court subsequently ordered, on June 4, 2014, the city to issue the appropriate credits to the city's residents in light of the reduced water and sewer rates previously ordered by the court. On June 16, 2014, the court issued another order, requiring the city to credit each of the 8,425 water and sewer accounts at issue $303.78, based on a total credit amount of $2,559,321.63. The city appealed those postjudgment orders by delayed leave granted in Docket No. 324564. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. An issue is moot when an event occurs that renders it impossible for a reviewing court to grant relief. A voluntary satisfaction of a judgment may render a case moot, but if a judgment is involuntarily satisfied, the appeal is not moot. In this case, the city filed its appeal from the court's January 23, 2014 judgment before the trial court entered the June 2014 postjudgment orders requiring compliance with the judgment, and the Court of Appeals denied the city's motion for a stay pending the appeal of that judgment. The city approved the form and content of the trial court's June 16, 2014 order, but that approval did not signal agreement with the trial court's finding of unreasonableness or its decision that residents were entitled to refunds. Accordingly, the city's approval of the form and content of the order and compelled satisfaction of that order did not render its challenge to the court's finding of reasonableness moot. The same conclusion applied to the city's challenge to the trial court's decision to estop the city from collecting the underbilled water and sewer charges from plaintiff. The city's action in applying the credit under these circumstances could not be considered voluntary or as otherwise waiving the right to challenge the January 23, 2014 judgment.

2. Municipal utility rates are presumptively reasonable, but the presumption of reasonableness may be overcome by a proper showing of evidence. In this case, the trial court clearly misconstrued the facts and law in ordering the city to reduce its combined water and sewer rate by 50% of the debt component of

the rate. The trial court openly acknowledged that it could not specifically identify what amount, if any, of the water and sewer rate accounted for expenses unrelated to water and sewer service, and the report relied on by the court in making its determination actually indicated that the water and sewer department was a borrower of restricted funds from other departments, not a lender of funds to other departments. There was no evidentiary support for the trial court's finding that a part of the debt component of the water and sewer rate was attributable to debt for expenses unrelated to water and sewer, let alone that the amount owed for unrelated expenses was $2.68 per unit. The trial court clearly erred by finding the city's water and sewer rate was unreasonable on these grounds.

3. While a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. Although ratemaking is a prospective operation, past expenses and costs may be taken into account when determining a new utility rate. Timely payment of the water and sewer department's debt was necessary for its continued operation and, therefore, constituted part of the actual cost of providing the service. Plaintiff did not provide evidence showing that the method chosen by the city to maintain its operations and repay its debts was unreasonable, and inclusion of the debt component in the city's water and sewer rates did not constitute impermissible retroactive ratemaking. Retroactive ratemaking does not occur if only future rates are affected, with no adjustments to previously set rates. Plaintiff did not show that the water and sewer rates were unreasonable or unlawful. The trial court's determination regarding the rates and its finding of unjust enrichment had to be reversed and the case remanded for entry of a judgment of no cause of action in favor of the city with respect to plaintiff's claim that the water and sewer rates violated the Inkster Charter. The city's postjudgment orders enforcing that portion of the judgment had to be vacated.

4. Equitable estoppel arises when a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts. Arguments based on equitable estoppel to avoid payment for public utility services received have been consistently rejected. A city must charge consumers within each rate classification according to an equal rate for provided services. Accordingly, the trial court erred insofar as it held that plaintiff could avoid paying for past

utility services received under the doctrine of equitable estoppel. Nonetheless, insufficient evidence demonstrated that plaintiff actually received the utility services for which he was charged. The city treasurer testified that after the city installed a new water meter in plaintiff's home in 2012, the city took a reading of usage calculated by the new meter versus the old meter and determined that the old meter was running slow. The city then created an estimate based on the difference between the two meters and generated a bill. But there was no evidence in the record indicating that plaintiff's old water meter ran at the same slower speed throughout its lifetime, or even during the period for which the city calculated plaintiff's past utility service usage. Further, as the trial court noted, plaintiff's water bill did not indicate what period of time was covered by the charge. Although a municipal utility may permissibly charge for past utility services provided to its customers, in this case, a remand was necessary for the city to provide sufficient evidence that plaintiff actually received the services for which he was charged. On remand, if the utility could prove that plaintiff actually received unpaid water and sewer services, it could charge for those services using the rates in effect at the time the usage occurred.

In Docket No. 320161, trial court's January 23, 2014 judgment reversed with respect to water and sewer rates; case remanded for further proceedings concerning plaintiff's July 2012 water and sewer bill. In Docket No. 324564, trial court's June 4 and June 16, 2014 postjudgment orders vacated.

PUBLIC UTILITIES — RATEMAKING — INCLUSION OF DEBT WHEN DETERMINING RATES.

While a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required; past expenses and costs may be taken into account when determining a new utility rate; payment of a utility's debt, as necessary for its continued operation, constitutes part of the actual cost of providing the service, and inclusion of the debt in setting the utility's rates does not constitute impermissible retroactive ratemaking.

The Nolen Law Firm (by *Byron H. Nolen*) for Terrance D. Trahey.

The Smith Appellate Law Firm (by *Michael F. Smith*) and *Allen Brothers PLLC* (by *Suzanne P. Bartos* and *David W. Jones*) for the city of Inkster.

Amicus Curiae:

Mark K. Wasvary, PC (by *Mark K. Wasvary*), and *Aaron D. Cox* for Singh Housing & Investment, LLC, Great Lakes Affordable Housing, LLC, and Gregory Hayden.

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

GADOLA, J. This case involves plaintiff Terrance D. Trahey's challenge to the water and sewer rates established by the city of Inkster (the city), commencing July 1, 2012. Plaintiff also challenged a bill he received for water and sewer services in July 2012 for $6,903.64[1] after the city installed a new water meter at plaintiff's home and determined that the new meter had a higher reading than the outside meter used to determine plaintiff's prior billings.

In Docket No. 320161, the city appeals as of right a January 23, 2014 judgment, entered following a bench trial. As part of that judgment, the court reduced water and sewer rates for the period beginning July 1, 2012, to the date of the judgment; required that residents be refunded, through a credit to be applied to future water and sewer bills, the difference between the amount owed given the reduced rates and the amount they had paid; and held that the city was estopped from collecting the amount billed to plaintiff for the usage determined from the inside meter in July 2012. In Docket No. 324564, the city appeals, by delayed leave granted, two postjudgment orders entered in response to plaintiff's motion to show cause why the city was not

[1] According to City Treasurer Mark Stuhldreher, the Inkster City Council later reduced plaintiff's bill to reflect the rate in effect on June 30, 2011, rather than the rate in effect at the time of the 2012 meter reading.

complying with the January 23, 2014 judgment.[2] In an order dated June 4, 2014, the trial court determined that the city was not in compliance with the January 23, 2014 judgment and ordered the city to follow the terms of the judgment. In an order dated June 16, 2014, the trial court determined that each of the 8,425 water and sewer accounts at issue should be credited $303.78 by June 27, 2014, based on a total credit amount of $2,559,321.63. In Docket No. 320161, we reverse the portion of the trial court's January 23, 2014 judgment reducing the city's water and sewer rates, but remand for further proceedings on the issue of plaintiff's July 2012 water and sewer bill. In Docket No. 324564, we vacate the trial court's June 4 and June 16, 2014 postjudgment orders in their entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed the complaint in this case in February 2013. Plaintiff brought the case as a class action, but it was never certified as a class action. Plaintiff's second amended complaint alleged that the city's decision to raise the combined water and sewer rate to $14.64 per unit of water usage violated certain provisions of both the Headlee Amendment, Const 1963, art 9, §§ 25 and 31, and § 14.3 of the Inkster Charter, which requires just and reasonable rates. Plaintiff also alleged that

[2] This Court's order granting the application in Docket No. 324564 states, in part, the following:

> Defendant requests that this Court "grant leave and address in one proceeding all issues relating to its rate increase" and raised no substantive legal issues in this application. Therefore, this appeal is limited to the issues raised in the claim of appeal in Docket No. 320161, *Terrance D Trahey v City of Inkster*, and no additional substantive legal issues may be raised. [*Trahey v City of Inkster*, unpublished order of the Court of Appeals, entered December 29, 2014 (Docket No. 324564).]

the Inkster City Council was grossly negligent by voting to purchase new "smart" water meters without first researching the health concerns and technical problems associated with the meters. Plaintiff asserted that the old metering system consisted of an inside meter connected to an outside meter, which a city employee could read without entering the business or residential property. He alleged that the city was unjustly enriched by charging businesses and residential customers for differences between the inside and outside readings after the new meters were installed or, alternatively, by using the newly established rate of $14.64 to calculate the charge.

When plaintiff filed his second amended complaint, the trial court also granted plaintiff's request for a preliminary injunction, which precluded the city from shutting off water and sewer services for business and residential customers as long as the customers paid their quarterly water bills at a rate of $12.73 per unit. In June 2013, the trial court granted the city's motion for summary disposition with respect to plaintiff's claim that the water and sewer rate violated the Headlee Amendment, but denied summary disposition with respect to plaintiff's claims under the Inkster Charter and for unjust enrichment. Plaintiff then filed a third amended complaint asserting only claims based on the Inkster Charter and the theory of unjust enrichment.

At the bench trial, the city's counsel advised the court that if it determined the city's water and sewer rates were unreasonable, any reduction to the rates would be credited to all residents, regardless of whether the case was certified as a class action. Evidence presented at trial established that the city had entered into a consent agreement with the state of

Michigan under former 2011 PA 4[3] before raising the combined water and sewer rate to $14.64, effective July 1, 2012. As part of the consent agreement, the city adopted a deficit elimination plan (DEP) for various accounts, including the account associated with the water and sewer department. Testimony revealed that $5.36 of the $14.64 per unit combined water and sewer rate was intended to pay down debt.

The trial court determined that, as a result of past improper borrowing between the city's various funds, at least some of the water and sewer department's debt was not attributable to past water and sewer costs. The court concluded that the debt component of the water and sewer rate should therefore be reduced by 50% under a theory of unjust enrichment, which would reduce the water and sewer rate of $14.64 by $2.68 per unit. After plaintiff's counsel informed the court that the water and sewer rates had again increased effective July 1, 2013, the trial court determined that the debt component of that rate should also be reduced by 50% and refunded to the city's residents.

With respect to plaintiff's claim regarding his July 2012 water bill, the trial court determined that the city was equitably estopped from collecting any charge for

[3] The consent agreement specified that in the event 2011 PA 4 was repealed or rendered ineffective, the agreement would "continue in full force and effect under any successor statute providing for consent agreements or similar forms of agreement." 2011 PA 4 was suspended in August 2012. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v City of Pontiac No 1*, 309 Mich App 590, 601-602; 873 NW2d 121 (2015). At a subsequent general election in November 2012, the electors rejected 2011 PA 4. As a result, the Local Government Fiscal Responsibility Act, 1990 PA 72, was revived. *Martin v Murray*, 309 Mich App 37, 41-42; 867 NW2d 444 (2015). The revived act, 1990 PA 72, was later repealed and replaced by the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1541 *et seq*., effective March 28, 2013. *Pontiac Police & Fire*, 309 Mich App at 602.

past unpaid water usage because when plaintiff purchased his home in 2011, he received information that the title company handling the closing for the sale found no outstanding water bill with the city. Therefore, the trial court determined that the city would be unjustly enriched if it was allowed to collect for the past unpaid usage from plaintiff.

On January 23, 2014, the trial court entered a judgment requiring the city to refund residents the difference between the amount owed given the rates set by the court and the amount the residents had paid over the relevant 16-month period through a water and sewer credit. The court also ordered the city to issue plaintiff a $3,389.14 credit to his water and sewer account for the improper July 2012 water bill. The city appealed the court's judgment in Docket No. 320161.

In April 2014, while the city's appeal was pending before this Court, plaintiff filed a motion to show cause, contending that the city was not in compliance with the January 23, 2014 judgment. At a hearing on June 2, 2014, the city's counsel informed the trial court that the city had credited plaintiff's water and sewer account in May 2014 for the entire amount awarded in the judgment. However, the court found that the city was not in compliance with the other aspects of the judgment. On June 4, 2014, the court ordered the city to issue the appropriate credits to the city's residents in light of the reduced water and sewer rates previously ordered by the court. The court also ordered the city's treasurer to address the city's failure to pay attorney fees and costs to plaintiff's counsel pursuant to a separate January 23, 2014 order. On June 16, 2014, the court ordered the city to credit each of the 8,425 water and sewer accounts at issue $303.78, based on a total credit amount of $2,559,321.63.

II. MOOTNESS

As a preliminary matter, plaintiff argues that the city's appeal of the January 23, 2014 judgment is moot because the city complied with the terms of the trial court's June 16, 2014 order, thereby satisfying the terms of the January 2014 judgment. Plaintiff adds that, with respect to the city's appeal in Docket No. 324564, the city's challenge to the portion of the judgment resolving his responsibility for his July 2012 water bill is also moot because the city credited the appropriate amount before the trial court entered the June 4 and June 16, 2014 orders. The city concedes that it made the credits required by the June 16, 2014 order, but argues that this appeal is not moot because the credits were made involuntarily.

An issue is moot when "an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v State Lottery Bureau*, 231 Mich App 356, 359; 586 NW2d 117 (1998). A voluntary satisfaction of a judgment may render a case moot. *Horowitz v Rott*, 235 Mich 369, 372; 209 NW 131 (1926). If, however, the judgment is involuntarily satisfied, the appeal is not moot. See *Becker v Halliday*, 218 Mich App 576, 578-580; 554 NW2d 67 (1996); see also *Kusmierz v Schmitt*, 268 Mich App 731, 740 n 3; 708 NW2d 151 (2005), rev'd in part on other grounds 477 Mich 934 (2006). Generally, "payment or performance following the invocation or threatened exercise of a court's contempt power should not be regarded as voluntary or as constituting a waiver of the right to challenge the court's order." *Indus Lease-Back Corp v Romulus Twp*, 23 Mich App 449, 452; 178 NW2d 819 (1970).

In this case, the city filed its appeal from the court's January 23, 2014 judgment before the trial court entered the June 2014 postjudgment orders requiring

compliance with the judgment. This Court denied the city's motion for a stay pending the appeal of that judgment. *Trahey v City of Inkster*, unpublished order of the Court of Appeals, entered April 16, 2014 (Docket No. 320161), and the city's motion for reconsideration of that order was denied shortly before the trial court entered the June 16, 2014 order, *Trahey v City of Inkster*, unpublished order of the Court of Appeals, entered June 12, 2014 (Docket No. 320161).

The trial court's June 16, 2014 order effectively modified the January 23, 2014 judgment by requiring the city to apply a uniform credit of $303.78 to each water and sewer account by June 27, 2014, rather than a credit computed based on the actual units of water usage or any provision for the credit to be applied pro rata over a 16-month period. The city's "form and content" approval of the June 16, 2014 order, combined with the parties' agreement on appeal that the requisite credits were made, might signal that the city agreed to the modified remedy for the trial court's determination that the city's water and sewer rates were unreasonable. However, it does not signal the city's agreement with the trial court's finding of unreasonableness or its decision that residents were entitled to refunds. *Ahrenberg Mech Contracting, Inc v Howlett*, 451 Mich 74, 77-78; 545 NW2d 4 (1996) (holding that when there is no indication that a party's approval of an order's form and content signals the party's agreement with the order, it is not appropriate to treat the order as an unappealable consent order). Therefore, the city's approval of the form and content of the June 16, 2014 order does not render this appeal moot. Further, considering that the modified remedy and its satisfaction occurred only after plaintiff sought to invoke the trial court's contempt power, the city's

compelled satisfaction of the June 16, 2014 order does not render moot its challenge to the trial court's finding of reasonableness.

We reach this same conclusion with respect to the city's challenge to the trial court's decision to estop the city from collecting water and sewer charges from plaintiff, considering the record evidence that the city did not apply a credit to plaintiff's water and sewer account until after this Court denied the city's motion for a stay and after plaintiff filed his motion to show cause. The city's action in applying the credit under these circumstances cannot be considered voluntary or as otherwise waiving the right to challenge the January 23, 2014 judgment. See *Indus Lease-Back Corp*, 23 Mich App at 452.

III. STANDARD OF REVIEW

This Court reviews a trial court's factual findings in a bench trial for clear error, and reviews its conclusions of law de novo. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 251. To the extent that our review requires the interpretation of a statute, our review is also de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). The interpretation of a city charter provision is reviewed de novo. *Barrow v Detroit Election Comm*, 301 Mich App 404, 411; 836 NW2d 498 (2013).

A trial court's application of equitable doctrines is also reviewed de novo. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013). Unjust enrichment is an equitable doctrine. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729

NW2d 898 (2006). But, whether a specific party has been unjustly enriched generally involves a question of fact. *Id*.

IV. WATER AND SEWER RATES

The city first challenges the trial court's finding that its water and sewer rates were unreasonable under § 14.3 of the Inkster Charter, which provides the following:

> The council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the city and others with such public utility services as the city may provide. There shall be no discrimination in such rates within any classification of users thereof, nor shall free service be permitted. Higher rates may be charged for service outside the corporate limits of the city.

The Inkster Charter does not provide any standards for determining "just and reasonable rates." "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *City of Novi v Detroit*, 433 Mich 414, 431; 446 NW2d 118 (1989). Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. *Id*. at 428. This presumption exists because "[c]ourts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id*. at 430. However, the presumption of reasonableness may be overcome by a proper showing of evidence. *Jackson Co v City of Jackson*, 302 Mich App 90, 109; 836 NW2d 903 (2013). The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable. *City of Novi*, 433 Mich at 432-433.

To begin, the trial court clearly misconstrued the facts and law in ordering the city to reduce its combined water and sewer rate by 50% of the debt component of the rate. The trial court determined that this portion of the city's water and sewer rate was unreasonable because it was not really attributable to debt for water and sewer expenses. The trial court based its decision on information contained in a March 1, 2012 report from the Governor's financial review team, which indicated that improper interfund transfers had occurred between several of the city's departments. The trial court stated that it could not determine what portion of the water and sewer department's debt was attributable to improper interfund transfers and asserted that state accountants could not determine how much money was borrowed between city departments. Nonetheless, the court settled on reducing the water and sewer rates by 50% of the debt component of the rates. The court reasoned, "I think all you can do is try to get a reasonable amount of what would be attributable to non water and sewage debt and then subtract that amount from $14.64."

Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable. See *Jackson Co*, 302 Mich App at 109. In this case, the trial court openly acknowledged that it could not specifically identify what amount, if any, of the water and sewer rate accounted for expenses unrelated to water and sewer. Our review of the March 1, 2012 report of the financial review team relied on by the trial court reveals that the court's conclusions were unfounded. The report does not contain a determination that a portion of the water and sewer department's debt was attributable to expendi-

tures for purposes other than water and sewer, nor did the financial review team analyze any of the water and sewer rates.

The March 1, 2012 report summarized a preliminary review conducted by the Michigan Department of Treasury. One of the summarized matters addressed the city's use of a pooled bank account to manage cash. The summary contained a table indicating that the water and sewer department had a negative cash balance as of September 30, 2011. Although the report stated that it could not be determined "which fund owed another" because the cash was pooled, the report indicated that "it could be presumed that each negative balance had drawn a proportional amount from each fund with a positive balance." In other words, the report indicated that the water and sewer department was a borrower of restricted funds from other departments, not a lender of funds to other departments. We find no evidentiary support for the trial court's finding that a part of the debt component of the water and sewer rate was attributable to debt for expenses unrelated to water and sewer, let alone that the amount owed for unrelated expenses was $2.68 per unit. The trial court clearly erred by finding the city's water and sewer rate was unreasonable on these grounds.

Alternatively, plaintiff argues that the water and sewer rate was unreasonable because it was not based on the actual costs of service because a portion of the rate covered debt for past, rather than current, expenses. In essence, plaintiff is arguing that the city engaged in impermissible retroactive ratemaking. Plaintiff also cites MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contrac-

tual customer as provided by subsection (2) shall not exceed the actual cost of providing the service."[4]

MCL 123.141 does not alter the general standard of reasonableness applied by courts when reviewing utility rates. *City of Novi*, 433 Mich at 431-432. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. *Id*. at 431. Accordingly, while a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. *Jackson Co*, 302 Mich App at 109.

We disagree with plaintiff that the portion of the water and sewer rate accounting for debt was not part of the city's actual cost of providing water and sewer services. Although ratemaking is a prospective operation, *Mich Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 547; 24 NW2d 200 (1946), past expenses and costs may be taken into account when determining a new utility rate, *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 113-114; 804 NW2d 574 (2010). When a rate structure is wrong and causes a loss, the rate may be raised so that the loss will not continue. *Id*. at 113. Timely payment of the water and sewer department's debt was necessary for its continued operation, and therefore constituted part of the actual cost of providing the service. Plaintiff has not provided evidence showing that the method chosen by

[4] MCL 123.141(2) exempts a water department that is not a contractual customer of another water department and that serves less than 1% of the state population from the cost-based requirements of MCL 123.141(2). See *Oneida Charter Twp v City of Grand Ledge*, 485 Mich 859 (2009).

the city to maintain its operations and repay its debts was unreasonable, and absent evidence of impropriety, we will not independently scrutinize the municipal ratemaking methods employed by the city. See *City of Novi*, 433 Mich at 429.

We also disagree that inclusion of the debt component in the city's water and sewer rates constituted retroactive ratemaking. "[R]etroactive ratemaking does not occur if only future rates are affected, with no adjustment to previously set rates." *In re Application of Mich Consol Gas Co to Increase Rates*, 293 Mich App 360, 366; 810 NW2d 123 (2011), citing *Attorney General v Pub Serv Comm*, 262 Mich App 649, 655, 658; 686 NW2d 804 (2004). Previously established water and sewer rates were not adjusted in this case, and inclusion of the debt component was necessary for the continued operation of the city's water and sewer department. Plaintiff has not shown that the water and sewer rates were unreasonable or unlawful. Therefore, we reverse the trial court's determination regarding the rates and remand for entry of a judgment of no cause of action in favor of the city with respect to plaintiff's claim that the water and sewer rates violated the Inkster Charter.

In light of our decision, we also reverse the trial court's unjust enrichment finding, which was predicated on the court's erroneous evaluation of the water and sewer rates. In addition, we need not address the city's arguments concerning statutory preemption and the separation-of-powers doctrine, or the city's challenge to the trial court's decision under a proposed arbitrary and capricious standard. It is also unnecessary to address the city's challenge to the trial court's pretrial ruling denying its motion for summary disposition with regard to the reasonableness of the water

and sewer rates under the Inkster Charter. Lastly, because the city's original water and sewer rates were reasonable, we vacate the June 4, 2014 postjudgment order requiring the city to follow the terms of the January 23, 2014 judgment by adjusting water and sewer rates and crediting the difference to all customers' accounts, and we vacate the June 16, 2014 postjudgment order, which imposed an amended remedy requiring the city to credit each of the 8,425 water and sewer accounts at issue $303.78.

V. PLAINTIFF'S JULY 2012 BILL

The city also challenges the trial court's determination that the city was unjustly enriched by requiring plaintiff to pay for water and sewer charges based on the reading of the interior water meter at his home in July 2012. The trial court applied the doctrine of unjust enrichment after concluding that the city should be equitably estopped from collecting the amount billed to plaintiff in July 2012, which was based on a difference in the reading between his old meter and the new smart meter inside his home. The trial court reasoned that plaintiff would not have purchased the home in 2011 if the city had properly reported the outstanding utility bill.

Initially, the trial court erred insofar as it held that plaintiff could avoid paying for past utility services received under the doctrine of equitable estoppel. "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." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435,

444; 513 NW2d 148 (1994). "Arguments based on equitable estoppel to avoid payment for public utility services received have been consistently rejected." *Sigal v Detroit*, 140 Mich App 39, 42; 362 NW2d 886 (1985). In *Sigal*, the plaintiff purchased an interest in an apartment building after inspecting past water bills that indicated the building's account was current and revealed quarterly water bills of between $500 and $700. *Id*. at 40. Shortly after the purchase, the plaintiff received a water bill for $3,441.98 and discovered that the meter had not been read in three years. *Id*. This Court held that the plaintiff could not rely on equitable estoppel to avoid liability for payment of water consumed because a "city must charge consumers within each rate classification according to an equal rate" for provided services. *Id*. at 44. Rather, the Court noted, "[u]nder appropriate circumstances, plaintiffs might have a claim against the seller for fraud or have a meritorious claim for rescission of the contract based on a mutual mistake." *Id*. at 45.

In this case, just as in *Sigal*, the Inkster Charter precludes provision of free water and sewer services and prohibits rate discrimination. Accordingly, the trial court erred when it ruled that plaintiff could avoid payment of previously received services under the doctrine of equitable estoppel. However, on the record before us, insufficient evidence demonstrates that plaintiff actually received the utility services for which he was charged. At the bench trial, City Treasurer Mark Stuhldreher testified that after the city installed a new smart water meter in plaintiff's home in 2012, the city took a reading of usage calculated by the new meter versus the old meter and determined that "there was a difference between those two numbers . . . ." The city then created an estimate based on the difference between the two meters and generated a bill of

$6,903.64. When asked to describe why the old meter produced a lower reading, Stuhldreher explained, "As time goes by, the older meters began to breakdown. They run slow." There is no evidence in the record indicating that plaintiff's old water meter ran at the same slower speed throughout its lifetime, or even during the period for which the city calculated plaintiff's past utility service usage. Further, as the trial court noted below, plaintiff's water bill does not indicate what period of time is covered by the charge. Although a municipal utility may permissibly charge for past utility services provided to its customers, in this case, we believe a remand is necessary for the city to provide sufficient evidence[5] that plaintiff actually received the services for which he was charged. On remand, if the utility can prove that plaintiff actually received unpaid water and sewer services, it may charge for those services using the rates in effect at the time the usage occurred.

In Docket No. 320161, we reverse the trial court's judgment with respect to water and sewer rates, but remand for further proceedings consistent with this opinion on the issue of plaintiff's July 2012 bill. In Docket No. 324564, we vacate the trial court's June 4 and June 16, 2014 postjudgment orders in their entirety. We do not retain jurisdiction.

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

[5] We conclude that the burden of proving past receipt of utility services by a customer is appropriately placed on the municipal utility in light of the fact that the utility holds all the evidence concerning its customers' past service usage. In our estimation, placing the burden of proof on a customer to demonstrate nonusage would create an insurmountable evidentiary barrier and would preclude appropriate accountability on the part of the utility.

HOPE-JACKSON v WASHINGTON

Docket No. 319810. Submitted March 10, 2015, at Lansing. Decided August 18, 2015, at 9:15 a.m.

Doris Hope-Jackson brought an action in the Washtenaw County Trial Court (Case No. 10-680-CD) against Sheri Washington and Willow Run Community Schools. Hope-Jackson had been the superintendent of Willow Run before her employment was terminated, and Washington was a school board member during Hope-Jackson's tenure. The complaint alleged numerous theories of recovery, including whistleblowing, civil rights violations, and defamation. The defamation claim arose from posts Washington made to a website. The posts discussed perceived abuses of Hope-Jackson's authority as superintendent. The court, Timothy P. Connors, J., entered an order that dismissed the case, and the matter proceeded to arbitration. The arbitrator initially dismissed all of Hope-Jackson's claims. With respect to the defamation claim, he concluded that it was time-barred. The arbitrator subsequently ordered supplemental briefing, however, on the question of whether the period of limitations for defamation was tolled under MCL 600.5855 if Washington was the administrator of the website and concealed her involvement with it. Ultimately, the arbitrator took judicial notice that Washington was the website's administrator and found that she had actively concealed her administrative role. Regardless of this concealment, however, the arbitrator again concluded that the limitations period had not been tolled because Hope-Jackson was aware that she had a possible defamation action when the posts were made. Hope-Jackson then brought a second action in the Washtenaw County Trial Court (Case No. 12-1139-CZ) to vacate the arbitrator's order dismissing her claims. The court, Donald E. Shelton, J., ruled that dismissing the defamation claim regarding the posts on the website was a clear error of law given the arbitrator's findings about Washington's concealment of her role as the website's administrator. The court remanded the matter to the arbitrator for consideration of that claim alone. On remand, the arbitrator found that some of Washington's statements were allegations of a crime and therefore constituted defamation per se. He awarded Hope-Jackson $360,000 in per se damages and

$140,000 in exemplary damages. The court granted Hope-Jackson's motion to confirm the arbitration award, denied Washington's motion to vacate it, and entered a judgment for Hope-Jackson totaling $505,754.50. Washington appealed, and Hope-Jackson cross-appealed.

The Court of Appeals *held*:

1. Reviewing courts can only act on a written record. No verbatim record need be made of private arbitration proceedings, there are no formal requirements of procedure and practice in arbitration beyond those ensuring impartiality, and no findings of fact or conclusions of law are required. Accordingly, a court's ability to review an arbitration award is restricted to cases in which an error of law appears from (1) the face of the award, (2) the terms of the contract submitting the dispute to arbitration, or (3) any documentation that the parties agree constitutes the record. To merit vacating an award, an error of law (1) must be so egregious, (2) must so materially affect the outcome of the arbitration, (3) must so plainly demonstrate a disregard of principles fundamental to a fair resolution of the dispute, or (4) must so unequivocally generate a legally unsustainable result that the erroneous legal conclusions cannot be said to be within the parties' agreement to arbitrate or the arbitrator's authority.

2. Under MCL 600.5805(9), the period of limitations for a defamation claim is one year. The arbitrator found that the challenged posts were made from June 18, 2008, to June 15, 2009. Because Hope-Jackson filed her complaint on June 22, 2010, more than a year after the last post, her defamation claim would have been time-barred unless the limitations period was tolled. MCL 600.5855 provides that if a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person liable for it from the person entitled to sue, the action may be commenced within two years after the person discovers or should have discovered the existence of the claim or the identity of the person liable for it. Because the fraudulent-concealment statute allows for tolling if either the claim or the identity of the person liable for it was fraudulently concealed, the arbitrator erred as a matter of law when he ruled that tolling under MCL 600.5855 did not apply because Hope-Jackson was aware of the cause of action for defamation when Washington made posts on the website even if she did not know the identity of the poster. Accordingly, the circuit court did not exceed its limited authority by vacating that portion of the arbitrator's order and remanding the case to the arbitrator on that matter.

3. The elements of a defamation claim are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication of the statement 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. A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of another as to lower that person in the estimation of the community or to deter third persons from associating or dealing with him or her. Under MCL 600.2911(1), statements imputing a lack of chastity or the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages. A plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the defamatory statements were made with actual malice, which exists when the defendant knowingly made a false statement or made a false statement in reckless disregard of the truth. If a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim. Expressions of opinion are protected from defamation actions. Statements that cannot be interpreted as stating facts, such as the rhetorical hyperbole and imaginative expression often found in satires, parodies, and cartoons, are protected by the First Amendment. Terms such as "blackmailer," "traitor," "crook," "steal" and "criminal activities" must be read in context to determine whether they are merely exaggerations typically used in public commentary. The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts. Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of provable fact. If a reasonable reader would understand the words as merely rhetorical hyperbole meant to express strong disapproval rather than an accusation of a crime or actual misconduct, the words cannot be regarded as defamatory.

4. Hope-Jackson was a public official for purposes of the actual-malice requirement. Among other things, Washington's posts asserted that Hope-Jackson had abused her authority in various ways, disrespected parents, threatened staff, discriminated against employees, and hired and overpaid unqualified staff. Although the arbitrator found that many of the statements were defamatory, he concluded that only the statements that Hope-Jackson had violated state and federal laws amounted to defamation per se. The circuit court could not speculate regarding

the mental path by which the arbitrator concluded that the statements implied that Hope-Jackson had committed a crime and were not hyperbole and could not review the arbitrator's findings of fact. Nor was the arbitrator required to explain his findings of fact regarding actual malice. Accordingly, the court properly declined to vacate the arbitrator's order concerning the defamation claim.

5. The arbitrator committed clear legal error by awarding Hope-Jackson exemplary damages. MCL 600.2911(2)(b) allows the recovery of exemplary and punitive damages in a defamation action only if before instituting the action the plaintiff gives notice to the defendant to publish a retraction and allows a reasonable time to do so. The arbitrator found that Hope-Jackson did not give the required notice, and the circuit court therefore erred by failing to vacate the award of $140,000 in exemplary damages.

6. If defamation per se occurred, the person defamed is entitled to recover general damages in at least a nominal amount. If the defamatory publication was maliciously published, the person defamed may recover substantial damages even if no special damages could be shown. This presumption of general damages in defamation per se is well settled. Washington argued that the arbitrator improperly awarded $360,000 in presumed damages because that sum was not a nominal amount. While presumed damages must be at least a nominal amount, however, they may be substantial. In this case, the arbitrator relied on the evidence in the record and his judicial experience to conclude that $360,000 in presumed damages were appropriate. Any court review of that factual finding was precluded.

7. Hope-Jackson argued on cross-appeal that the arbitrator erred by failing to award her economic damages (including damages for emotional distress) related to her termination from Willow Run. The arbitrator, however, relied on his previous finding that Willow Run had not breached its contract with Hope-Jackson when it terminated her and found that Washington's posts on the website did not contribute to Hope-Jackson's termination. Because the arbitrator's findings of fact were unreviewable, the circuit court did not err by affirming the award despite the arbitrator's decision not to award economic damages.

Affirmed in part; arbitrator's order vacated in part.

1. ARBITRATION — COURTS — REVIEW — VACATION OF ARBITRATION AWARD.

Because no verbatim record need be made of private arbitration proceedings, no formal requirements of procedure and practice

exist in arbitration beyond those ensuring impartiality, and no findings of fact or conclusions of law are required, a court's ability to review an arbitration award is restricted to cases in which an error of law appears from (1) the face of the award, (2) the terms of the contract submitting the dispute to arbitration, or (3) any documentation that the parties agree constitutes the record; to merit vacating an award, the error of law (1) must be so egregious, (2) must so materially affect the outcome of the arbitration, (3) must so plainly demonstrate a disregard of principles fundamental to a fair resolution of the dispute, or (4) must so unequivocally generate a legally unsustainable result that the erroneous legal conclusions cannot be said to be within the parties' agreement to arbitrate or the arbitrator's authority.

2. LIMITATION OF ACTIONS — DEFAMATION — TOLLING OF LIMITATIONS PERIOD — FRAUDULENT CONCEALMENT OF CLAIM OR PERSON LIABLE.

Under MCL 600.5805(9), the period of limitations for a defamation claim is one year; MCL 600.5855 provides, however, that if a person who is or may be liable for any claim (including a defamation claim) fraudulently conceals the existence of the claim or the identity of any person liable for it from the person entitled to sue, the action may be commenced within two years after the person discovers or should have discovered the existence of the claim or the identity of the person liable for it.

3. TORTS — DEFAMATION — ELEMENTS — OPINIONS AND HYPERBOLE — INTERNET POSTINGS.

The elements of a defamation claim are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication of the statement 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; a communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of another as to lower that person in the estimation of the community or to deter third persons from associating or dealing with him or her; under MCL 600.2911(1), statements imputing a lack of chastity or the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages; expressions of opinion, however, are protected from defamation actions; statements that cannot be interpreted as stating facts, such as the rhetorical hyperbole and imaginative expression often found in satires, parodies, and cartoons, are protected by the First Amendment, and terms such as "black-

mailer," "traitor," "crook," "steal" and "criminal activities" must be read in context to determine whether they are merely the sort of exaggerations typically used in public commentary; the context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts; Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of provable fact; if a reasonable reader would understand the words as merely rhetorical hyperbole meant to express strong disapproval rather than an accusation of a crime or actual misconduct, the words cannot be regarded as defamatory.

4. TORTS — DEFAMATION — PUBLIC OFFICIALS — ACTUAL MALICE.

A plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the defamatory statements were made with actual malice, which exists when the defendant knowingly made a false statement or made a false statement in reckless disregard of the truth; if a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim.

5. TORTS — DEFAMATION — EXEMPLARY AND PUNITIVE DAMAGES — REQUIREMENT OF OPPORTUNITY TO RETRACT DEFAMATORY STATEMENT.

MCL 600.2911(2)(b) allows the recovery of exemplary and punitive damages in a defamation action only if before instituting the action the plaintiff gives notice to the defendant to publish a retraction and allows a reasonable time to do so.

6. TORTS — DEFAMATION PER SE — GENERAL DAMAGES — AMOUNT RECOVERABLE.

If defamation per se occurred, the person defamed is entitled to recover general damages in at least a nominal amount; if the defamatory publication was maliciously published, however, the person defamed may recover substantial damages even if no special damages can be shown.

Hatchett, DeWalt & Hatchett, PLLC (by *Darryl K. Segars*), and *The Sanders Law Firm, PC* (by *Herbert A. Sanders*), for Doris Hope-Jackson.

Foster, Swift, Collins & Smith, PC (by *Scott L. Mandel* and *Pamela C. Dausman*), for Sheri Washington.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

WILDER, P.J. Respondent Sheri Washington appeals as of right the circuit court's order granting the motion of claimant, Doris Hope-Jackson, to confirm an arbitration award (the postremand order) regarding claimant's defamation claim and denying respondent's motion to vacate that award. Respondent also challenges an earlier order by the circuit court vacating a portion of one of the arbitrator's previous orders (the preremand order) that both dismissed claimant's defamation claim because the limitations period had expired and remanded the case for further proceedings. We affirm in part, but vacate the portion of the arbitrator's postremand order awarding $140,000 in exemplary damages to claimant.

I

The instant matter arises out of a multicount complaint by claimant, who is the former superintendent of Willow Run Community Schools (Willow Run), against Willow Run and respondent, who was a school board member during claimant's tenure. Claimant made numerous allegations in Washtenaw County Trial Court Docket Number 10-680-DC, including breach of contract, sexual harassment, and violations of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., due process, the Employee Right to Know Act, MCL 423.501 *et seq*., the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*., and the Civil Rights Act, MCL 37.2101 *et seq*., all of which were submitted to arbitration and ultimately dismissed. Relevant to this appeal is claimant's defamation claim against respondent arising from posts made to a website: willowrunwatchdogs.com.

Initially, in the preremand order, the arbitrator dismissed the defamation claim, ruling that it was time-barred. The arbitrator found that the challenged posts on the website were made from June 18, 2008, to June 15, 2009. Moreover, the arbitrator found that because the complaint was filed on June 22, 2010, the one-year period of limitations had already run and any claim based on these allegedly defamatory statements was time-barred.

After dismissing the defamation claim, however, the arbitrator ordered supplemental briefing on the question whether the period of limitations was tolled under MCL 600.5855 if respondent was the administrator of the website and concealed her involvement with it. The record demonstrated that at a 2010 hearing for claimant before she was terminated from Willow Run, a witness testified that she believed respondent was the website's administrator, but respondent nevertheless testified that she was not. Ultimately, the arbitrator took judicial notice that respondent was the website's administrator and found that respondent had actively concealed her administrative role. Regardless of respondent's concealment of her identity, however, the arbitrator again concluded that the period of limitations had not been tolled, reasoning that the period of limitations continued to run because claimant was aware she had a possible cause of action for defamation at the time the posts were made.

The arbitrator also held respondent in contempt of court for repeatedly making false statements about her role as the website's administrator. Respondent paid $12,500 in sanctions to claimant, and the parties agreed that the payment satisfied the portion of the arbitration order requiring sanctions.

Claimant filed a complaint in the circuit court (Washtenaw County Trial Court Docket Number 12-1139-CZ) to vacate the arbitrator's preremand order dismissing her claims. The circuit court ruled that dismissing the defamation claim regarding the posts on the website was a clear error of law given the arbitrator's findings about respondent's concealment of her role as administrator. The circuit court remanded the matter to the arbitrator for consideration of that claim alone.

On remand, the arbitrator issued an interim opinion and order, finding that the administrator had made at least two statements that were defamatory per se and that they were made with actual malice. The arbitrator further found that some of the statements made by a blogger identified as "WRCAT" were also defamatory and that a question of fact existed regarding whether WRCAT was also respondent. On this question of fact concerning the identity of WRCAT, the arbitrator permitted the parties to offer additional evidence. Next, the arbitrator requested briefing and oral argument regarding whether statements against professional reputation can be defamation per se or whether defamation per se is limited to statements about criminal conduct and lack of chastity. Finally, the arbitrator ordered oral argument on damages, particularly whether exemplary or punitive damages were permitted and whether claimant had requested a retraction.

In the postremand order, the arbitrator found claimant's testimony to be "generally credible" and respondent's testimony to be "self-serving, evasive when convenient, and clear and decisive when it served her purposes." The arbitrator also found that posts on the website that were identified as having been made by the administrator, "Admin," and "WRCAT" were actu-

ally made by respondent. The arbitrator found, consistently with the preremand order, that claimant's termination was not a violation of her contract and that the defamation did not contribute to the termination. The arbitrator ruled that while defamation per se does not generally extend to statements regarding business interests, some of respondent's statements constituted allegations of a crime and therefore were defamation per se. In a review of each statement made on the website pertaining to claimant the arbitrator concluded that

> [d]efamation per se can be found on page 3 and 7-8 in an article entitled "Google Me." The allegations on these pages are particularly concerning for the Arbitrator. Statements that Dr. Jackson "has abused her authority as superintendent; disrespected parents to the highest degree; violated contracts and state and federal laws; [and] threatened employees" will be considered defamatory. More particularly, the statements that Claimant violated state and federal laws are made with actual malice and sufficient in the Arbitrator's mind, especially when viewing the website as a whole, to qualify as accusations of a crime and, accordingly, defamation per se. Similar statements can be found on page 37 in an article entitled "Have white employees been victims of reverse discrimination in WR?"[1] [Second alteration in original.]

Regarding the statements (1) "that Claimant 'robs Willow Run blind' by 'boosting [Larry and Laconda's][2] big salaries' " and (2) "that Claimant is 'giving away [Willow Run's] $$$ [sic]' by '[finding] a way to get Laconda a raise,' " the arbitrator, citing *Hodgins v Times Herald Co*, 169 Mich App 245; 425 NW2d 522 (1988), found that these statements were not accusa-

[1] "WR" presumably stands for "Willow Run."

[2] Larry Gray and Laconda Hicks were other administrators at Willow Run.

tions of a crime, but instead were strongly worded opinions and political speech. (Alterations in original.) The arbitrator concluded that the remaining passages cited by claimant were not defamation for one or more of the following reasons: (1) respondent did not make the statements, (2) the statements were not about claimant, (3) the statements were hyperbole, strongly worded opinion, or political speech, or (4) the statements did not contain actual malice.

The arbitrator awarded $360,000 in per se damages and $140,000 in exemplary damages. Respondent had testified at the 2010 pretermination hearing for claimant:

> I recall having a meeting with Dr. Jackson it may -- maybe August, Septemberish, I'm not sure of the exact date but I think that period of time is close. Dr. Jackson had a prepared agenda for this particular meeting, a rather long agenda. And towards the bottom of that agenda there was the name "watchdogs" . . . . [S]he said that there were some employees that were having difficulty with finding new employment because of what was posted on that web site and . . . they're going to sue . . . .
>
> And she had asked me if I could talk to whoever is responsible for the site and ask them to remove, I guess, information pertaining to -- and at that point in the conversation, she hadn't mentioned names, but I think she mentioned -- she made reference later in the conversation, like, she didn't want to reveal it at the beginning, and basically she was like, "What should I tell them?" And I -- you know, I'm not a lawyer. I can't give legal advice. But I think I said something to her along the lines that referenced, "Listen to your attorney" as far as what to tell the individuals that she was counseling with.

Concerning exemplary damages, the arbitrator found that the testimony showed that although claimant asked to have the website removed, she did not request a retraction. The arbitrator recognized that, generally,

a party must seek a retraction in order to recover exemplary damages, citing *Cousino v Nowicki*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2004 (Docket Nos. 240764 and 240794), but nevertheless concluded that exemplary damages should be awarded to claimant because any request for a retraction from respondent would have "fallen on deaf ears." The arbitrator declined to award attorney fees.

In the circuit court, claimant moved to confirm the award, and respondent moved to vacate it. The circuit court granted claimant's motion, denied respondent's motion, and entered a judgment for claimant totaling $505,754.50.

II

A

Respondent, asserting that the arbitrator correctly ruled that claimant's defamation claim was time-barred and that tolling under MCL 600.5855 did not apply, contends that the circuit court therefore exceeded its limited authority by vacating the portion of the arbitrator's preremand order that dismissed the defamation claim on statute-of-limitations grounds. We disagree.

This Court reviews de novo a circuit court's decision to vacate an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). The circuit court's power to vacate a statutory arbitration award is very limited. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

> Reviewing courts can only act upon a written record. There is no requirement that a verbatim record be made of

> private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required. Thus, from the perspective of the record alone, a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record. [*DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982).]

The *DAIIE* Court further explained:

> In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*Id*. at 429.]

To merit vacation of an arbitration award, an error of law must be evident on the face of the award and

> be so egregious, . . . so materially affect the outcome of the arbitration, . . . so plainly demonstrate a disregard of principles fundamental to a fair resolution of the dispute, or . . . so unequivocally generate a legally unsustainable result, that [the erroneous legal conclusion] cannot be said to be within the parties' agreement to arbitrate or the arbitrator's authority. [*Id*. at 429-430.]

"By 'on its face' we mean that only a legal error 'that is evident without scrutiny of intermediate mental indicia' will suffice to overturn an arbitration award" because we may not "engage in a review of an 'arbitrator's "mental path leading to [the] award." ' " *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009) (quotation marks and citations omitted) (alteration in original).

The period of limitations for claimant's defamation claim is one year. See MCL 600.5805(9). Claimant filed her complaint on June 22, 2010. The arbitrator explained in his preremand order that there was no defamation claim in the initial complaint but respondents "assume that [claimant's] defamation claim would relate back to the June 22, 2010 filing under [MCR] 2.118(D)." Thus, the defamation claim, which the arbitrator found was based on statements that all preceded June 22, 2009, would be time-barred by MCL 600.5805(9) unless the limitations period was tolled.

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

The arbitrator found in an addendum to the preremand order that respondent fraudulently concealed her identity as the administrator of the website and author of the challenged posts. On appeal, respondent merely maintains that the fraudulent concealment of her identity did not trigger tolling under MCL 600.5855 because claimant was nevertheless aware of the cause of action for defamation at the time the posts were made and before the limitations period expired.

In *UAW v Wood*, 337 Mich 8, 14-15; 59 NW2d 60 (1953), the Michigan Supreme Court held that the concealment of a defendant's identity, as opposed to the concealment of a cause of action, did not trigger the

fraudulent-concealment statute. At that time, the fraudulent-concealment statute was worded differently:

> If any person who is liable to any of the actions mentioned in this chapter [Chapter IX of the Judicature Act of 1915], shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 2 years after the person who is entitled to bring the same shall discover that he had such cause of action, although such action would be otherwise barred by the provisions of this chapter. [1948 CL 609.20.]

In 1954, the statute was amended:

> If any person, who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action, or *conceal the identity of any party thereto*, from the knowledge of the person entitled thereto, the action may be commenced at any time within 2 years after the person who is entitled to bring the same shall discover that he had such cause of action, although such action would be otherwise barred by the provisions of this chapter. [Former MCL 609.20, as amended by 1954 PA 49 (emphasis added).]

In *Ross v Fisher*, 352 Mich 555; 90 NW2d 483 (1958), the plaintiff was beaten by two police officers. The trial court dismissed the plaintiff's claim against the officers because it was not filed within the two-year period of limitations. On appeal, the Supreme Court explained that the plaintiff knew he had a cause of action at the time he was beaten, but the plaintiff maintained that because of fraudulent concealment, he was unable to learn the identity of the officers until after the limitations period had expired. The Court acknowledged that the 1954 amendment of the fraudulent-concealment statute included language regarding concealment of a party's identity, but held that it did not result in tolling for the concealment of the identity of a party because,

under the plain language of the amendment, tolling was limited to the discovery of a "cause of action." *Id*. at 558-559. The Court explained, "The situation before us then is not so much an ambiguity in the words used in the amendment as the complete omission of an essential 'pay off' clause from an essential place in the amended statute." *Id*. at 559. Because the amendment did not provide for tolling the limitations period on the basis of the discovery of the identity of a party, the Supreme Court affirmed the dismissal of the plaintiff's claim against the officers.

Thereafter, in 1963, the statute assumed its current form by the enactment of the Revised Judicature Act of 1961, including the phrase "the identity of the person" in the "pay off clause" described by the Court in *Ross*:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim *or the identity of the person* who is liable for the claim, although the action would otherwise be barred by the period of limitations. [MCL 600.5855, as enacted by 1961 PA 236, effective January 1, 1963 (emphasis added).]

Unlike the versions of the statute in *Wood* and *Ross*, which only allowed for tolling on the basis of the discovery of a cause of action, the plain language of the fraudulent-concealment statute now allows for tolling if *either* the claim or the identity of the person who is liable for the claim was fraudulently concealed. Therefore, we conclude that the arbitrator erred as a matter of law when he ruled that tolling under MCL 600.5855 did not apply because claimant was aware of the cause of action for defamation at the time posts were made on

the website even if she did not know the identity of the author of the posts. Accordingly, the circuit court did not exceed its limited authority by vacating that portion of the arbitrator's preremand order. *Gordon Sel-Way*, 438 Mich at 495.[3]

We also reject respondent's related argument that, to be entitled to tolling, claimant was required to file her defamation claim against an alternative party, such as John Doe or willowrunwatchdogs.com. The plain language of MCL 600.5855 allows an action to be "commenced . . . within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim . . . ." Nothing in the statute requires a plaintiff to commence an action within the statute-of-limitations period with a placeholder defendant and then amend the complaint when the identity of the proper defendant is discovered, as respondent suggests. The absence of such a requirement is deemed to be intentional. This Court may not read language into a statute. See *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011).

Respondent further argues that claimant's acceptance of the $12,500 in sanctions amounted to a waiver by claimant of tolling through fraudulent concealment. Respondent cites the document signed by both parties, which is labeled "SATISFACTION OF SANCTIONS AWARD PORTION OF ARBITRATION AWARD" and provides:

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[3] Respondent's reliance on *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 643-644; 692 NW2d 398 (2004), is misplaced because, in that case, the plaintiff only claimed that the cause of action had been concealed and made no claim that the defendant archdiocese's identity, like respondent's identity here, had been concealed.

> Claimant, Doris Hope-Jackson, through her attorneys, Darryl K. Segars and Herbert A. Sanders, hereby acknowledges that the $12,500 Sanctions Award in favor of Claimant against Respondent Washington, as delineated in the Arbitration Award entered in the above-captioned matter on October 1, 2012, has been satisfied in full and that this portion of the October 1, 2012, Arbitration Award is not the subject of Claimant's Motion to Reinstate Case and Vacate and/or Modify Arbitration Award filed with the Washtenaw County Circuit Court, Case No. 10-680-CD. Claimant further agrees that the sanctions award portion of that October 1, 2012, Arbitration Award shall not be challenged by Claimant and that Claimant shall not attempt to reinstate, vacate, and/or modify the award or appeal that portion of the October 1, 2012, Arbitration Award in this action or any other action.

"A 'waiver is the intentional relinquishment or abandonment of a known right.' " *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 357; 852 NW2d 22 (2014), quoting *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012). In the "SATISFACTION OF SANCTIONS" document, claimant merely relinquished any challenge to the "$12,500 Sanctions Award." Although the basis of the sanctions award was respondent's repeated false statements, and claimant maintained that respondent's false statements impeded discovery of respondent's identity for purposes of filing the defamation claim within the limitations period and for purposes of MCL 600.5855, nothing in the document relinquished a right to challenge the arbitrator's dismissal of the defamation claim on statute-of-limitations grounds. Therefore, respondent's payment of the sanctions and claimant's signature on the document did not amount to a waiver of the challenge to the dismissal of the defamation claim.

B

Respondent also argues on appeal that the circuit court should have vacated the arbitrator's postremand order, which made several factual findings and damages awards. We disagree in part and agree in part.

1

Respondent claims that the circuit court should have vacated the arbitrator's postremand order because (a) her statements were not defamatory allegations of a crime, but were just hyperbole, and (b) the arbitrator found that she acted with actual malice but did not expressly address, in his opinion, whether she knowingly made a false statement or made a false statement in reckless disregard of the truth. We disagree.

In Michigan, the four basic elements of a defamation claim are as follows:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication 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 publication. [*Ghanam v John Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014) (quotation marks and citation omitted).]

"A communication is defamatory if, considering all the circumstances, it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998). Under MCL 600.2911(1), statements imputing a lack of chastity or the commission of a crime constitute defamation per se

and are actionable even in the absence of an ability to prove actual or special damages. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000).

Moreover, "a plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the alleged defamatory statements were made with 'actual malice.' 'Actual malice' exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533 (2010) (citations omitted); see also MCL 600.2911(6).

> Without the actual malice requirement, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Whether the statements are defamatory and whether the evidence presented is sufficient to show actual malice on the part of the defendant present questions of law to be decided by the courts. When a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition of the defamation claim. [*Ghanam*, 303 Mich App at 531-533 (citations omitted).]

The parties do not dispute that claimant was a public official for purposes of the actual-malice requirement.

A court may hold as a matter of law that a defamatory statement is incapable of defamatory meaning. *Ireland*, 230 Mich App at 619. But questions of fact may exist regarding the statement's potential defamatory meaning. See *id*. "[E]xpressions of opinion are protected from defamation actions. However, there is no constitutional protection given to false statements of fact, so false statements of fact are not protected

from libel suits." *Hodgins*, 169 Mich App at 253 (citation omitted). Courts recognize that "[t]echnical inaccuracies in legal terminology employed by nonlawyers," particularly when "the popular sense of a term may not be technically accurate," should not form the basis for recovery. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 264; 487 NW2d 205 (1992).

> We are mindful of the inherent imprecision of language and the difficulties this poses to any evaluation of the truth or falsity of [a statement], particularly one that rests upon the use of a word with ambiguous implications. . . . To ensure the requisite 'breathing space' for free and robust debate on matters of public concern, we think it important to allow for imprecision and ambiguity in the choice of language. [*Id*. at 263 n 25.]

Statements that cannot be interpreted as stating facts, such as "rhetorical hyperbole" and the sort of "imaginative expression" often found in satires, parodies, and cartoons, are protected by the First Amendment. *Ghanam*, 303 Mich App at 546, citing *Hustler Magazine, Inc v Falwell*, 485 US 46, 50, 53-54; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Ireland*, 230 Mich App at 617-618. "Terms such as 'blackmailer,' 'traitor,' 'crook,' 'steal,' and 'criminal activities' must be read in context to determine whether they are merely exaggerations of the type often used in public commentary." *Ghanam*, 303 Mich App at 546, citing *Greenbelt Coop Publishing Ass'n, Inc v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970); *Kevorkian v American Med Ass'n*, 237 Mich App 1, 7-8; 602 NW2d 233 (1999).

> The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts. Courts that have considered the matter have concluded that Internet message boards and similar communication platforms are

> generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact. ". . . Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly." [*Ghanam*, 303 Mich App at 546-547, quoting *Summit Bank v Rogers*, 206 Cal App 4th 669, 696-697; 142 Cal Rptr 3d 40 (2012) (citations omitted).]

If a reasonable reader would understand such words as merely "rhetorical hyperbole" meant to express strong disapproval rather than an accusation of a crime or actual misconduct, they cannot be regarded as defamatory. *Greenbelt*, 398 US at 14; *Ireland*, 230 Mich App at 618-619.

In *Ghanam*, the plaintiff claimed that statements made on an Internet message board constituted actionable statements that accused him of stealing public property. *Id*. at 525, 550. This Court held:

> Review of these statements in context leads us to conclude that they cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge, namely the apparent misappropriation of a large amount of rock salt and the controversial purchase of additional garbage trucks. The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out, and the far-fetched suggestion that plaintiff somehow hid over 3,600 tons of salt near the city sports complex all indicate that these comments were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts. Examination of the statements and the circumstances under which they were made show them to be mere expressions of rhetorical hyperbole and not defamatory as a matter of law. [*Id*. at 550.]

In *Hodgins*, the defendant published an editorial letter that stated that the plaintiffs (kennel owners)

would sell dogs to anyone, and then stated that some of the animals were used for dogfighting. *Hodgins*, 169 Mich App 248-250. Dogfighting and the sale of animals for dogfighting are state and federal crimes. This Court held:

> This is not the same as calling someone a "blackmailer" or a "crook" in a strongly worded opinion statement. The . . . letter's language accuses or strongly implies that plaintiffs are involved in illegal or wrongful conduct involving dog fighting and moves across the line dividing strongly worded opinion from accusation of crime. These statements are not protected by the First Amendment from libel suits. [*Id*. at 254.]

In this case, in a November 3, 2008 article posted on the website (entitled "Google me"), respondent wrote:

> Thank you, Google, for helping get the word out on how Doris Hope Jackson has abused her authority as superintendent; disrespecting parents to the highest degree; violated contracts and state and federal laws; threatened employees; maintained an environment where staff is punished for speaking to board members or for questioning things; hired unqualified staff and paying them at top of pay scale; discriminated against white and black employees; reduced services to special needs students; moved teachers into positions so that they could be deemed not highly qualified and have their pay reduced; spawned the highest number of grievances and arbitrations our district has ever seen.

Although the arbitrator found that many of the statements in that article were defamatory, he concluded that only the statement that claimant violated "state and federal laws" amounted to defamation per se.

In an August 28, 2008 article (entitled "Have white employees been victims of reverse discrimination in WR?"), respondent wrote:

> There has been alot of talk about Dr. Jackson blatantly abusing her power and administrative authority in the district to "muscle" people out of jobs. Jackson has changed titles, given raises to some. As for the others, well, she has demoted, demoralized, threatened and removed them....Of these horrific deeds, the most noticeable aspect is that the bad deeds have been done at the expense of white teachers and staff in the district. If Hope Jackson was a white woman, everyone in the district would be screaming bloody murder! But should these bad deeds go unpunished just because she is black? I think not! Jackson so sheepishly does her dirty work in such a way that listening to her paralyzes you, and suddenly fills you with fear...for your job.
>
> Jackson needs to be reported to the federal and state authorities. Her behavior and acts are against the law. Someone, everyone needs to blow the whistle on her. Stop fearing retaliation and do something to stop this horrible behavior that the BOE [board of education] obviously condones.
>
> Jackson seems to have deep rooted issues concerning race relations. Perhaps going to an all-white school in the 60's and 70's left too deep a scar for her to see past her own wrong doings and mistreatments of WR staff.

The arbitrator found that respondent's statement that claimant should be reported to the federal and state authorities because "[h]er behavior and acts are against the law" was defamation per se.

Because a verbatim record of the arbitration proceedings is not required, *DAIIE*, 416 Mich at 428, the factual record considered by the arbitrator in this case is incomplete on appeal. As claimant argues, the arbitrator could have established that claimant was a public officer, see MCL 380.471a, and that the allegations that respondent made on the website about claimant's violation of state and federal laws—when considered in light of all her statements about claimant's abuse of author-

ity and the context of the website—could have amounted to a charge of misconduct in office, a common-law felony under MCL 750.505. See *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003) ("An officer could be convicted of misconduct in office [at common law] (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance."). Even though the forum used to make the statements was a blog, which tends to be a vehicle for expression of opinions, *Ghanam*, 303 Mich App at 546-547, the arbitrator could have concluded that this website indicated that it was providing more than just opinions—identifying itself as the Willow Run Community Action Team and taking responsibility for "Keeping Watchful Eyes on Willow Run." The arbitrator could have also concluded that, unlike the posts in *Ghanam*, the statements were not joking or sarcastic; rather, they urged the public to contact the authorities for action. Because the circuit court could not speculate regarding the mental path by which the arbitrator concluded that the statements implied that claimant had committed a crime and were not hyperbole (leading to the award), and the circuit court could not review the arbitrator's findings of fact, it properly declined to vacate the postremand order. *DAIIE*, 416 Mich at 428-429; *Washington*, 283 Mich App at 672.[4]

Respondent further argues that the arbitrator exceeded his authority because he found that respondent had acted with actual malice but did not expressly find,

[4] In light of this conclusion, we need not decide whether the arbitrator could have alternatively found defamation per se from the harm to claimant's business reputation.

in his opinion, that she had knowingly made a false statement or made a false statement in reckless disregard of the truth. The arbitrator was not required to explain his findings of fact regarding actual malice. See *Saveski*, 261 Mich App at 555 (" '[N]o findings of fact or conclusions of law are required.' ") (citation omitted). Respondent cites statements on the website that she claims made her allegations of an abuse of authority substantially true. But the arbitrator could have concluded that, even if claimant abused her authority in the few narrow and specific ways cited by respondent, there was no basis for the remaining sweeping allegations of abuse of authority. Because there is no legal error clearly appearing on the face of the award and we can only speculate about the reasons for the arbitrator's decision, *Washington*, 283 Mich App 672, the circuit court also did not err by declining to vacate the arbitrator's postremand order on this ground.

2

Respondent argues that the arbitrator committed clear legal error by awarding exemplary damages on the basis of the unpublished opinion in *Cousino*.[5] We agree.

MCL 600.2911(2) provides:

> (a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.
>
> (b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant

[5] Unpublished decisions are not binding on this Court. MCR 7.215(C)(1).

> to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. For libel based on a radio or television broadcast, the retraction shall be made in the same manner and at the same time of the day as the original libel; for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

MCL 600.2911(2)(b) expressly prohibits an award of exemplary damages unless the plaintiff gives notice to the defendant to publish a retraction. The arbitrator found that claimant did not give such a notice and, again, this factual finding is not reviewable. *DAIIE*, 416 Mich at 428-429.

The arbitrator nevertheless awarded exemplary damages by relying on *Cousino*. In that case, the defendant, John Kiefer, sent a notice to publish a retraction just two days before he filed a counterclaim for defamation against the plaintiff. *Cousino*, unpub op at 5. In deciding whether it was error to instruct the jury regarding exemplary damages in light of the short period of time given to publish the retraction, this Court noted that "the trial court instructed the jury that it would award exemplary damages *if* it found that Kiefer requested a retraction and allowed reasonable time for publication of the retraction." *Id*. at 6. This Court further stated that, given the plaintiff's ongoing efforts to malign Kiefer, "there is no indication that even with an earlier request for retraction that plaintiff would have retracted his comments." *Id*.

The arbitrator here found that *Cousino* stood for the

proposition that a retraction is not required in all circumstances and concluded that because respondent "maintains little, if any, credibility, combined with the testimony taken during the hearing, there is no doubt in the Arbitrators [sic] mind that such a request would have fallen on deaf ears." On the basis of these legal and factual findings, the arbitrator awarded $140,000 in exemplary damages despite claimant's failure to request a retraction.

The arbitrator's ruling is an error of law on the face of the order. A request for a retraction is mandatory under MCL 600.2911(2)(b). In *Cousino*, the defendant sent a request for a retraction in accord with the statute and there was merely a question of fact regarding whether it had been sent within a reasonable time. Here, in contrast, claimant did not satisfy the mandatory statutory-retraction requirement. Therefore, the circuit court erred by failing to vacate the award of exemplary damages.[6]

Claimant maintains that the failure to request a retraction is an affirmative defense, which must be raised in the first responsive pleading, and because it was not raised by respondent in her first responsive pleading, it is waived. Claimant cites no authority establishing that the failure to request a retraction is, in fact, an affirmative defense under MCR 2.111(F)(3). Moreover, the lower court record for Docket Number 10-680-DC is not before this Court and claimant has not attached any exhibits to her brief on appeal, such as the register of actions or any pleadings, to evidence the character and content of respondent's first responsive pleading. Without an adequate record to support

[6] In light of this conclusion, we decline to address respondent's argument that exemplary damages were improper because she is not a media defendant.

claimant's argument, this is yet another factual matter that is unreviewable because of the nature of the arbitration proceeding. *DAIIE*, 416 Mich at 428-429.

3

Last, respondent argues that the arbitrator improperly awarded $360,000 in presumed damages because that is not a "nominal amount." But respondent acknowledges *Burden*, in which this Court explained the history of presumed damages:

> Where defamation per se has occurred, the person defamed is entitled to recover general damages in at least a nominal amount. *Slater v Walter*, 148 Mich 650, 652-653; 112 NW 682 (1907); *Scougale v Sweet*, 124 Mich 311, 323, 325; 82 NW 1061 (1900); *Sias* [*v Gen Motors Corp*, 372 Mich 542, 551-552; 127 NW2d 357 (1964)]. Where the defamatory publication is "maliciously published," the person defamed may recover "substantial damages" even where no special damages could be shown. *Whittemore v Weiss*, 33 Mich 348, 353 (1876). Whether nominal or substantial, where there is defamation per se, the presumption of general damages is well settled. *McCormick v Hawkins*, 169 Mich 641, 650; 135 NW 1066 (1912); *Clair v Battle Creek Journal Co*, 168 Mich 467, 473-474; 134 NW 443 (1912); *Simons v Burnham*, 102 Mich 189, 204; 60 NW 476 (1894); *In re Thompson*, 162 Bankr 748, 772 (ED Mich, 1993). [*Burden*, 240 Mich App at 728.]

Although nominal damages are defined as "a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages," 4 Restatement Torts, 2d, § 907, p 462, presumed damages need not just be nominal, but rather "at least a nominal amount," *Burden*, 240 Mich App at 728. Moreover, under *Burden*, they may be substantial. In this case, the arbitrator relied on the evidence in the record and his judicial

experience to conclude that $360,000 in presumed damages were appropriate. Any review of that factual finding is precluded by *DAIIE*, 416 Mich at 428-429.

4

On cross-appeal, claimant argues that the arbitrator erred by failing to award economic damages (including damages for emotional distress) related to her termination from Willow Run. But the arbitrator relied on his previous finding that Willow Run did not breach its contract with claimant by terminating her,[7] and the arbitrator made the factual finding that respondent's posts on the website did not contribute to her termination. Because the arbitrator's findings of fact were unreviewable, the circuit court did not err by affirming the award despite the arbitrator's decision not to award economic damages. *DAIIE*, 416 Mich at 428-429.

Affirmed in part; postremand order vacated in part. No costs under MCR 7.219 because neither of the parties prevailed in full.

SERVITTO and STEPHENS, JJ., concurred with WILDER, P.J.

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[7] Claimant suggests the arbitrator was not bound by his previous findings about her breach-of-contract claim merely because the circuit court subsequently reversed the dismissal of the defamation claim involving posts to the website. But the circuit court affirmed the arbitrator's decision regarding the breach-of-contract claim. Therefore, the arbitrator was bound by the law of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) ("Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.") (citations and quotations marks omitted).

RIEMER v JOHNSON

Docket No. 321057. Submitted March 10, 2015, at Lansing. Decided August 18, 2015, at 9:20 a.m.

Plaintiff Andrew Riemer and defendant Christa Johnson contested custody, child support, parenting time, and attorney fees in a 19-day trial in the Manistee Circuit Court concerning the parties' minor child, ARJ. The parties began dating in 2007 or 2008 and never married. ARJ was born in 2011. After the lengthy trial and numerous motions and hearings, the court, Thomas N. Brunner, J., issued an opinion that (1) gave both parties joint physical and legal custody of ARJ, (2) outlined a parenting time schedule that progressively increases plaintiff's parenting time with the minor child over a period of years, finally arriving at a 50/50 parenting time schedule as of June 1, 2017, (3) ordered plaintiff to pay child support in an amount that gradually decreases over a period of years and settles at $3,012 a month after June 1, 2017, and (4) ordered plaintiff to pay defendant a portion of her attorney and expert witness fees. Plaintiff appealed, and defendant cross-appealed.

The Court of Appeals *held*:

1. The trial court's ruling regarding custody of the minor child was not an abuse of discretion. Plaintiff argued that the trial court's findings regarding best-interest factors (b), (d), (f), and (g) should have favored him. Plaintiff's fundamental argument was that defendant's instances of dishonesty, and her behavior during her pregnancy and during the demise of the parties' relationship should have weighed in his favor. The trial court acknowledged that defendant had engaged in angry outbursts, but noted that she parented ARJ in a kind, loving, and nurturing manner. The trial court concluded that defendant's behavior was situational and was not indicative of a shortcoming in her moral fitness or mental health. Plaintiff also contended that the best-interest factor accounting for the length of time a child has lived in a stable and satisfactory environment should not have weighed in defendant's favor because defendant restricted his time with ARJ when the parties' relationship was ending. The trial court acknowledged that defendant was initially restrictive but noted

that defendant had complied with the trial court's temporary orders regarding parenting time and had resolved with plaintiff important decisions affecting ARJ's welfare. The trial court's assessment of the best-interest factors was not against the great weight of the evidence, and even though more factors weighed in favor of plaintiff, the trial court did not abuse its discretion by awarding the parties shared physical custody.

2. The trial court's decision to award parenting time according to a schedule that gradually increases plaintiff's parenting time over a period of more than three years was not an abuse of its discretion. The trial court's decision was based on expert testimony indicating that a smooth and gradual transition to equal parenting time was better for a child emotionally and cognitively. And contrary to defendant's assertion that any change to the parenting time schedule must be precipitated by proper cause or change of circumstances, the future adjustments to the parties' parenting time were documented in the trial court's original January 2014 judgment and so did not constitute a modification or amendment of the parenting time judgment.

3. Even if the trial court erred by permitting a witness whose background was in political science, rather than psychology, to testify as an expert in father-child relationships, any error was harmless. Although there was disagreement among the other experts regarding the witness's qualifications and methodology, the trial court relied on only one aspect of the witness's testimony—the importance of fathers in the lives of children. Importantly, none of the other experts disagreed with that conclusion, and in light of the consensus that fathers were significant in the lives of children, admission of the witness's testimony was not inconsistent with substantial justice.

4. The trial court did not clearly err by subtracting from plaintiff's annual income the depreciation deductions related to plaintiff's businesses that he claimed on his income tax returns, and then calculating the amount of child support plaintiff was to pay defendant based on that adjustment to plaintiff's annual income. Defendant argued that the depreciation amounts plaintiff claimed on his income tax returns should have been included in plaintiff's income to accurately reflect plaintiff's actual resources. However, although depreciation does not necessarily affect cash flow, it does affect a person's resources, and the trial court did not clearly err when it concluded that the depreciation deductions claimed by plaintiff were legitimate realities of plaintiff's businesses.

5. The trial court did not abuse its discretion by refusing to deviate downward from the Michigan Child Support Formula, and it did not err by retroactively modifying a previous support order. Plaintiff argued that the amount of child support he was ordered to pay plaintiff exceeded that which was necessary to provide for ARJ's care and maintenance, and that the excess child support constituted a de facto award of spousal support. Plaintiff contended that his income should not have been fully taken into consideration when calculating child support because he earned such a large income. A court may not read into the Michigan Child Support Formula a deviation factor not listed there. Plaintiff further contended that the trial court improperly made modification of a previous order of support retroactive to a date before the court's January 2014 opinion. Although the previous order did not indicate that it could be modified retroactively by a subsequent order, as MCR 3.207(C)(4) requires, the trial court's intention that the earlier support order be retroactively modifiable was understood by plaintiff's counsel. When the trial court included in its January 2014 opinion a statement of its intent that the previous order be modifiable and retroactively so, the court satisfied, *nunc pro tunc*, the court rule requirement that an order state whether it is retroactively modifiable.

6. The trial court did not clearly err in its award of attorney fees to defendant, the court properly calculated the attorney fees it awarded, and the amount of fees awarded was reasonable. The trial court's failure to follow the procedure for determining attorney fees set forth in a case related to case evaluation sanctions was not error because the case's procedure did not apply to the fees defendant sought under MCR 3.206(C)(2). The trial court properly assessed whether attorney fees would be appropriate and if so, what amount of fees would be reasonable. It did so by concluding that defendant could not afford to defend the action without financial assistance, and that plaintiff was able to assist defendant with the costs of defending the action. To determine the amount of fees that would be reasonable, the trial court properly analyzed the factors in Michigan Rule of Professional Conduct 1.5(a). Ultimately, the trial court awarded defendant a portion of the expenses she had incurred, but the court did not order plaintiff to pay defendant's expenses in full. The trial court did not abuse its discretion by ruling that defendant could have been well represented by a single attorney at an hourly rate of $200. The trial court calculated the amount of attorney fees by multiplying $200 by the number of hours one attorney would have billed defendant, and adding in a sum of money for expert witness fees. The trial court multiplied this total by two to arrive

at a total amount of attorney and expert witness fees it considered reasonable to each party's representation in the litigation. The trial court proportionately divided payment of the total amount according to the parties' incomes. The trial court's conclusion that defendant could have been well represented by a single attorney, and basing the amount of attorney fees she was awarded on the cost of a single attorney, was not outside the range of principled outcomes.

Affirmed.

Phelps Legal Group, PLC (by *Eric W. Phelps* and *Morgan G. Shier*), for plaintiff.

Scott Bassett for defendant.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

WILDER, P.J. Plaintiff Andrew Riemer appeals as of right the trial court's judgment in this custody proceeding and challenges the court's determinations regarding custody, parenting time, child support, and attorney fees. Defendant Christa Johnson cross-appeals. We affirm.

I. FACTS AND PROCEDURE

The trial court set forth the following relevant facts in its January 31, 2014 opinion:

> The parties are the parents of [ARJ], born April 1, 2011, and were never married.
>
> Plaintiff/Father is Dr. Andrew Riemer . . . who is 52 years old. He is an ophthalmologist who owns his own practice, Riemer Eye Care, with four locations. [Plaintiff] lives in Ludington, Michigan, on Hamlin Lake. He was previously married to Lori Riemer, from whom he was divorced in 2004. [Plaintiff] and Lori Riemer have six children who are now all adults.
>
> Defendant/Mother is Dr. Christa Johnson . . . who is 41 years old. She is a chiropractor who shares ownership in

her own practice, Zeller & Johnson, in Manistee. [Defendant] lives in Manistee, Michigan. She was previously married to Eric Ross, from whom she was divorced in 2007. They had no children.

Plaintiff and Defendant started dating in late 2007 or early 2008. [Defendant] became pregnant three times during her relationship with [plaintiff]. The first pregnancy was in May 2009, which resulted in a miscarriage.

During the time of the relationship between [plaintiff and defendant, plaintiff] fathered a child with Sara Zingery. The child, [AR], was born on July 16, 2009. [Plaintiff] and Ms. Zingery were not married. Legal proceedings as to custody ensued with [plaintiff] and Ms. Zingery agreeing on shared custody of the child, [AR], with the actual sharing of time on a 50/50 basis commencing in the summer of 2013.

Subsequent to the birth of [AR], the relationship continued between [plaintiff] and [defendant] with a second pregnancy occurring, followed by a miscarriage. [Defendant]'s third pregnancy with [plaintiff] occurred thereafter with the child, [ARJ], born on April 1, 2011.[1] An *Acknowledgment of Parentage* was signed, and [plaintiff]'s name appears as the father on the birth certificate.

[Plaintiff] and [defendant] were unable to agree on long-term custody and/or parenting time arrangements, and the custody suit was brought forth by [plaintiff]. Ultimately, the parties' relationship continued to deteriorate with neither marriage occurring nor continuation of their romantic relationship.

The trial court found that the parties' relationship continued to deteriorate after ARJ's birth. The trial court further found that defendant initially allowed plaintiff parenting time on her own terms and pre-

[1] The trial court found that at various times during defendant's pregnancy and her despair from her relationship with plaintiff, she struck her belly, and on at least one occasion, defendant screamed at AR, shook AR's carseat, and kicked plaintiff.

dominately at her home. Defendant became upset and even more restrictive with plaintiff's parenting time after seeing plaintiff with AR in public. The parties engaged in mediation, which resulted in parenting time for plaintiff every Tuesday and Thursday from 6:30 p.m. to 10:00 p.m., and four to six hours every other Friday, Saturday, and Sunday. On September 1, 2011, plaintiff filed the instant action for custody and parenting time. On February 9, 2012, the trial court entered a temporary order for the same parenting time schedule that resulted from mediation and required plaintiff to pay defendant $1,500 a month in child support, effective November 8, 2011. At the November 8, 2011 hearing, the parties and the trial court addressed whether the temporary child support of $1,500 could be modified. Plaintiff's attorney believed that the trial court "ordered [the $1500] to continue until replaced after a review by a different figure." The trial court stated that "neither party is stuck with" the temporary support figure.

On July 11, 2013, the trial court entered another temporary order changing plaintiff's parenting time to every Tuesday and Thursday from 6:00 p.m. to 9:30 p.m., and every other weekend from Friday at 6:00 p.m. to Saturday at 6:00 p.m., and Sunday from 2:30 p.m. to 8:30 p.m. The trial court also ordered plaintiff to pay defendant $3,000 a month in child support. In its written order, the trial court ruled:

> Defendant's request for retroactive application and mandatory child support guideline applicability is reserved; the Court will address final child support amounts or deviation therefrom, and resultant arrearages, if any, consistent with this Court's previous order of November 8, 2011, when it issues its opinion/order after conclusion of the present evidentiary hearing.

Following approximately 19 days of trial, the trial court entered its January 31, 2014 opinion regarding custody, parenting time, child support, and attorney fees. First, the trial court ruled that ARJ had an established custodial environment with both parents. Then it determined that Factors (a), (b), and (e) were equal, Factors (c), (j), (k), and (*l*) favored plaintiff, Factor (d) favored defendant, and Factors (f), (g), (h), and (i) favored neither party. The trial court ordered shared physical custody with gradually increasing parenting time for plaintiff "developed over time for a smooth transition towards accomplishing a goal of approximately equal co-parenting time for both parents."[2]

The trial court awarded joint legal custody of ARJ to plaintiff and defendant. Although it found that defendant's anger toward plaintiff regarding their relationship had previously reduced her willingness to facilitate a close relationship between ARJ and plaintiff, the trial court concluded that the parties nevertheless had satisfactorily resolved important matters affecting ARJ's welfare and it was in ARJ's best interests for the parties to share decision-making authority.

In awarding child support, the trial court calculated plaintiff's adjusted gross annual income as $1,493,481, based on the average adjusted gross income from his tax returns in 2010, 2012, and his

[2] From the date of the January 31, 2014 opinion to April 1, 2015, a two-week parenting time schedule awarded plaintiff overnight parenting time on Tuesday and Thursday during one week, and five hours on Tuesday and overnight parenting time on Friday and Saturday during the following week. Beginning on April 1, 2015, and until June 1, 2017, a two-week parenting time schedule awarded plaintiff overnight parenting time on Tuesday, Wednesday, and Thursday during one week, and overnight parenting time on Thursday, Friday, and Saturday during the following week. After June 1, 2017, the parties were ordered to alternate custody of ARJ every Friday.

estimated return in 2013. The trial court calculated defendant's adjusted gross annual income as $107,722, based on the average adjusted gross income from her tax returns in 2010 and 2011, noting that in 2012, she had voluntarily reduced her work schedule to care for ARJ. From November 1, 2011, to June 15, 2012, the trial court ordered plaintiff to pay defendant $6,229 a month in child support. From June 15, 2012, to June 18, 2013, the trial court ordered plaintiff to pay defendant $6,807 a month in child support. From June 18, 2013, to January 31, 2014, the trial court ordered plaintiff to pay defendant $6,804 a month in child support. From January 31, 2014, to April 1, 2015, the trial court ordered plaintiff to pay defendant $6,204 a month in child support. From April 1, 2015, to June 1, 2017, the trial court ordered plaintiff to pay defendant $4,511 a month in child support. After June 1, 2017, the trial court ordered plaintiff to pay defendant $3,012 a month in child support. The trial court noted that it had intended the temporary orders for child support from February 9, 2012, and July 11, 2013, to be "modifiable retroactively back to the date of the filing of the motion for support because not all of the information was available at the time." It further noted its statement at the November 8, 2011 hearing that neither party would be "stuck with the support figure."

Finally, the trial court ordered plaintiff under MCR 3.206(C)(2)(a) to pay a portion of defendant's attorney fees and the expenses for her expert witnesses. The trial court ruled that defendant could have been well represented by one attorney at $200 an hour for a total of $186,654 in attorney fees. The trial court also fixed defendant's expert witness expenses at $41,050, for a total of $227,704 to defend against plaintiff's action. From this total, the trial court created what it

called a "war chest" of attorney fees and expert witness costs—multiplying by two $227,704, the amount attributed to each party for attorney and expert witness fees, for a total of $455,408. The trial court assigned responsibility for payment of the war chest total to each party based on the percentage each party contributed to their combined annual incomes—defendant earned 6.7% and plaintiff earned 93.3%. The trial court ordered defendant to pay $30,512 toward the war chest amount and plaintiff to pay the remaining $424,896 ($197,192 of which would be contributed to defendant's fees). In addition, the trial court ordered defendant to pay any of her fees exceeding $200 an hour and the fees charged by her second attorney, noting that either of defendant's attorneys alone would have been competent to defend her case.

II. CUSTODY AND PARENTING TIME

The parties first challenge the trial court's order regarding custody and parenting time.

In child custody disputes, " 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011), quoting MCL 722.28. Accordingly, the trial court's findings of fact are reviewed under the great weight of the evidence standard, which precludes a reviewing court from substituting its judgment on questions of fact unless the facts "clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). Under this standard, a court "should review the record in order to determine whether the verdict is so contrary to the great weight

of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial . . . ." *Id*. (quotation marks and citation omitted). Discretionary rulings, including the ultimate award of custody, are reviewed for an abuse of discretion. *Id*. at 879. "An abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey*, 291 Mich App at 664-665 (quotation marks and citations omitted). Further, " 'clear legal error' occurs when a court incorrectly chooses, interprets, or applies the law." *Id*. at 665.

Whether an established custodial environment exists with one or both parents is a question of fact to be determined before the trial court makes any custody determination. *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). If an established custodial environment exists with either or both parents, the trial court must find clear and convincing evidence that a change in the established custodial environment is in the child's best interests. *Kessler*, 295 Mich App at 61.

In determining whether a change of custody is in the best interests of a child, the best-interest factors set forth in MCL 722.23 are the appropriate measurement. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). "Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor, and failure to do so is usually error requiring reversal." *Id*. The best-interest factors set forth in MCL 722.23 are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

A. BEST-INTEREST FACTORS

On appeal, plaintiff first argues that the trial court's findings regarding Factors (b), (d), (f), and (g) were against the great weight of the evidence. We disagree.

Factor (b) requires the trial court to consider "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance, and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). Contrary to plaintiff's claim, there was evidence that both parties had the capacity and disposition to provide love, affection, and comfort to ARJ. The trial court found that both parties were professionals with strong educational backgrounds and ties to their religion. The trial court relied on the testimony of the court-appointed evaluator, Dr. Frank Langer, that both parents were capable of providing excellent care for ARJ, even though some of the psychological testing results suggested risk factors for both parents regarding attachment, for defendant regarding anger management, and for plaintiff regarding maintaining close relationships. The trial court acknowledged plaintiff's experience in raising six successful adult children, and also found that although defendant has only parented ARJ, she has done so in a kind, loving, and nurturing manner. Plaintiff claims that when considering defendant's ability to give ARJ love, affection, and guidance, the trial court did not give adequate weight to defendant's behavior during her pregnancy and to the instances of her dishonesty. Instead, the trial court concluded that defendant had been kind, loving, and nurturing to ARJ after ARJ's birth. The evidence presented did not clearly preponderate in the opposite direction.

Factor (d) requires the trial court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court found that although both parents provided a safe, comfortable, secure, and loving environment, ARJ had lived with defendant for quantitatively more time than the child

had lived with plaintiff. Plaintiff claims that because defendant limited his time with ARJ after the breakdown in the parties' relationship, the trial court's finding that defendant promoted a stable environment was against the great weight of the evidence. The record is clear that defendant was initially restrictive with plaintiff's parenting time, but the record also demonstrates that defendant followed the trial court's temporary orders regarding parenting time and resolved with plaintiff important decisions affecting ARJ's welfare. Moreover, the trial court found that during her time with ARJ, defendant demonstrated appropriate, one-on-one caretaking. Plaintiff has not demonstrated that the evidence presented clearly preponderated in the opposite direction.

Factor (f) requires the trial court to consider "[t]he moral fitness of the parties involved." MCL 722.23(f). Plaintiff claims that the trial court erred when it found that defendant's behaviors—including violence during her pregnancy, restrictiveness with parenting time due to jealousy of Zingery and AR, and dishonesty—"did not appear to be a continuation of an element of a shortcoming of moral fitness as to her interaction with or raising of the child." As plaintiff notes, defendant was in counseling to address her anger issues related to plaintiff. Dr. Barbara Edwards did not expect defendant to behave similarly in the future with anyone else. The trial court concluded that defendant's behaviors were situational, or related directly to her despair regarding the demise of her relationship with plaintiff and her pregnancy, and the evidence presented did not clearly preponderate in the opposite direction. Moreover, there is evidence in the record that both parties were dishonest on occasion. We cannot substitute our judgment regarding the moral fitness of the parties for that of the trial court.

Factor (g) requires the trial court to consider "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court found that plaintiff and defendant were both in good physical health. Again, the trial court relied on Langer's testimony that both parents were capable of providing excellent care for ARJ even though some of the psychological testing results suggested psychological difficulties. Moreover, despite defendant's "previous difficulty with anger management," the trial court relied on Edwards's testimony that defendant was mentally healthy at the time of trial. Edwards credited the change in defendant's mental health to her realization that her relationship with plaintiff could not function.[3] Therefore, the trial court concluded that any mental instability defendant had previously demonstrated was specifically attributable to either her relationship with plaintiff or her pregnancy and did not reflect her current mental health. Once again, the evidence presented did not clearly preponderate in the opposite direction.

Plaintiff has not demonstrated that any of the trial court's findings regarding the best-interest factors were against the great weight of the evidence. Even though the trial court found four of the factors weighed in plaintiff's favor and only one factor weighed in defendant's favor, plaintiff has not established that the award of shared physical custody was an abuse of discretion. The "trial court need not make its custody determination on the basis of a mathematical calculation and may assign differing weights to the various

[3] Although plaintiff points to some testimony from Edwards suggesting she was not aware of all of the interactions defendant had with plaintiff's children in the parties' attempts to integrate defendant into the lives of plaintiff's older children, there is no testimony in the record that Edwards's opinion regarding defendant's overall mental health at the time of trial changed on the basis of these interactions.

best-interest factors . . . ." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

B. PARENTING TIME

Both parties challenge the trial court's order regarding parenting time, which gradually adjusts parenting time over the course of approximately three and one-half years and ultimately results in equal parenting time. MCL 722.27a(1) provides:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

Plaintiff challenges the parenting time order, claiming it was based on testimony from Langer that overnights should only be added "when there's a reasonable likelihood that they will be positive experiences for ARJ and not occasions of distress for mother." Plaintiff claims that parenting time should be granted consistent with the best interests of the child, not on the basis of one parent's distress, and notes testimony from other experts at trial that criticized Langer's opinion focusing on defendant's distress. The trial court acknowledged the critique of Langer's opinion, and, contrary to plaintiff's claim on appeal, did not rely on it when imposing a gradual adjustment to the parenting time schedule. Rather, the trial court explained the purpose of the gradual adjustment was to allow a "smooth transition" to equal parenting time. The expert testimony at trial—that it is easier on a child emotionally and cognitively to increase parenting time

gradually—supported the trial court's conclusion. As Dr. Pamela Ludolph testified:

> [Y]ou wouldn't want to change [a child] from . . . one custodial arrangement to a custodial arrangement that's entirely different from whatever that first one was, even if the second arrangement was very good in the long run. You would want to do it more slowly so he could ease into it.

Defendant claims that each change to the parenting time schedule ordered to occur after the date of the trial court's January 31, 2014 opinion could not be implemented without proper cause or a change of circumstances demonstrated at a hearing under MCL 722.27(1)(c) held at the time of the change. MCL 722.27(1)(c) provides, in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

But defendant's reliance on MCL 722.27(1)(c) is misplaced because the gradual changes to the parenting time schedule are contemplated in the January 31, 2014 opinion and they do not "[m]odify or amend" that opinion. Defendant cites no authority for the proposition that the full effect of the parenting time order was required to be implemented immediately. Accordingly, we conclude that the trial court's parenting time schedule was not grossly violative of fact or logic.[4]

C. EXPERT WITNESS

Defendant argues that the trial court abused its discretion by allowing Dr. Warren Farrell to testify as an expert in father-child relationships in cases of divorce and nonintact families. She claims that Farrell was unqualified to testify under MRE 702 and *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), because of his background in political science (rather than psychology), and she argues that his testimony was unreliable because there was no evidence that his literature review of studies regarding father-child relationships had been peer-reviewed, was accepted in the scientific community, or had a known rate of error. We conclude that even if the trial court admitted the expert testimony in violation of MRE 702 and *Daubert*, any error

[4] We reject defendant's claim that the fact that ARJ will grow older during the period of time that the gradual changes to the parenting time schedule take effect amounts to a change of circumstances warranting a hearing with every gradual change. Aging is a normal life change and cannot, by itself, constitute proper cause or change of circumstances under MCL 722.27(1)(c). Otherwise, as every child grew older, there would be proper cause or a change of circumstances to modify a previous parenting time order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 513-514; 675 NW2d 847 (2003) (a normal change that occurs during the life of a child does not constitute the sufficient change of circumstances required to modify a custody order).

was harmless. See *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) ("A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected . . . and it affirmatively appears that failure to grant relief is inconsistent with substantial justice . . . .") (citations omitted). See also MCR 2.613(A). Although there was disagreement among the experts at trial regarding Farrell's qualifications and methodology, the trial court in its opinion only cited Farrell's opinion that fathers have "significant importance" in the lives of children. There was no dispute in the record about that opinion, even by defendant's own expert (Ludolph), who testified that "there are notable positive effects that fathers have on their children and . . . they should be involved in their children's lives in a very real way." Ludolph stated, "[I]t's useful to have a good relationship with both your parents if you're a baby . . . ." Ludolph further testified that she agreed with Farrell that children need the involvement of both parents and that both parents can serve as an attachment figure with "two, compl[e]mentary and necessary functions." She also agreed that each parent needs substantial parenting time to foster a good relationship with a child. In light of the abundance of testimony regarding the significance of fathers in the lives of children, defendant has not proved that the admission of Farrell's testimony on this point was inconsistent with substantial justice.

III. CHILD SUPPORT

Next, defendant argues that the trial court miscalculated the amount of child support required under the 2013 Michigan Child Support Formula (MCSF), while plaintiff argues that the trial court should have devi-

ated downward from the formula, and that the trial court improperly modified its first temporary child support order retroactively. We disagree.

"Generally, this Court reviews child support orders and orders modifying support for an abuse of discretion. Whether the trial court properly acted within the child support guidelines is a question of law that this Court reviews de novo. This Court also reviews questions of statutory construction de novo." *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007) (citations omitted). "Finally, to the extent that the trial court made factual findings in determining the amount of support under the child support formula, those findings are reviewed for clear error." *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

"The formula shall be based upon the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(*vi*). A trial court must comply with the requirements of the formula in calculating the parents' support obligations unless it "determines from the facts of the case that application of the child support formula would be unjust or inappropriate . . . ." MCL 552.605(2). This Court, in turn, must ensure compliance with the plain language of the MCSF Manual. See *Peterson v Peterson*, 272 Mich App 511, 518; 727 NW2d 393 (2006), citing *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003) ("We cannot read into the statute what is not there.").

First, defendant claims that the trial court erred in calculating plaintiff's income for purposes of child support by excluding depreciation taken by plaintiff's limited liability companies (LLCs).

2013 MCSF 2.01(E)(4) provides, in relevant part:

> (e) Deductions for Taxes. For a variety of historical and policy reasons, the government allows considerable deductions for business-related expenses before taxes are calculated. Those same considerations are not relevant to monies a parent has available for support. Therefore, some deductions should be considered income for purposes of determining child support, unless they are consistent with the nature of the business or occupation, including:
>
> (i) Rent paid by the business to the parent.
>
> (ii) Depreciation.
>
> A parent's income does not include depreciation figured at a straight-line (not accelerated) rate on a parent's (not a corporation's or partnership's) tangible personal property other than for vehicles or home offices. Any who use accelerated depreciation for a parent's tangible personal property other than for a vehicle or a home office can claim a deduction for the straight-line amount if the parent provides proof of what the straight-line amounts would have been.
>
> (iii) Home office expenses, including rent, hazard insurance, utilities, repairs, and maintenance.
>
> (iv) Entertainment expenses spent by the parent. Legitimate expenses for [a] customer's entertainment are allowable as deductions.
>
> (v) Travel expense reimbursements, except where such expenses are inherent in the nature of the business or occupation (e.g., a traveling salesperson), and do not exceed the standard rates allowed by the state of Michigan for employee travel.
>
> (vi) Personal automobile repair and maintenance expenses.

Depreciation is one of the deductions that the MCSF expressly provides should be included in a parent's income even though it is excluded from income for tax purposes. But the formula limits this inclusion in income by specifying that "some deductions should be considered income for purposes of determining child

support, unless they are consistent with the nature of the business or occupation." Defendant has not demonstrated that the trial court's finding that "there is no indication the depreciation is not a legitimate reality to the nature of the business" was clearly erroneous.[5] Moreover, we reject defendant's claim that depreciation is merely "theoretical" and should have been included in income to fully understand plaintiff's "actual resources." See MCL 552.519(3)(a)(*vi*). Although an accountant testified at trial that depreciation does not necessarily affect cash flow, it nevertheless affects a parent's resources. Depreciation is "a decrease in value due to wear and tear, decline in price, etc." *Random House Webster's College Dictionary* (2001). In this case, the trial court found the decrease in value to plaintiff's business property, according to plaintiff's Schedule Es, was $276,163 for 2010, $313,737 for 2011, and $284,955 for 2012. The trial court did not err in calculating plaintiff's income and excluding from plaintiff's income depreciation taken by plaintiff's LLCs because the depreciation deductions were consistent with the nature of plaintiff's businesses.

Second, defendant claims that certain income deductions taken in plaintiff's 2009 tax return should have been considered when calculating plaintiff's income for purposes of child support. But to calculate child support, the trial court considered the average of plaintiff's

[5] Defendant claims that all depreciation deductions are, by definition, for property used in a business and argues that under the trial court's interpretation, depreciation could never be included in a parent's income, and 2013 MCSF 2.01(E)(4)(e)(ii) would be rendered nugatory. But it is not inconceivable that a parent could claim a depreciation deduction on an income tax return for property used in a business that is not actually consistent with the nature of the business or occupation. Such an inconsistency would have to be established on the record, but as the trial court found, has not been established here.

income for 2010, 2012, and 2013. Defendant does not explain why income deductions plaintiff took in 2009 are relevant to the average income plaintiff received between 2010 and 2013. " 'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted). "[Defendant's] failure to properly address the merits of [her] assertion of error constitutes abandonment of the issue." *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Plaintiff argues that the trial court abused its discretion by failing to deviate downward from the MCSF. We disagree.

MCL 552.605(2) provides:

> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.

> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

Plaintiff claims the child support award provides an amount more than necessary for ARJ's care and maintenance and constitutes de facto alimony for defendant. But our Supreme Court has explained that the formula incorporates both a child's needs and the actual resources of the parents. *Burba v Burba (After Remand)*, 461 Mich 637, 648; 610 NW2d 873 (2000). "Parents' incomes are accounted for when child support levels are set because they are one of the factors used in the formula, and the formula sets exact support levels on the basis of parents' incomes, including parents whose incomes are disparate." *Id*.

2013 MCSF 1.04(E) provides a list of situations that may cause strict application of the formula to be unjust or inappropriate. The trial court found that 2013 MCSF 1.04(E)(17) applied, but would be *de minimis* ("A parent provides a substantial amount of a child's day-time care and directly contributes toward a significantly greater share of the child's costs than those reflected by the overnights used to calculate the offset for parental time."). Plaintiff does not challenge that finding as clearly erroneous. Rather, plaintiff challenges the trial court's finding that none of the other situations listed in 2013 MCSF 1.04(E) applied. Plaintiff claims a downward deviation was warranted under 2013 MCSF 1.04(E)(9) ("A parent earns an income of a magnitude not fully taken into consideration by the formula."). But plaintiff's reliance on 2013 MCSF 1.04(E)(9) is misplaced because he does not argue that his income was not fully taken into consideration by the formula, as the plain language of the deviation factor requires. Instead, plaintiff claims his income was fully taken into consideration by the formula and

should not have been because he earns so much. We cannot read into the MCSF a deviation factor that is not there. See *Peterson*, 272 Mich App at 518.[6]

Lastly, plaintiff argues that the trial court's February 9, 2012 order, which required plaintiff to pay child support of $1,500, effective November 8, 2011, was improperly modified retroactively by the trial court's January 31, 2014 opinion. Plaintiff relies on MCR 3.207(C)(4), which provides, "A temporary order must state its effective date and whether its provisions may be modified retroactively by a subsequent order." In its January 31, 2014 opinion, the trial court acknowledged that its written February 9, 2012 order "did not address retroactivity." The trial court nevertheless ruled that it was its intent, at that time, for any temporary orders to be modifiable retroactively. We conclude that, not only was it clear that the trial court intended temporary orders to be modifiable retroactively, it was clear from plaintiff's counsel's statements at the November 8, 2011 hearing that this intention was understood. By recording its intent regarding retroactivity in its written January 31, 2014 opinion, the trial court satisfied, *nunc pro tunc*, the retroactivity requirement of MCR 3.207(C)(4). See *Sleboede v Sleboede*, 384 Mich 555, 558-559; 184 NW2d 923 (1971) ("The function of such an order is to supply an omission in the record of

[6] We note that plaintiff's reliance on *Kalter v Kalter*, 155 Mich App 99, 104; 399 NW2d 455 (1986), and *In re Marriage of Patterson*, 22 Kan App 2d 522; 920 P2d 450, 456 (1996), is misplaced because these cases are not binding precedent. See MCR 7.215(J)(1) and *A & E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 645; 723 NW2d 223 (2006). We also note defendant's claim that by failing to include plaintiff's depreciation allowances from his Schedule Es and some of his 2009 deductions, the trial court effectively deviated from the MCSF and failed to satisfy the written requirements of MCL 552.605(2)(a) through (d). But we concluded earlier that defendant has not established that the trial court erred in calculating plaintiff's income.

action previously taken by the court but not properly recorded[.]") (emphasis omitted).

IV. ATTORNEY FEES

On appeal, both parties challenge the trial court's award of attorney fees.[7] Plaintiff asserts some entitlement to attorney fees on the basis that defendant's misconduct protracted the proceedings and increased the costs of litigation. However, plaintiff did not file a motion requesting attorney fees in the lower court. As such, any consideration whether plaintiff was entitled to attorney fees on the basis of defendant's conduct is unpreserved, and we decline to address it. See *King v Mich State Police Dep't*, 303 Mich App 162, 184-185; 841 NW2d 914 (2013).

Defendant argues that after the trial court determined she was entitled to attorney fees under MCR 3.206(C)(2)(a),[8] the trial court erred when it failed to determine the amount of fees to be awarded by following in detail the procedure outlined in *Smith v Khouri*,

[7] The parties' challenges on appeal are limited to the award of attorney fees; the parties do not challenge the award for expert witness expenses under MCR 3.206(C).

[8] MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

481 Mich 519, 530-531; 751 NW2d 472 (2008). We disagree. In *Smith*, the Supreme Court "review[ed] a trial court's award of 'reasonable' attorney fees *as part of case-evaluation sanctions under MCR 2.403(O)* . . . ." *Smith*, 481 Mich at 522 (emphasis added). The Supreme Court noted that "[t]he purpose of [MCR 2.403(O)] is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted but did not." *Id*. at 527-528. In contrast, as is apparent from the language of the court rule, the purposes for awarding attorney fees under MCR 3.206(C)(2) are: (1) to assist a party who is unable to bear the expense of the action, when the other party is able to pay the first party's fees; and (2) to reimburse a party for attorney fees incurred when that party has sought to enforce an order with which the other party is able, but fails, to comply.[9] Because an award of attorney fees under MCR 3.206(C)(2) has no relation to an award of attorney fees under MCR 2.403(O), we conclude that the trial court did not err by failing to follow the detailed procedure set forth in *Smith*. See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008).

In determining whether a trial court's award of attorney fees under MCR 3.206(C)(2) was unreasonable, we review the trial court's findings of fact for clear error. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). We review for an abuse of discretion whether the fees awarded were reasonable. *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 61; 604 NW2d 745 (1999).

[9] As recently clarified by this Court in *Richards v Richards*, 310 Mich App 683, 700; 874 NW2d 704 (2015), "MCR 3.206(C)(2) provides two independent bases for awarding attorney fees and expenses."

"A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court relied on Michigan Rule of Professional Conduct (MRPC) 1.5(a) and the factors articulated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), in determining the amount of attorney fees to be awarded to defendant. MRPC 1.5(a) provides:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

The six additional *Wood* factors are "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood*, 413 Mich at 588 (quotation marks and citation omitted).

In its opinion, the trial court first analyzed the factors in MRPC 1.5(a). Regarding Factor (1), the trial court found that the issues were limited to custody, parenting time, child support, and attorney fee contribution. While the issues were not unusual and many competent attorneys in the area could have handled them, the trial court noted that the case was time-intensive—involving 19 days of trial, over 100 exhibits submitted by each party, and several expert witnesses.

Regarding Factor (2), the trial court found that even though the case was time-consuming, the attorneys for both parties—Eric Phelps and an associate for plaintiff, and Keldon Scott and Mark Quinn for defendant—had active law practices, and this case did not noticeably preclude other employment.

Regarding Factor (3), the trial court listed the mean hourly rate for attorneys in the circuit ($175), in Lansing (where Scott practices) ($221), and among family law practitioners in Michigan ($199).

Regarding Factor (4), the trial court found that while custody and child support were important to the parties, this factor was better suited to evaluating the amount at issue in a civil lawsuit seeking the recovery of damages.

Regarding Factor (5), the trial court found that no time limitations were imposed on the attorneys in the case.

Regarding Factor (6), the trial court found that defendant and her attorneys had no relationship before the case.

Regarding Factor (7), the trial court found that the parties' attorneys were well-qualified and represented the parties well.

Finally, regarding Factor (8), the trial court found that attorney fees were "hourly based upon the amount of time spent."

After analyzing the factors, the trial court noted the hourly rates of each attorney, i.e., Phelps ($200), Phelps's associate ($175), Quinn ($200), and Scott ($325), listed the amounts charged by the attorneys through August 31, 2013, and estimated the fees that were incurred afterwards. The trial court further ruled that defendant could have been well represented by one attorney at $200 an hour for a total of $186,654. The trial court also concluded that reasonable expert witness fees in the amount of $41,050 were appropriate, for a total of $227,704 to be attributed to defendant's expenses of defending the action. Then, as we have previously explained, the trial court ordered that a "war chest" be funded with a total of $455,408 (double the amount attributed to defendant) through payments made by the parties in proportion to their annual incomes.

Defendant challenges the reasonableness of the attorney fees awarded to her, arguing that she was disadvantaged because plaintiff incurred for his own attorney fees nearly double the amount she was awarded by the trial court to pay her attorneys. But in its consideration of MRPC 1.5(a)(1), the trial court

expressly considered the resources required given the "time-intensive" nature of the proceedings, and it ultimately concluded that defendant could have been well represented by one attorney at $200 an hour for a total of $186,654. Defendant has failed to establish that the trial court's conclusion was outside the range of principled outcomes. *Maldonado*, 476 Mich at 388.

Affirmed. No costs are awarded, as neither of the parties prevailed in full. MCR 7.219.

SERVITTO and STEPHENS, JJ., concurred with WILDER, P.J.

ESPN, INC v MICHIGAN STATE UNIVERSITY

Docket No. 326773. Submitted August 5, 2015, at Lansing. Decided August 18, 2015, at 9:25 a.m. Leave to appeal denied 498 Mich 957.

ESPN, Inc., brought an action in the Ingham Circuit Court against Michigan State University (MSU) under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., after MSU responded to ESPN's request for a list of incident reports involving student athletes by providing records in which the names of the suspects, victims, and witnesses had been redacted. The court, Clinton Canady, III, J., granted ESPN's motion to disclose the names of the suspects, but denied its motion to disclose the names and identifying information of the witnesses and victims. MSU appealed, arguing that the names of the suspects were protected under the privacy exemption in MCL 15.243(1)(a).

The Court of Appeals *held*:

The trial court did not err by ruling that the names of the suspects identified in the incident reports were not exempt from disclosure under FOIA. Under MCL 15.243(1)(a), a public body may exempt from FOIA's general disclosure requirement information that is of a personal nature if the disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy. Although having one's name linked with a criminal incident is information of a personal nature, the disclosure of the names of the student athletes who were identified as suspects in the reports was not a clearly unwarranted invasion of their privacy because it served the public understanding of the operation of MSU's police department and was necessary for ESPN's investigation into whether MSU's policing standards were consistent and uniform. Under the circumstances, the public's interest in government accountability prevailed over the student athletes' expectation of privacy.

Affirmed.

Honigman Miller Schwartz and Cohn LLP (by *James E. Stewart*, *Eric J. Eggan*, and *Mitra Jafary-Hariri*) for ESPN, Inc.

Theresa Kelley for Michigan State University.

Before: SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ.

Per CURIAM. In this dispute over the application of the privacy exemption to Michigan's Freedom of Information Act (FOIA), see MCL 15.231 *et seq*., defendant, Michigan State University (the University), appeals by right the trial court's order requiring it to reveal the redacted names of student-athletes who were listed as suspects in incident reports requested by plaintiff, ESPN, Inc. Under the circumstances of this case, we conclude that the trial court did not err when it determined that the exemption did not apply. Accordingly, we affirm.

I. BASIC FACTS

In September 2014, ESPN submitted a request under FOIA to the University asking it to provide ESPN with incident reports involving a list of student-athletes over a specific period of time. The University produced two sets of records, but redacted the names and identifying information of the suspects, victims, and witnesses. As authority for its decision to redact the names and identifying information, the University cited the privacy exemptions set forth in MCL 15.243(1)(a) and MCL 15.243(1)(b)(*iii*) of FOIA.

In February 2015, ESPN sued the University to obtain the records with the names of the suspects, victims, and witnesses. After holding a hearing, the trial court ordered the University to disclose the names of the suspects if they were one of the 301 student-athletes identified by ESPN in its request. The Court, however, agreed that the privacy exemption applied to the names and identifying information of the victims

and witnesses, even if the victims or witnesses were one of the student-athletes identified in the request.[1]

The University then appealed in this Court.

II. THE PRIVACY EXEMPTION

A. STANDARD OF REVIEW

The University argues that the trial court erred when it determined that the names of the suspects identified in the incident reports were not exempt from disclosure under FOIA. This Court reviews de novo whether the trial court properly interpreted and applied FOIA. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). This Court reviews the trial court's factual findings for clear error, but reviews its discretionary determinations—such as its application of the balancing test under FOIA—for an abuse of discretion. *Id*. at 472. A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*.

B. ANALYSIS

The Legislature determined that a public body "may exempt" from FOIA's general disclosure requirement information that is "of a personal nature" if the disclosure of the personal information would "constitute a clearly unwarranted invasion of an individual's privacy." MCL 15.243(1)(a).[2] The test for applicability of the exemption has two prongs, which both must be

[1] ESPN has not challenged the trial court's determination that the privacy exemption applies to the names and identifying information of the victims and witnesses.

[2] On appeal, the parties confine their discussion to whether the trial court properly applied the privacy exemption stated under MCL 15.243(1)(a). We shall similarly limit our analysis to that exemption.

satisfied in order for the exemption to apply: "First, the information must be 'of a personal nature.' Second, it must be the case that the public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy.' " *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008).

The first prong of the privacy exemption will be satisfied if the information contains " 'intimate' or 'embarrassing' details of an individual" because these are of a personal nature. *Mich Federation of Teachers*, 481 Mich at 675. Further, records containing "private or confidential information relating to a person, in addition to embarrassing or intimate details, is 'information of a personal nature.' " *Id*. at 676.

In *Rataj v Romulus*, 306 Mich App 735, 753; 858 NW2d 116 (2014), this Court stated that a person's name—standing alone—is not information of a personal nature and, on that basis, determined that the privacy exemption did not apply to the names that had been redacted from an incident report. The Court in *Rataj* cited three decisions for this general proposition, but did not analyze those authorities; instead, it merely concluded that the names were not information of a personal nature. *Id*. Moreover, to the extent that the decision in *Rataj* can be understood to stand for the proposition that a name can never constitute information of a personal nature, that conclusion appears to conflict with this Court's earlier decision in *State News v Mich State Univ*, 274 Mich App 558, 578; 735 NW2d 649 (2007) (holding that "people linked with a crime, whether as a perpetrator, witness, or victim, have an interest in not sharing this information with the public"), rev'd in part on other grounds 481 Mich 692 (2008), and is inconsistent with our Supreme Court's

application of the first prong for determining whether the privacy exemption applies.

It is accurate to state that a person's name does not by itself provide information of a personal nature; but this is true only to the extent that the name is not associated with any personal information about the person named. In order for a name to be useful, the name must normally be associated with some other information. In the context of a police report, a person's name is useful because the report will contain information about the person's actual or purported involvement in the incident. That is, the report will associate the name with specific facts or allegations that may or may not be information of a personal nature. And, in analyzing the first prong of the test for the privacy exemption, our Supreme Court has recognized that the relevant inquiry is whether the information associated with the name is information of a personal nature.

In *Mager v Dep't of State Police*, 460 Mich 134, 135; 595 NW2d 142 (1999), the plaintiff requested that the Michigan State Police provide him with a list of the names and addresses of the persons who owned registered handguns. In determining whether the request was exempt from disclosure under the first prong of the test, the Court did not examine whether the disclosure of names alone constituted information of a personal nature; instead, it stated that the relevant inquiry was whether associating those names with "the fact of gun ownership is 'information of a personal nature.' " *Id*. at 143. The Court then held that gun ownership constituted information of a personal nature: "A citizen's decision to purchase and maintain firearms is a personal decision of considerable importance. We have no doubt that gun ownership is an intimate or, for some persons, potentially embarrassing detail of one's per-

sonal life." *Id*. at 143-144. Similar to the analysis in *Mager*, when examining whether the disclosure of a name amounts to information of a personal nature, Michigan courts have consistently framed the inquiry as one involving the information associated with the person named. See, e.g., *Mich Fed of Teachers*, 481 Mich at 676 (holding that the names of employees along with their addresses and telephone numbers were information of a personal nature); *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 455, 461; 789 NW2d 178 (2010) (stating that the relevant inquiry was whether the voter's name coupled with his or her party preference amounted to information of a personal nature and concluding that party preference is not such information); *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 282; 713 NW2d 28 (2005) (framing the issue as whether the names of pensioners with the amounts of their pensions constitutes information of a personal nature).

In order to protect the privacy of the person named in a report, a public body might redact the information of a personal nature associated with the named person or, as was the case here, might redact the name of the person involved, but leave the information unredacted. Thus, the issue here is not whether the names of the suspects in the reports amount to information of a personal nature, but whether the revelation of the names when coupled with the information in the reports constitutes information of a personal nature and, if so, whether the method for protecting the private information was minimally sufficient to avoid an unwarranted invasion of privacy.

As this Court has explained, just being linked with a criminal incident is information of a personal nature: "[P]eople linked with a crime, whether as a perpetra-

tor, witness, or victim, have an interest in not sharing this information with the public." *State News*, 274 Mich App at 578. Having one's name appear in a report of a criminal investigation—even in the absence of specific details—necessarily links the person named to the criminal investigation. Even if being identified in a report of a criminal investigation were not by itself information of a personal nature, such a report may include private or confidential details about the persons named in the report. A report of an investigation involving allegations of sexual assault may, by way of example, include intimate details of the suspect's sex life. For that reason, it may sometimes be necessary to examine the facts and allegations associated with the person named in the report to determine whether the disclosure of the person's name amounts to information of a personal nature. See *id*. at 580-582 (stating that the report at issue in that case had to be examined individually to separate the exempt information from the nonexempt information). Nevertheless, in this case, it is unnecessary to examine individually each report to ascertain whether the report includes information of a personal nature about the student-athletes who were identified as suspects. Even if the reports reveal such information, the trial court did not err when it determined that the disclosure of the information did not constitute a clearly unwarranted invasion of an individual's privacy under the second prong of the test. See *Mich Federation of Teachers*, 481 Mich at 675.[3]

The second prong asks "whether disclosure of the information at issue would constitute a clearly unwar-

[3] For this reason, we decline to address the University's argument that the trial court should have reviewed the unredacted reports in camera to ascertain whether there was information of a personal nature.

ranted invasion of an individual's privacy." *Id*. at 682. In making this determination, courts " 'must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect.' " *Mager*, 460 Mich at 145, quoting *US Dep't of Defense v Fed Labor Relations Auth*, 510 US 487, 495; 114 S Ct 1006; 127 L Ed 2d 325 (1994) (interpreting the federal FOIA). " '[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of *the operations or activities of the government*.' " *Mager*, 460 Mich at 145, quoting *Fed Labor Relations Auth*, 510 US at 495 (emphasis in original). Requests for information on private citizens accumulated in government files that reveal little to nothing about the inner working of government will fail this balancing test. *Id*. at 145-146, citing *Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989).

The disclosure of the names of the student-athletes who were identified as suspects in the reports serves the public understanding of the operation of the University's police department. ESPN seeks the information to learn whether policing standards are consistent and uniform at a public institution of higher learning. The disclosure of the names is necessary to this purpose. In order to determine whether the student-athletes were treated differently from the general student population or from each other on the basis of the student-athlete's participation in a particular sport or the renown of the student-athlete, it is necessary to know the student-athlete's name and the nature of the allegations involved in the investigation. Only then can ESPN compare and contrast the information

within the requested reports to both other incident reports and other cases disclosed via news media. Further, ESPN requires the student-athletes' names in order to facilitate further investigation into whether other governmental agencies agreed with the University's handling of a particular student-athlete's case. Consequently, even if revealing the names of the student-athletes in the context of the reports amounts to the revelation of information of a personal nature, that revelation is not unwarranted. MCL 15.243(1)(a). Under the circumstances, the public's interest in government accountability must prevail "over an individual's, or a group of individuals', expectation of privacy." *Practical Political Consulting*, 287 Mich App at 464.

III. CONCLUSION

On this record, we cannot conclude that the trial court abused its discretion when it balanced the public's interest in understanding how the University's police department handles criminal investigations involving student-athletes against the student-athletes' privacy interests and determined that the balance favored disclosure. *Herald Co*, 475 Mich at 472. The trial court did not err when it ordered the University to disclose the names of the student-athletes at issue.

Affirmed.

SAWYER, P.J., and M. J. KELLY and SHAPIRO, JJ., concurred.