MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN
COURT OF APPEALS

FROM

April 30, 2019 through June 20, 2019

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOLUME 328

FIRST EDITION

2021

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

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PEOPLE v BENSCH

Docket No. 341585. Submitted September 5, 2018, at Detroit. Decided April 30, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 859 (2019).

Joseph R. Bensch pleaded guilty to operating a vehicle while intoxicated, second offense, MCL 257.625(1), in the 2A District Court. Defendant's criminal convictions arose out of two separate drunk-driving incidents over the course of approximately five months, each of which resulted in its own district court case. In both cases, defendant pleaded guilty to operating while intoxicated, second offense, and defendant was sentenced for the offenses on the same day. The district court, Laura J. Schaedler, J., sentenced defendant to one year in the county jail in one of the cases and to two years of probation with numerous conditions in the other case. Immediately after the district court ruled, defense counsel objected to the probationary sentence, arguing that defendant could reject probation in favor of incarceration. The district court denied the objection, and defendant appealed by leave granted in the Lenawee Circuit Court. The circuit court, Margaret M. S. Noe, J., reversed and remanded, holding that the district court erred by barring defendant from rejecting probation in favor of incarceration. The prosecution sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

Under MCL 771.1(1), if a court determines that a convicted defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer. The Legislature has long described a trial court's decision to grant probation as "a matter of grace," and *People v Peterson*, 62 Mich App 258 (1975), articulated the rule that a defendant may reject probation. In subsequent cases, the underlying premise that a defendant consents to probation (and may choose to reject it) informed the reasoning that warrantless-search conditions of probation were constitutional because the defendant—by accepting probation—agreed to waive the consti-

tutional right to be free from unreasonable searches and seizures. Accordingly, the rule that a defendant may reject probation was a longstanding rule of law, and no compelling reason existed to abandon that rule. Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed. Factors to consider in determining whether to overrule a decision include whether the decision at issue defies practical workability, whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. In this case, the prosecution did not present compelling reasons to depart from the longstanding interpretation of MCL 771.1 announced in *Peterson*: the prosecution did not identify any difficulties that have occurred as a result of defendants being able to refuse probation, and the prosecution's argument that *Peterson* has become an outdated nullity was not persuasive because while some out-of-state jurisdictions do not allow a defendant to refuse probation, numerous other jurisdictions agree that defendants should have the choice to reject probation. Additionally, there was no conflict between the general rule that probation may be declined and a rule that even when a defendant "accepts" probation, he or she may still be granted a right by statute to decline a specific provision of that probation. Accordingly, the rule announced in *Peterson* that a defendant may decline a sentence of probation and instead seek a sentence of incarceration was affirmed.

Affirmed and remanded for resentencing.

TUKEL, P.J., dissenting, would have held that *Peterson* was incorrectly decided and that the majority's justifications for adhering to it were inadequate. The underlying rationale for the *Peterson* Court's decision was unclear; *Peterson* provided no analysis beyond the one sentence stating that "[p]robation is a matter of grace and rejectable, we think, at the option of the probationer," and that sentence appeared to be a mere supposition ("we think") unsupported by any authority. Additionally, no other cases stating that a defendant may veto probation contained any discussion of the source or rationale of that rule. The plain language of MCL 771.1 states that *the court* may place the defendant on probation; MCL 771.1 contains no language providing that a defendant must consent to, and therefore may veto, such a sentence. By ratifying the principle that a defendant may overrule a sentencing court's determination of what "the public good" requires in regard to the imposition of proba-

tion, the majority transferred one aspect of sentencing from courts, where the Legislature has reposed sentencing authority, to criminal defendants. Moreover, reliance on MCL 771.4, the statutory provision containing the "matter of grace" language, to support the validity of the *Peterson* rule was misplaced. In its proper context, the "matter of grace" language means that a defendant has no right to demand whatever is at issue, which in the case of MCL 771.4 is the continuation of probation, and thus the decision whether to terminate probation is committed solely to the discretion of the trial court. A defendant has no involvement in the decision whether to impose probation because (1) a defendant has no right to such a sentence and therefore cannot expect it, demand it, or approve or disapprove it, and (2) the decision to impose a sentence of probation resides solely with the trial court. The "matter of grace" language is merely another way of saying that the granting of probation is a purely discretionary decision by the trial court. Judge TUKEL therefore would have held that the rule announced in *Peterson* necessarily impinges on a judge's range of options and, by affording to a defendant a say in the decision to impose probation, mandates that the ultimate decision involves considerations other than those of the judge, as well as approval by someone other than the judge, which contravenes the long-settled principle that the decision whether to impose probation is committed to the trial court. Moreover, there could not have been any reliance interest by defendant in committing his second drunk-driving offense such that he would have had an expectation that he could reject probation; and even if defendant had had such a reliance interest, it was one that was illegitimate, given his violation of the criminal law, and thus should not be further endorsed by the judiciary. Accordingly, Judge TUKEL would have overruled *Peterson* to the extent that it permits a defendant to veto a sentencing court's decision to impose a term of probation.

CRIMINAL LAW — SENTENCING — PROBATION — DEFENDANT MAY DECLINE PROBATION AND INSTEAD SEEK INCARCERATION.

Under MCL 771.1(1), if a court determines that a convicted defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer; when a court imposes a sentence of probation, a defendant may decline the sentence of probation and instead seek a sentence of incarceration.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *David Porter*, Assistant Attorney General, for the people.

State Appellate Defender (by *Michael Dagher-Margosian*) for defendant.

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. The prosecution appeals by leave granted[1] the circuit court's ruling that defendant could decline probation and instead be sentenced to incarceration. The prosecution requests that we reject the rule first articulated in *People v Peterson*, 62 Mich App 258, 265; 233 NW2d 250 (1975), that permits criminal defendants to refuse probation. In the absence of a compelling reason to do so, we decline to overrule a longstanding rule of law that has been repeatedly relied on by this Court. Accordingly, we reaffirm *Peterson* and affirm the circuit court.[2]

I. BACKGROUND

Defendant's criminal convictions arose out of two separate drunk-driving incidents over the course of approximately five months, each of which resulted in its own district court case. In both cases, defendant reached a plea agreement whereby he pleaded guilty to operating while intoxicated, second offense, MCL 257.625(1). Defendant was sentenced for the offenses on the same day. The sentences imposed run concur-

[1] *People v Bensch*, unpublished order of the Court of Appeals, entered May 18, 2018 (Docket No. 341585).

[2] We review de novo questions of law. *People v Steele*, 283 Mich App 472, 482; 769 NW2d 256 (2009).

rently.[3] In one of the cases, the district court sentenced defendant to one year in the county jail.[4] In the other case, the district court sentenced defendant to two years of probation with numerous conditions. Immediately after the district court ruled, defense counsel objected to the probationary sentence, arguing that "if Mr. Bensch doesn't wan[t] [to] be on probation . . . , I don't think the Court can put him . . . there." The district court denied the objection.

Defendant appealed by leave granted in the circuit court, arguing that he could reject probation in favor of incarceration under *Peterson*, 62 Mich App at 265. Defendant contended that the district court erred by forcing him to accept a probationary sentence in the second case, thereby disregarding *Peterson*, which was controlling under the doctrine of stare decisis. The prosecutor, on the other hand, acknowledged that *Peterson* was binding on lower courts but attempted to factually distinguish it. The prosecutor also offered several policy arguments for why defendants should not be permitted to reject probation. After considering the issue, the circuit court held that the district court had erred by barring defendant from "waiv[ing] his privileges to probation . . . ." Thus, the circuit court reversed and remanded for resentencing.

II. DISCUSSION

If a court determines that a convicted defendant "is not likely again to engage in an offensive or criminal

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[3] In Michigan, "concurrent sentencing is the norm. A consecutive sentence may be imposed only if specifically authorized by statute." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996) (citation omitted).

[4] Defendant was to be released, after serving six months, into a six-month inpatient treatment program.

course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer."[5] MCL 771.1(1). The Legislature has long described a trial court's decision to grant probation as "a matter of grace." See *People v Sattler*, 20 Mich App 665, 669; 174 NW2d 605 (1969).

In *Peterson*, the defendant challenged the probation condition requiring her to submit to warrantless searches, i.e., searches that but for her probationary status would have been unconstitutional. *Peterson*, 62 Mich App at 265. This Court acknowledged that the defendant chose to accept the terms of probation: "Probation is a matter of grace and rejectable, we think, at the option of the probationer." *Id*. The Court nevertheless struck down the condition, determining that despite the ability to reject probation, "the waiver of protection against unreasonable searches and seizures is so repugnant to the whole spirit of the Bill of Rights as to make it alien to the essence of our form of government." *Id*. at 266. The Court concluded that a "blanket search and seizure" provision amounts to a bill of attainder for the period of probation. *Id*. at 265.

Judge DANHOF dissented from this holding. His opinion, which was later adopted by this Court, argued that by accepting a sentence of probation carrying such a condition, the defendant voluntarily waived her Fourth Amendment rights. *Id*. at 270-272 (DANHOF, P.J., concurring in part and dissenting in part). In defining this approach, Judge DANHOF agreed with the majority that "probation is 'rejectable'; that is, optional and essentially voluntary." *Id*. at 271. He explained, "A proba-

[5] That statutory section was identical in all relevant respects at the time *Peterson* was decided. MCL 771.1, as amended by 1961 PA 185.

tioner or parolee has given his consent in return for more lenient treatment." *Id*. Thus, while the *Peterson* majority and dissent disagreed on whether a defendant could waive the constitutional right to be free from unreasonable searches, they agreed that a defendant could decline probation.

If *Peterson* were the end of the story, we might be willing to address the question as essentially a matter of first impression.[6] However, the rule that defendants may reject probation has been accepted and relied on in subsequent cases in which a defendant agreed to probation but objected to a particular condition.[7]

Not long after *Peterson*, the issue of warrantless probation searches arose again in *People v Richards*, 76 Mich App 695, 699; 256 NW2d 793 (1977). Adopting Judge DANHOF's analysis, we found that there was no "constitutional barrier" to a warrantless-search condition of probation because the defendant had waived objection to this condition by accepting probation.

[6] We note that we are not bound by any rules of law announced in *Peterson* because that case was decided before November 1, 1990. See MCR 7.215(J)(1). However, while we are not "strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990," those opinions are nonetheless "considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018) (emphasis omitted). Further, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2).

[7] The dissent argues that a defendant should not be permitted to decline probation, a rule it unilaterally characterizes as the "probation veto doctrine." While a memorable turn of phrase, this characterization is incomplete because it suggests that a defendant's "veto" of probation leaves him or her unpunished. To the contrary, the very rare defendant who elects not to accept probation will be incarcerated. Similarly, we reject as hyperbole the prosecution's claim that the *Peterson* rule allows a defendant to "dictate the terms of his own punishment." The rule does not allow a defendant to refuse a sentence of incarceration and select probation or to choose his or her minimum and maximum terms.

Similarly, in *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990),[8] we rejected a Fourth Amendment challenge to a warrantless-search probation condition:

> [A] waiver of one's constitutional protections against unreasonable searches and seizures may properly be made a condition of a probation order where the waiver is reasonably tailored to a defendant's rehabilitation. As Judge DANHOF recognized in his dissent in *Peterson*, "[a] probationer or parolee has given his consent in return for more lenient treatment." [Citations omitted.]

In other words, we again reasoned that the warrantless-search condition of probation was constitutional because the defendant—by accepting probation—agreed to waive the constitutional right to be free from unreasonable searches and seizures.[9] Waiver is an *intentional* relinquishment of a known right. *People v Kammeraad*, 307 Mich App 98, 117; 858 NW2d 490 (2014). Thus, the underlying premise to *Hellenthal* is that a defendant consents to probation and can choose to reject it.

We again employed this analysis in *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995), in which the defendant argued that a fine imposed by the trial court as a condition of probation was unauthorized. We held that the fine was authorized, but we also reasoned that

> had defendant found the term of probation to be overly onerous, he could have declined the grant of probation,

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[8] *Hellenthal* is not binding on us because it was decided in August 1990. MCR 7.215(J)(1).

[9] We note that the United States Supreme Court has since declined to rule on whether a probationer's consent to warrantless searches is dispositive of Fourth Amendment issues. *United States v Knights*, 534 US 112, 118; 122 S Ct 587; 151 L Ed 2d 497 (2001).

> notified the court that he would not abide by the terms of probation, and submitted himself for sentencing directly under the retail fraud statute, with its limitation on the amount of fine that may be imposed. [*Id*.]

Unpublished decisions of this Court have also relied on the fact that a defendant agrees to probation in resolving challenges to orders of probation.[10] These decisions are not binding precedent, MCR 7.215(C)(1), but it is clear that the rule that a defendant can elect to reject probation has been used by this Court (and others[11]) to dispose of arguments made by defendants challenging the terms of their probation. Under these circumstances, we decline to simply abandon that rule without a compelling reason to do so.[12]

"[U]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017) (quotation

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[10] *People v Loughner*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 1997 (Docket No. 190286); *People v Jan*, unpublished memorandum opinion of the Court of Appeals, issued January 13, 1998 (Docket No. 196492).

[11] See *Brennan v Dawson*, opinion of the United States District Court for the Eastern District of Michigan, issued September 7, 2017 (Case No. 16-10119).

[12] The dissent notes the published decisions relying on *Peterson* but dismisses them because they "contain no discussion of the source of the doctrine" other than two cases that relied on Judge DANHOF's partial dissent, which, according to the dissent, was "deficient." Setting aside the strength of *Peterson*'s legal analysis, the dissent ignores that this Court has relied on the case to resolve challenges to conditions of probation by reasoning that the defendant *chose* probation and therefore cannot complain of its conditions. Notably, the dissent fails to address the viability of these decisions if we eliminate the rationale on which they rest. Further, we cannot simply reject the *Peterson* rationale when a defendant relies on it and accept it when the prosecution relies on it.

marks and citation omitted). "The application of stare decisis is generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014) (quotation marks and citation omitted). Factors to consider in determining whether to overrule a decision include "whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id*. at 250-251 (quotation marks and citation omitted).

The prosecution does not identify any difficulties that have occurred as a result of defendants being able to refuse probation. Indeed, as a practical matter, we think it is safe to say that the overwhelming majority of criminal defendants gladly welcome probation over incarceration and that the issue rarely arises. Further, it is questionable whether a trial court can find that a defendant who does not want to participate in probation "is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law . . . ." MCL 771.1(1). Nevertheless, the prosecution argues that *Peterson* "is no longer good law" because the three possible rationales for that decision have been repudiated. We disagree.

The prosecution first argues that the "probation-as-contract theory," in which the court and the probationer are thought to have arrived at an arm's-length bargain, has been rejected. Yet *Peterson* does not describe probation in contractual terms, and therefore

this purported development in the law does not provide a basis to depart from that decision. Second, the prosecution argues that *Peterson* and its progeny rest on an outdated view of probation as being an "act of grace" and that we should reject that view. However, this argument runs afoul of the plain language of MCL 771.4, which provides that "[i]t is the intent of the legislature that the granting of probation is a matter of grace . . . ."[13] Third, the prosecution argues that probation is no longer considered a rehabilitative alternative to incarceration and is instead considered solely as a criminal punishment with the corresponding goals of retribution and deterrence. We disagree with this premise, but even accepting it as true, we fail to see how this warrants a change in longstanding law. If a defendant declines probation, the goals of the criminal justice system can still be accomplished through incarceration.

The prosecution also contends that caselaw from other jurisdictions supports overruling *Peterson*. However, our review of that caselaw shows that states take a variety of approaches toward this issue. Some states allow a defendant to refuse probation. See, e.g., *People v Olguin*, 45 Cal 4th 375, 379; 198 P3d 1 (2008); *State v Divan*, 724 NW2d 865, 872; 2006 SD 105 (2006); *State v McCready*, 234 Wis 2d 110, 114; 2000 WI App 68; 608 NW2d 762 (2000). Other states do not. See, e.g., *State v Pawling*, 9 Neb App 824, 831; 621 NW2d 821 (2000); *State v Walton*, 137 Ohio App 3d 450, 457; 738 NE2d

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[13] The prosecution also argues that the United States Supreme Court rejected the notion that probation is an act of grace in *Gagnon v Scarpelli*, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973). We disagree. *Gagnon* did not reject the view that probation is a matter of grace; it only rejected the argument that because probation is an act of grace, the defendant is not entitled to any due process when the prosecution seeks probation revocation. *Id*. at 782 n 4.

1258 (2000); *State v Estep*, 854 SW2d 124, 127 (Tenn Crim App, 1992). At least one jurisdiction expressly provides by statute that "[a] person may not be put on probation without his consent," DC Code 16-710(a), while other jurisdictions have statutes that expressly provide that a defendant does not have the right to reject probation, Ala Code § 15-22-50; Or Rev Stat 137.010(5). Given that overview, we do not agree with the prosecution that *Peterson* has become an outdated nullity. To the contrary, numerous states agree that defendants should have the choice to participate in probation. For those reasons, we are not persuaded to overrule *Peterson* on the basis of out-of-state authority.

MCL 771.1, the statute allowing a trial court to impose probation, has remained essentially the same since *Peterson* was decided. However, the prosecution contends that there are two probation programs in the Code of Criminal Procedure (the Code), MCL 760.1 *et seq*., that explicitly require a defendant's permission. From this, the prosecution argues that when the Legislature wants to allow a defendant to refuse a sanction, it knows how to explicitly do so.

The first probation program that the prosecution relies on took effect in 2013 as the "probation swift and sure sanctions act," Chapter XIA of the Code. 2012 PA 616. In 2017, the Legislature amended that chapter to include a subparagraph, which, according to the prosecution, provides that a defendant may decline to participate in this program. See MCL 771A.4(4)(a), as added by 2017 PA 17. The prosecution is mistaken. The statute contains no specific provision that allows a defendant to decline the program. Rather, MCL 771A.4(4)(a) merely provides that if the jurisdiction in which the defendant has been convicted does not have a swift-and-sure probation program and the court

wishes to place the defendant in such a program operating in a different county, then the defendant must agree to the change of jurisdiction to another county.

The other probation program to which the prosecution refers us is the "special alternative incarceration program," MCL 771.3b, which was added to the probation chapter (Chapter XI) of the Code in 1988. 1988 PA 286. Relevant to this appeal, that statutory section provides that "[a] person shall not be placed in a program of special alternative incarceration unless the person consents to the placement." MCL 771.3b(6). This provision is also inapposite. Special alternative incarceration can only be imposed as a *condition* of probation, and the statute permits a defendant to object to that condition even if he otherwise "accepts" probation. See MCL 771.3b(1) (providing that a special alternative incarceration program may be imposed "[i]n addition to any other terms or conditions of probation provided for under this chapter"). We do not see a conflict between the general rule that probation may be declined and a rule that even when a defendant "accepts" probation, he or she may still be granted a right by statute to decline a specific provision of that probation.

In sum, we conclude that the arguments made by the prosecution are not compelling reasons to depart from the longstanding interpretation of MCL 771.1 announced in *Peterson*. We therefore reaffirm the rule that a defendant may decline a sentence of probation and instead seek a sentence of incarceration.

Affirmed and remanded to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

BECKERING, J., concurred with SHAPIRO, J.

TUKEL, P.J. (*dissenting*). Is there any circumstance under which a criminal defendant may veto a sentence that the trial judge intends to impose and demand a sentence more to the defendant's liking? Reading the Michigan Constitution and statutes, one would certainly think not. "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. "The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary." *Id*. at 436-437, citing MCL 769.1(1). The majority, however, reaffirms the rule first enunciated in *People v Peterson*, 62 Mich App 258, 265; 233 NW2d 250 (1975), that "[p]robation is a matter of grace and rejectable, we think, at the option of the probationer." Because I believe that *Peterson* was incorrectly decided and that the justifications given by the majority for adhering to it are inadequate, I respectfully dissent.

I. AUTHORITY TO IMPOSE A SENTENCE OF PROBATION

A. THIS COURT'S DECISION IN *PETERSON*

The precise question presented here is whether a defendant who the trial court determines should be sentenced to probation can "veto" the imposition of probation and instead opt for a custodial sentence.[1]

[1] There does not seem to be a name for the doctrine at issue. For ease of reference, this dissent refers to the proposition that a criminal defendant has the authority to reject a probationary sentence that the trial court intends to impose as the "probation-veto doctrine" or "veto doctrine." The majority's claim that this terminology is somehow "incomplete" because it supposedly suggests that a defendant can opt

Such was the holding in *Peterson*, but the underlying rationale for the decision is at best unclear; the Court provided no analysis beyond the quoted sentence, and that sentence appeared to be a mere supposition ("we think"), unsupported by any authority.[2]

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out of *all* punishment is simply not correct, as this dissent's framing of the issue makes clear. Instead, this doctrine means what it says: a defendant can unilaterally veto or decline *probation*. Neither this phrase nor this opinion suggests that such a defendant could decline *other* forms of punishment, and in fact the entire point of the case is that it permits a defendant to choose another form of punishment in lieu of probation.

While a defendant's choice to elect imprisonment over probation might seem counterintuitive, the interplay of Michigan law and the facts of a particular case could make it quite rational from a defendant's perspective. In Michigan, as the majority notes, "concurrent sentencing is the norm," and "[a] consecutive sentence may be imposed only if specifically authorized by statute." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Thus, for example, if a defendant was being sentenced on two convictions, and if the maximum possible imprisonment for each was one year, such a defendant may opt for two concurrent terms of imprisonment, assuming no concurrent-sentencing exception existed, instead of one term of imprisonment and one lengthier term of probation. In the concurrent-sentencing scenario, the defendant would be "done" with his or her punishment at the end of one year at the latest; in the other scenario, the defendant may have served a year in jail but still might be subject, for many years afterward, to terms of probation perceived to be onerous. Thus, the punishment in the latter scenario would be more severe to that defendant because the normal benefit of probation, avoiding jail time, would not be realized. Indeed, the statute at issue here authorizes consecutive sentencing for a second-offense drunk-driving conviction, as in this case, and in fact requires that at least some of the imposed sentence be served consecutively. See MCL 257.625(9)(b)(i) (authorizing "[i]mprisonment for not less than 5 days or more than 1 year," and "[n]ot less than 48 hours of the term of imprisonment imposed . . . must be served consecutively").

[2] The partial dissent in *Peterson* also said: "As recognized by the majority, probation is 'rejectable'; that is, optional and essentially voluntary . . . . A probationer or parolee has given his consent in return for more lenient treatment." *Peterson*, 62 Mich App at 271 (DANHOF, P.J., concurring in part and dissenting in part). Judge DANHOF provided no further authority for that view than did the *Peterson* majority, instead simply

Despite this lack of authority, the majority states that "[t]he prosecution does not identify any difficulties that have occurred as a result of defendants being able to refuse probation. Indeed, as a practical matter, we think it is safe to say that the overwhelming majority of criminal defendants gladly welcome probation over incarceration and that the issue rarely arises." While it is in fact likely that most defendants do prefer probation to a sentence of incarceration, whether the prosecution has identified problems that have arisen as a result of the veto doctrine is not relevant to whether it is a proper interpretation of the law. The correct resolution turns on legislative intent, which is itself based on statutory language that expresses the Legislature's policy determinations, and we do not consider or weigh those policy pronouncements. See *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature[.]").

In addition, the other cases from this Court stating that a defendant may veto probation, which the majority cites, also contain no discussion of the source of the doctrine, other than that two of them cited Judge DANHOF's partial dissent in *Peterson*, which itself was deficient for reasons already stated. See *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995) (stating in dictum and without citing any authority, "Indeed, had defendant found the term of probation to be overly onerous, he could have declined the grant of probation, notified the court that he would not abide by the terms of probation, and submitted himself for sentencing directly under the [statute of conviction]"); *People v Hellenthal*, 186

assuming that a defendant had given consent and that by withholding consent, a defendant could veto the term of probation.

Mich App 484, 486; 465 NW2d 329 (1990) (quoting the partial dissent in *Peterson*); *People v Richards*, 76 Mich App 695, 699; 256 NW2d 793 (1977) (adopting without discussion Judge DANHOF's view in *Peterson*).[3]

B. STATUTORY AUTHORITY REGARDING PROBATION

However, the availability of probation as a sentencing option for a particular offense is purely a legislative determination. As our Supreme Court has noted, "[T]he source of the trial court's probation authority [is] the Legislature." *People v McLeod*, 407 Mich 632, 660; 288 NW2d 909 (1980) (opinion by RYAN, J.), citing *People v Davis*, 392 Mich 221, 226; 220 NW2d 452 (1974); see also *People v Marks*, 340 Mich 495, 498; 65 NW2d 698 (1954) (stating that "[t]he authority of the court" to impose a probationary sentence "must be found in the statute"). And it has long been clear in Michigan that the decision to impose a sentence of probation "rests in the sound discretion of the trial court." *McLeod*, 407 Mich at 660 (opinion by RYAN, J.); see also *Marks*, 340 Mich at 499. It is, of course, a familiar tenet of statutory construction that we are to effectuate the intent of the Legislature as set forth in the statutory language used. See, e.g., *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018). "In doing so, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, . . . the statute must be enforced as

[3] In note 12 of its opinion, the majority states that "the dissent ignores that this Court has relied on the case to resolve challenges to conditions of probation by reasoning that the defendant *chose* probation and therefore cannot complain of its conditions." However, the majority's point is circular—reliance on a defendant's *choice* of probation is only material if a defendant has a right to such a choice. That is the question presented here, so its correctness cannot simply be assumed.

written. No further judicial construction is required or permitted." *Id*. (quotation marks and citations omitted).

1. MCL 771.1—VESTING POWER WITH "THE COURT"

The relevant statutory language is provided by MCL 771.1(1) and states:

> In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

It is thus readily apparent that by its plain terms, MCL 771.1(1) places the decision of whether to impose a term of probation on the sentencing court, without reserving to a defendant any option of vetoing such a sentence. That section provides that, except in regard to certain offenses that the Legislature has determined are ineligible for probation, and so long as other conditions are met, "*the court* may place the defendant on probation[.]" (Emphasis added.)

As MCL 771.1(1) is the basis of a court's authority to impose probation, it is noteworthy that the statute contains no language providing that a defendant must consent to, and therefore may veto, such a sentence. Nor do any of the other statutory provisions dealing with the authority to impose a term of probation contain such consent or veto provisions. See, e.g., MCL 771.2(5) ("The court shall, by order to be entered in the

case as the court directs by general rule or in each case, fix and determine the period and conditions of probation."); MCL 771.2a(1) to (3) (providing that "the court" may impose a term of probation of up to 5 years for various offenses); MCL 771.3(2) (providing for terms that "the court may require the probationer to do" as conditions of probation). That is, of course, in accordance with the normal and expected functioning of the criminal justice system, under which "[a] judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law." MCL 769.1(1). By ratifying the principle that a defendant may overrule a sentencing court's determination of what "the public good" requires in regard to the imposition of probation, MCL 771.1(1), the majority transfers one aspect of sentencing from courts, where the Legislature has reposed sentencing authority, to criminal defendants. As an abstract principle, it is highly dubious that the Legislature intended to cede the determination of what constitutes "the public good" for sentencing purposes to the defendant who was convicted of a particular offense. That premise is confirmed by the express language of the statute, which makes clear that the Legislature did not do so, given that it enacted language providing that if "the court" makes a particular determination about the public good, then "the court" may impose a term of probation.

2. MCL 771.4—"MATTER OF GRACE"

The provision on which the majority expressly relies is MCL 771.4. That section provides, in relevant part:

> It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to

> its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation.

Peterson did not cite MCL 771.4 but referred to probation being "a matter of grace," so it may well have had the section in mind. In any event, reliance on MCL 771.4 to support the validity of the probation-veto doctrine is misplaced.

To begin with, the majority quotes only a portion of the statute, citing it for the proposition that "probation is a matter of grace." However, a proper reading of the statute shows that it is MCL 771.1 through MCL 771.3 that commit to "the court" the decision whether to sentence a defendant to probation. The statute then goes on to provide the circumstances under which a court that previously has sentenced a defendant to a term of probation may cancel or revoke that probation. MCL 771.4 addresses only that decision to cancel probation—not to grant it in the first instance—and thus has no applicability regarding whether a defendant may veto a sentencing court's initial decision to impose a term of probation.[4] Rather, MCL 771.4 provides that "the granting of probation is a matter of grace conferring no vested right to its continuance," such that, if the court determines either that the probationer is likely to again engage in criminal con-

[4] The structure of the statute supports this reading as well. The first three sections (MCL 771.1 through MCL 771.3) define the circumstances and procedure under which a court may impose probation, the first step in a sentencing determination leading to probation. MCL 771.4, the fourth section, then defines the circumstances under which a court may undo its previous actions. Thus, the structure of these sections corresponds chronologically to how a probationary sentence works in practice.

duct "or that the public good requires revocation of probation, the court may revoke probation." Thus, although MCL 771.4 does not address the initial decision to impose probation, in the situation to which it does apply—revocation—the "matter of grace" language actually means the opposite of what the majority says it means. In its proper context, the "matter of grace" language means that a defendant has no right to demand whatever is at issue, which in the case of MCL 771.4 is the continuation of probation, and thus the decision of whether to terminate probation is committed solely to the discretion of the trial court.

But even if the majority is correct that the initial decision of whether to impose probation is controlled by the "matter of grace" language of MCL 771.4, it would simply mean that defendant has no involvement in the decision of whether to impose probation. That is because (1) a defendant has no right to such a sentence and therefore cannot expect it, demand it, or approve or disapprove it; and (2) the decision to impose a sentence of probation resides solely with the trial court. In other words, the "matter of grace" language merely is another way of saying that the granting of probation is a purely *discretionary* decision by the trial court, albeit in more archaic language owing to its 1947 roots.

The phrase "a matter of grace" was first used in a probation statute in 1947 PA 246, Chapter XI, § 4, which provided, in relevant part:

> It is the intent of the legislature that the granting of probation to one convicted shall be a *matter of grace conferring no vested right to its continuance*, if, during the period of probation it shall appear to the satisfaction of the sentencing court that the probationer is likely again to engage in an offensive or criminal course of conduct, or that the public good requires revocation or termination of

> probation previously granted. *All* probation orders, therefore, shall be revocable or terminable in any manner which the court which imposed probation shall deem applicable, either for any violation, or attempted violation of any condition of probation, or for any other type of antisocial conduct or action on the part of the probationer . . . . [Emphasis added.]

As is the case with the current version of the statute, the "matter of grace" language related not to the initial decision to impose probation but rather to its revocation. But even beyond that, in 1947, when the "matter of grace" language was adopted, the term was understood generally to mean simply the opposite of being a matter of right. As noted, our job in construing a statute is to effectuate the intent of the Legislature as set forth in the statutory language used. In doing so, we must use the understanding of a term as it was known by the Legislature that enacted the statute. See *People v Bolling*, 140 Mich App 606, 611-612; 364 NW2d 759 (1985) (construing the word "timber" as it was understood by the Legislature in 1867, when the statute at issue was enacted). Moreover, even though the "matter of grace" language has been reenacted in subsequent legislation, it is nevertheless the language of the 1947 act that is controlling because "[t]he provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments." MCL 8.3u.

In 1947, when the "matter of grace" language was first adopted, our courts uniformly interpreted the phrase to mean that something was *not* a matter of right but rather of judicial discretion. See, e.g., *Worsham v McCall*, 259 Mich 630, 632; 244 NW 183 (1932) ("The remedy of specific performance is a matter

of grace rather than of right."); *Harmon v Muirhead*, 247 Mich 614, 615; 226 NW 713 (1929) ("Specific performance is a matter of grace, not of right."); *Stuart v Gonyea*, 246 Mich 109, 112; 224 NW 386 (1929) ("It is only a matter of grace and not a matter of right."); see also *Black's Law Dictionary* (3d ed) (defining "grace" as "commonly used in contradistinction to 'right' "). And that point accords exactly with what our Supreme Court has long held—as the majority notes—that the decision to impose a sentence of probation "rests in the sound discretion of the trial court." *McLeod*, 407 Mich at 660 (opinion by RYAN, J.); see also *Marks*, 340 Mich at 499. In other words, as used in the probation statute, the term "a matter of grace" in 1947 meant the same thing that "sound discretion of the trial court" means today.

Thus, the majority's position that a trial court's "discretion" nevertheless is dependent on a defendant's approval and therefore is subject to a defendant's veto is untenable; none of the cases from our Supreme Court so much as hints that a trial court's discretionary authority over the decision to impose probation is so limited. Indeed, if that were the case, the use of the term "discretion" to describe the trial court's authority would be self-contradictory, because such conditional discretion would not constitute discretion at all. See *Sparks v Sparks*, 440 Mich 141, 149 n 7; 485 NW2d 893 (1992), quoting *Langnes v Green*, 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931) (" 'The term "discretion" denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, *and directed by the reason and conscience of the judge to a just result*.' ") (ellipsis omitted; emphasis added).

The veto doctrine necessarily impinges on a judge's range of options and, by affording to a defendant a say in the decision to impose probation, mandates that the ultimate decision involves considerations other than those of the judge, as well as approval by someone other than the judge. Accordingly, the veto doctrine transforms a judge's "discretion" into something that falls well short of "the reason and conscience of the judge" leading "to a just result." *Langnes*, 282 US at 541. The veto doctrine therefore contravenes the long-settled principle that the decision whether to impose probation is committed to the trial court, whether one uses the modern term "discretion" or the more old-fashioned phrase "matter of grace" to describe that authority, because in this context the two terms mean the same thing.[5]

II. STARE DECISIS

The majority correctly notes that we are not required to follow *Peterson* because it was issued before November 1, 1990. MCR 7.215(J)(1). The majority, citing *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018), notes that such opinions are "nonetheless 'considered to be precedent and entitled to significantly greater deference than are unpublished cases.' " The majority also cites MCR

[5] On appeal, the prosecution argues three other reasons justifying the overruling of *Peterson*: (1) probation as contract theory is no longer viable, (2) probation as "a matter of grace" is based on an outmoded view, and (3) probation no longer is viewed as a tool of rehabilitation. However, in light of the authority to impose probation being purely legislative, any analysis of the validity of the probation-veto doctrine properly begins and ends with statutory construction; thus, a court properly ought not consider these policy concerns the prosecution raises. Moreover, in determining whether to adhere to the rule of *Peterson*, it makes no sense to rely on rationales not provided by *Peterson* itself.

7.215(C)(2) in pointing out that " '[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.' "

Stare decisis is generally " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Pohutski v City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002) (quotation marks and citation omitted). Before overruling a prior decision, a court must be convinced " 'not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.' " *Id*. (citation omitted).

At the same time, "stare decisis is a principle of policy, not an inexorable command." *Id*. at 694. As United States Supreme Court Justice Louis Brandeis put it, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406; 52 S Ct 443; 76 L Ed 815 (1932) (Brandeis, J., dissenting), majority opinion overruled in part on other grounds by *Helvering v Mountain Producers Corp*, 303 US 376, 378 (1938). Nevertheless, "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Robinson*, 462 Mich at 463. In *Robinson*, our Supreme Court set forth four factors that courts must consider before overruling a prior decision: (1) whether the earlier case was wrongly decided, (2) whether the decision defies "practical workability," (3) whether reliance interests would work an undue hardship, and (4) whether changes in the law

or facts no longer justify the questioned decision. *Id*. at 464.

In considering the reliance interest, courts consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*. at 466. However, our Supreme Court also has noted that

> it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id*. at 467-468; accord *Pohutski*, 465 Mich at 694-695.]

In the criminal-law context, reliance interests often will carry little weight in determining whether to overrule an incorrectly decided precedent. This is so because "to have reliance the knowledge must be of the

sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Robinson*, 462 Mich at 467. However, "[t]he nature of a criminal act defies any argument that offenders attempt to conform their crimes—which by definition violate societal and statutory norms—to a legal test established by [previous judicial decisions]." *People v Gardner*, 482 Mich 41, 62; 753 NW2d 78 (2008). Moreover, to the extent such earlier judicial decisions "implicate reliance interests, such interests weigh in favor of overruling them. Michigan citizens and prosecutors should be able to read the clear words of the statutes and 'expect that they will be carried out by all in society, including the courts.' " *Id*., quoting *Robinson*, 462 Mich at 467 (ellipsis omitted).

In sum, "no person could conceivably have relied on [the veto doctrine as enunciated in *Peterson*] to his or her detriment. That is, we cannot conceive that anyone has committed a [drunk-driving offense] on the basis that, under [*Peterson*], he or she could only be" sentenced to probation with his or her consent. *People v Ream*, 481 Mich 223, 240-241; 750 NW2d 536 (2008) (bracketed material added to correspond with the facts of this case).

In this case, it is clear that *Peterson* should be overruled. For the reasons already stated, the doctrine it enunciated is contrary to the clear statutory directive under which the Legislature has given the authority to the courts to impose a probationary sentence, and nowhere has it afforded a defendant the power to refuse such a sentence. Moreover, for the reasons stated by our Supreme Court in *Gardner* and *Ream*, there could not have been any reliance interest by defendant in committing his second drunk-driving offense, such that he would have had an expectation

that he could reject probation; and even if defendant had had such a reliance interest, it is one that is illegitimate given his violation of the criminal law, and thus it should not be further endorsed by the judiciary.

For these reasons, I would hold that *Peterson* is incorrect to the extent that it permits a defendant to veto a sentencing court's decision to impose a term of probation. I would vacate the decision of the circuit court and remand to the trial court for resentencing.

PEOPLE v EDWARDS

Docket No. 344541. Submitted February 5, 2019, at Grand Rapids. Decided May 7, 2019, at 9:00 a.m.

In an interlocutory appeal in this homicide case, defendant William D. Edwards appealed the Berrien Circuit Court's pretrial orders denying his motions to (1) admit evidence of the decedent Novena Mathis's previous specific act of violence against him, (2) admit evidence of Mathis's specific acts of violence against third persons, and (3) exclude evidence of Edwards's daughter's allegation that he sexually assaulted her when she was a child. Edwards lived with Mathis, a woman with whom Edwards had two children. Late one night in January 2018, their daughter and her two children moved into the home Edwards and Mathis shared, and Edwards became angry, gathered his belongings, and asked Mathis to give him a ride. Mathis's body was later found in her car in a parking lot. Edwards told police detectives that he and Mathis had stopped in the parking lot and argued over Mathis's decision to allow their daughter to move into the home. Edwards admitted that years earlier his daughter had accused him of criminal sexual conduct and that he had been forced to move out at that time because he could not live in the same house with her. Edwards explained that the argument had escalated and when Mathis reached for her purse, Edwards pulled out a gun and shot her. Edwards told the detectives that he knew that Mathis had a hatchet in her purse, that he thought she intended to use it on him, and that he killed her in self-defense. Edwards moved in limine for the admission of evidence of an argument he and Mathis had in December 2017—Mathis attacked Edwards with a hatchet and severely injured him, resulting in his hospitalization. Edwards also moved for the admission of evidence of specific acts of violence and aggression by Mathis against third persons about which Edwards had knowledge. The court, Donna B. Howard, J., ruled inadmissible Mathis's specific acts of violence and aggression against third parties and against Edwards, holding that only evidence of Mathis's reputation for violence was admissible. The court further ruled that the daughter's allegation of sexual assault against Edwards was admissible because it was proba-

tive of his motive for shooting Mathis and its probative value was not substantially outweighed by the danger of unfair prejudice.

The Court of Appeals *held*:

1. Under MRE 404(a)(2), when self-defense is an issue in a charge of homicide, evidence of the decedent's character trait of aggression may be admissible. A person's character may be shown under MRE 405 by reputation or opinion evidence (Subrule (a)) or by evidence of specific instances of conduct (Subrule (b)). Evidence of a decedent's violent character in the form of reputation evidence is admissible, even if the decedent's reputation was unknown to the defendant, to show the decedent's probable aggression and act of violence at the time the decedent was killed. In contrast, reputation evidence may not be used to prove the defendant's state of mind (apprehension of harm) unless the defendant knew about the decedent's character at the time of the decedent's death. Edwards sought to introduce evidence of Mathis's specific act of violence against him—the December 2017 assault with a hatchet—to establish an element of his claim of self-defense. That is, Edwards sought to show that he had a reasonable apprehension of harm because he knew that Mathis carried a hatchet in her purse and had previously injured him with it. The evidence of the December 2017 assault was directly relevant to an ultimate issue in Edwards's claim of self-defense in accordance with admission under MRE 405(b). Therefore, the trial court abused its discretion by excluding the admissible specific-acts evidence of the December 2017 hatchet assault.

2. Edwards also sought to introduce evidence of seven separate assaults that Mathis reportedly perpetrated on members of her family and on Edwards's ex-girlfriend. Mathis's specific acts of violence and aggression against third parties occurred years before the instant incident, but Edwards was aware of them and argued that the assaults were admissible at trial to support his honest and reasonable belief that he was in imminent danger of being attacked and severely injured by Mathis and that his use of force was necessary to prevent his own death or serious bodily injury. The trial court misconstrued Edwards's argument as asserting that the assaults were admissible to prove Mathis's reputation for violence. Although specific acts of violence or aggression are not admissible to establish that a victim was the aggressor, specific acts may establish a defendant's reasonable apprehension of harm under MRE 405(b). The trial court was required to examine each specific act to determine its admissi-

bility on the basis of how it might have affected Edwards's state of mind at the time of the shooting. On remand, the trial court must engage in a full evidentiary analysis of each of Mathis's specific acts of violence against third persons to determine each act's admissibility.

3. MRE 404(b)(1) prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. Other-acts evidence may be admissible, however, if (1) it is offered for a proper purpose, i.e., something other than a character-to-conduct theory; (2) it is relevant under MRE 402, as enforced by MRE 104(b), to an issue or fact of consequence at trial; and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. The prosecution argued that the daughter's alleged sexual assault had nothing to do with Edwards's propensity to commit the charged offenses, but admission of the evidence of the assault would establish that Edwards had a motive for killing Mathis. The prosecution offered the evidence for a proper purpose—to show motive—and explained the relevance of the evidence. Specifically, the prosecution explained, and the record supported, that (1) on the day of the incident, the daughter moved into the home shared by Edwards and Mathis; (2) Edwards became angry at Mathis for allowing the daughter to move into the home because the daughter had made the previous allegation of sexual assault, and Edwards could not live in the same house with her; and (3) Edwards directed his anger at Mathis and killed her out of his anger over the situation. The trial court then properly applied the test in MRE 403, ruling that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice given that the evidence was highly probative of the circumstances that led to the offenses. Accordingly, the trial court did not abuse its discretion by determining that the evidence was admissible.

Affirmed in part, reversed in part, vacated in part, and remanded.

Judge SAWYER concurred in the result only.

EVIDENCE — SELF-DEFENSE — WHEN CHARACTER IS AN ELEMENT OF THE DEFENSE — ADMISSION OF SPECIFIC ACTS.

In a homicide case involving a claim of self-defense, when character is an element of the defense, specific acts of violence or aggression by the decedent are admissible under MRE 405(b) to establish the defendant's reasonable apprehension of harm.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Patricia T. Ceresa*, Assistant Prosecuting Attorney, for the people.

Berrien County Public Defender (by *Christopher Renna*) for defendant.

Before: METER, P.J., and SAWYER and CAMERON, JJ.

CAMERON, J. In this interlocutory appeal in this homicide case, defendant challenges the trial court's pretrial orders denying his motions to admit evidence of the decedent's specific acts of violence against defendant and against third persons and to exclude evidence of defendant's daughter's allegation of criminal sexual conduct by defendant. We reverse the trial court's ruling regarding evidence of the decedent's specific acts of violence against defendant, vacate the trial court's ruling regarding evidence of the decedent's specific acts of violence against third persons, and affirm the trial court's other evidentiary ruling involving the allegation of criminal sexual conduct.

Defendant lived with the decedent, Novena Mathis, a woman with whom defendant had two children in common. On January 7, 2018, just after midnight, their daughter and her two children moved into the decedent's home. When the daughter arrived, defendant became angry, gathered his belongings, and asked the decedent to give him a ride. The decedent told the daughter that she would be back shortly, but that was the last time the daughter saw the decedent alive.

Family members reported the decedent missing, and the police later found her body in her car in a parking lot. Her purse, which held a small hatchet, was re-

trieved from the car. Detectives investigated and interviewed defendant. Defendant told the detectives that he and the decedent stopped the car in a parking lot and argued over the decedent's decision to allow their daughter to move into the home. Defendant admitted to the detectives that his daughter had accused him of criminal sexual conduct years earlier and that he had been forced to move out because he could not live in the same house with her. Defendant admitted that his daughter's move into the home made him angry and caused him to get into the argument with the decedent. He also explained that their argument escalated and that when the decedent reached for her purse, defendant pulled out a gun and shot her. Defendant told the detectives that he knew that the decedent had a hatchet in her purse and that he thought she intended to use it on him.

Defendant claims that he killed the decedent in self-defense. Defendant moved in limine for the admission of evidence of an incident that occurred during an argument that defendant had with the decedent on December 7, 2017, in which the decedent attacked him with a hatchet and severely injured him, resulting in his hospitalization. Defendant also moved for admission of specific acts of violence and aggression by the decedent against third persons about which he had knowledge. The trial court ruled inadmissible the specific acts of violence and aggression by the decedent. Instead, the trial court held that only evidence of the decedent's reputation for violence was admissible—a much more restrictive ruling.

Defendant argues that the trial court erred by denying the admission of all specific-acts evidence because such evidence had relevance to defendant's claim of self-defense. We partly agree.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). We review de novo a trial court's interpretation of the Michigan Rules of Evidence. *Id*. A trial court has abused its discretion if its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The admissibility of character evidence is governed by MRE 404 and MRE 405. MRE 404 provides in relevant part:

> (a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2) . . . ;
>
> (2) *Character of alleged victim of homicide*. When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused . . . .

MRE 405 provides the methods of proving character:

> (a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.
>
> (b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In *People v Harris*, 458 Mich 310, 314-317; 583 NW2d 680 (1998), a homicide case, the Michigan Supreme Court held that evidence of the violent character of the decedent in the form of reputation evidence is admissible, even if unknown to the defendant, to show the decedent's probable aggression and act of violence at the time the decedent was killed. Our Supreme Court explained, however, that reputation evidence could not be used to prove the defendant's state of mind unless the defendant knew about the decedent's character at the time:

> [W]here a defendant charged with murder asserts that he killed in self-defense, his state of mind at the time of the act is material because it is an important element in determining his justification for his belief in an impending attack by the deceased. The reputation of the deceased for a violent or turbulent disposition is a circumstance that would cause such a belief. However, unlike evidence tending to show that the victim was the aggressor, the deceased's violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense. Reputation in the neighborhood where both live is sufficient with nothing more. The strength of the deceased as well as his habitual carrying of weapons or his possession of them at the time of the affray, if known to the defendant, should be considered as properly affecting his apprehensions. The purpose of this evidence is to show the defendant's state of mind; therefore, it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant. [*Id*. at 316-317 (quotation marks and citations omitted).]

Our Supreme Court also distinguished character evidence used in relation to an ultimate issue in a case from character evidence used as circumstantial evidence of an act. *Id*. at 317. The Supreme Court explained that in cases "[w]here character is 'in issue,'

the character of a person may be an element of the . . . defense." *Id*. at 318. In such cases, "[MRE] 405 allows specific instances of violence to be admitted . . . ." *Id*. at 319. The *Harris* Court cited this Court's decision in *People v Cooper*, 73 Mich App 660; 252 NW2d 564 (1977), for the well-settled law that specific acts of aggression by the decedent are admissible to establish a defendant's reasonable apprehension of harm.

In cases where the decedent's character was not an essential element and "in issue," our Supreme Court clarified that the general rule applied, and the decedent's character "may not be shown by specific instances of conduct . . . ." *Harris*, 458 Mich at 319. Our Supreme Court explained:

> As a general rule, the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.
>
>> "[W]hen character is not an essential element, it may be shown only by reputation or opinion evidence. . . . Hence, construed literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary *act* of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue." [*Id*. (citation omitted; alteration in original).]

Therefore, the rule enunciated in *Harris* is twofold. First, evidence of a victim's aggressive character is

admissible in the form of reputation evidence, even if the defendant does not have knowledge of the decedent's character, to show that the decedent was the probable aggressor. With that said, evidence of the decedent's reputation that is not known to the defendant is inadmissible to prove an essential element of self-defense, e.g., a reasonable apprehension of harm. Second, evidence of the decedent's specific acts of violence is admissible only to prove an essential element of self-defense, such as a reasonable apprehension of harm.

In this case, defendant sought the admission of evidence that fell within the category of specific-acts evidence discussed and distinguished in *Harris*, i.e., specific-acts evidence used to show an essential element of self-defense. Application of the analysis articulated in *Harris* to the facts of this case establishes that the trial court erred because it failed to differentiate between the evidentiary nuances set forth in *Harris*.

Defendant sought the admission of evidence of the decedent's specific act of violence committed against him personally: the decedent's alleged December 2017 assault with the hatchet that resulted in defendant's hospitalization. Defendant sought admission of this specific-acts evidence to establish an element of his claim of self-defense—that he had a reasonable apprehension of harm from the decedent because he knew she carried a hatchet in her purse and had recently injured him with it. Defendant claimed that the decedent's recent attack caused him to fear imminent harm when the decedent reached for her purse just before he shot her.

To prove that he acted in self-defense, defendant had to present evidence that he had a reasonable belief that he had to use deadly force to prevent his own death or to prevent great bodily harm to himself. *Cooper*, 73 Mich

App at 663-664. As explained in *Harris*, under MRE 405(b), the specific-acts evidence of the decedent's violent assault placed the decedent's character in issue. This evidence, if admitted, would directly affect defendant's ability to prove that he acted in self-defense on the basis of his reasonable apprehension of imminent bodily injury or death. Unlike the defendant in *Harris*, who did not have direct knowledge of specific acts of aggression and who sought the admission of evidence of the decedent's general reputation to establish that the decedent probably acted aggressively at the time he was killed, defendant's evidence in this case is directly relevant to an ultimate issue in his defense. Accordingly, the trial court abused its discretion by excluding this admissible specific-acts evidence.

Defendant also sought the admission of evidence of specific acts of violence and aggression by the decedent against third persons years before the incident. He filed a motion in limine to admit seven separate assaults that the decedent reportedly perpetrated on members of her family and on defendant's ex-girlfriend. The alleged prior assaults ranged from relatively minor harassment that resulted in the issuance of a PPO[1] 18 years ago to more recent physical assaults. During the motion hearing, defense counsel asserted that defendant was personally aware of these prior assaults and further argued that these assaults were admissible at trial to support defendant's claim that he honestly and reasonably believed that he was in imminent danger of being attacked and severely injured by the decedent. Depending on the nature and timing of the prior assaults, defendant may very well have presented a recognized basis to admit specific-acts evidence under MRE 405(b).

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[1] Personal protection order.

However, the trial court misconstrued defendant's legal argument and denied defendant's motion to admit the evidence without any individualized analysis. In summarily denying defendant's motion to admit the evidence, the trial court seems to have concluded that defendant believed that he was entitled to introduce specific acts of conduct to prove the decedent's reputation for violence. If that were the case, the trial court's exclusion of specific-acts evidence would be on solid legal ground. MRE 405(a). But, as previously stated, defendant's theory of admission was to support his assertion that he honestly and reasonably believed that his use of force was necessary to prevent his own death or bodily injury. Therefore, the trial court was required to examine each allegation and then determine its admissibility. The trial court did not engage in any such examination. Instead, as the following excerpt from the motion hearing reveals, the trial court was uncertain about our Supreme Court's decision in *Harris*, and as a result, the trial court never specifically addressed the admissibility of each specific act on the merits:

> [*Defense Counsel*]: I think the caselaw is that, specific acts of aggression are admissible to the extent that [defendant] is aware of them at the time that the shooting happens, because those speak to his honest—his reasonableness of—the reasonableness of his belief that the other person would act violently.
>
> *The Court*: You think that's what People v Harris says?
>
> [*Defense Counsel*]: That's exactly what I think People v Harris says.
>
> *The Court*: Really? Where—Where is that? Where do they say that?

After additional discussion about the holding of *Harris*, the trial court issued its ruling: "So, I am granting

[defendant's] motion in part, as to the reputation evidence only, denied as to the evidence of specific acts, or evidence of violence, based on the holding in People v Harris." Thus, the trial court, by misconstruing defendant's argument, concluded that under *Harris*, a defendant cannot introduce specific acts of violence as reputation evidence. While this is certainly true under *Harris*, defendant was not in this instance requesting the use of reputation evidence. Defendant sought the admission of specific acts of violence by the decedent that he knew about at the time of the shooting to show his reasonable apprehension of harm. See *Harris*, 458 Mich at 319 (relying on *People v Farrell*, 137 Mich 127; 100 NW 264 (1904), for the proposition "that specific acts may not be shown to establish that the victim was the aggressor," but specific acts "may be shown to establish reasonable apprehension of harm").

We order the trial court on remand to engage in a full evidentiary analysis as to each of the decedent's specific acts of violence against third persons to determine its admissibility. Importantly, while the evidence defendant seeks to admit may be admissible under MRE 404(a) and MRE 405(b), the trial court never reached the question of relevancy and undue prejudice. Under MRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." On remand, the trial court should first determine whether any of the decedent's violent acts against third persons are relevant to the self-defense claim. The trial court should then determine whether the evidence is admissible under MRE 403. Under MRE 403, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. In determining unfair prejudice,

courts may consider a number of factors as enunciated in *People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012), such as whether the specific-acts evidence is temporally remote and has a causal connection.

Defendant also argues that the trial court erred by not excluding evidence of his alleged criminal sexual conduct against his daughter as inadmissible other-acts evidence under MRE 404(b). We disagree.

Other-acts evidence is governed by MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *Dobek*, 274 Mich App at 85-86, this Court considered the admissibility of other-acts evidence and stated:

> Evidence of other acts may be admitted under MRE 404(b)(1) if (1) the evidence is offered for a proper purpose, i.e., "something other than a character to conduct theory," (2) the evidence is relevant under MRE 402, as enforced by [MRE] 104(b), "to an issue or fact of consequence at trial," and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), citing and quoting *Huddleston v United States*, 485 US 681, 687, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). With respect to the first two *VanderVliet* requirements, our Supreme Court in *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004), reviewing the law regarding MRE 404(b), stated:

> In *People v Crawford*, 458 Mich 376, 385, 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, *supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.

This Court explained that the proponent of the other-acts evidence must recite one of the purposes stated in MRE 404(b) and articulate how the evidence relates to the recited purpose. *Dobek*, 274 Mich App at 85.

In this case, the prosecution gave the trial court a reason to allow the admission of the evidence of defendant's sexual assault of his daughter when she was five years old. The prosecution explained to the trial court that the alleged sexual-assault evidence had nothing to do with defendant's propensity to commit the charged offenses but that the evidence's admission would establish that defendant had a motive for killing the decedent. The prosecution explained that: (1) on the day of the incident, the daughter moved into the decedent's home where defendant resided; (2) defendant became angry at the decedent for allowing the daughter to move into the home because the daughter previously alleged that defendant had sexually assaulted her and because he could not live in the same home with the daughter because of her previous allegations against him; and (3) defendant directed his anger at the decedent and killed her out of anger over the situation.

The record establishes that the prosecution recited one of the proper purposes stated under MRE 404(b) and explained how the evidence related to the recited purpose. The record supports the prosecution's explanation for admission. A detective testified at defendant's preliminary examination that defendant told him that his argument with the decedent centered on the daughter's moving into the house in light of the sexual-assault allegations she had made against defendant. Defendant told the detective that his argument with the decedent escalated to the point where defendant pulled out a gun and shot the decedent. Therefore, the prosecution proposed admission of this evidence to prove defendant's motive for the homicide, which is an acceptable purpose.

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 . . . ." MRE 403. Under MRE 403, the trial court had to consider whether, although relevant, unfair prejudice substantially outweighed this evidence's probative value. The record reflects that the trial court applied the MRE 403 test and concluded that the evidence went to the issue of motive and could establish the fact that defendant became angry and that his anger was highly probative regarding the circumstances that led to the offense. The trial court further concluded that the anticipated testimony had significant probative value and stated that defendant could counter the evidence to balance any prejudicial effect. The admission of the evidence, like all inculpatory evidence, likely would be prejudicial to defendant, but the evidence's probative value respecting his motive for the shooting—an issue about which defendant and the prosecution disagreed vehemently—is not substantially outweighed by the danger of unfair preju-

dice. Accordingly, the trial court did not abuse its discretion by ruling that evidence of the sexual assault would be admissible at trial.

Reversed in part, vacated in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

METER, P.J., concurred with CAMERON, J.

SAWYER, J. (*concurring*). I concur in the result only.

PEOPLE v HOANG

Docket No. 336746. Submitted April 2, 2019, at Lansing. Decided May 7, 2019, at 9:05 a.m. Leave to appeal denied 504 Mich 1000 (2019).

Hieu Van Hoang was convicted following a jury trial in the Chippewa Circuit Court of assault with intent to commit murder, MCL 750.83; attempted murder, MCL 750.91; and first-degree arson, MCL 750.72. According to defendant's then wife, Anh Thi-Ngoc Nguyen, defendant poured gasoline on their bed, threatened to stab her if she tried to leave the room, and pushed her back toward the bed while lighting either a match or a lighter. Nguyen, whose clothes were soaked with gasoline, opened the window and jumped out of the second-story apartment to the sidewalk below. Defendant, who spoke Vietnamese, declined the offer of an interpreter when the police initially interviewed him, but after defendant was charged, the court, James P. Lambros, J., appointed defendant a Vietnamese interpreter who was physically present at all hearings and the trial. Before the plea hearing, defendant sent numerous letters to the court requesting an interpreter for his pretrial and plea-offer discussions with his attorney because of the language barrier and requesting that the telephone conversations he had with Nguyen from jail be retranslated. Although an interpreter was then present by speakerphone during those pretrial and plea-offer negotiations, defendant informed the trial court by letter that he needed the interpreter to be physically present during those meetings to avoid any confusion. The interpreter was physically present at the plea hearing when defendant rejected the offer and was again present via speakerphone for all attorney-client discussions at the jail before trial. At the plea hearing, neither defendant nor trial counsel raised the issue of needing the interpreter to be physically present for trial-preparation discussions at the jail, but defendant later wrote letters to the court making that request. Defendant appealed his convictions and moved to remand for an evidentiary hearing to develop the record regarding his claims of ineffective assistance of counsel related to trial counsel's alleged failure to impeach Nguyen's testimony, failure to introduce an allegedly exculpatory letter written by Nguyen, and failure to introduce the jail calls between defendant and Nguyen that were allegedly

improperly translated and proved defendant's innocence; the Court of Appeals granted the remand motion and retained jurisdiction. On remand, the trial court denied defendant's request for an evidentiary hearing, concluding that there was insufficient evidence to support defendant's claim that Nguyen wrote an exculpatory letter and that the retranslated letters were substantially similar to the old ones.

The Court of Appeals *held*:

1. MCL 775.19a provides that a trial court must appoint a qualified person to act as an interpreter if an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language. MCR 1.111(B)(1) in turn provides that a court must appoint a foreign-language interpreter for a person who is a party if the person requests such an interpreter and the court determines those services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that those services are necessary for a person to meaningfully participate in the case or court proceeding; the phrase "meaningfully participate" fundamentally extends to the ability to engage in pretrial preparation with trial counsel. Because MCR 1.111(A) defines the phrase "case or court proceeding" to mean any hearing, trial, or other appearance before any court in Michigan in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer, MCR 1.111(B)(1) mandates that a defendant receive foreign-language interpretation services during pretrial preparations when necessary for the defendant to meaningfully participate in the case or court proceeding; the requirements of MCL 775.19a and MCR 1.111 are not violated by a defendant receiving telephonic interpretation services during pretrial preparations if the services allow the defendant to meaningfully participate in the case and court proceedings. In this case, although trial counsel did not detect a communication breakdown, he ensured defendant had access to an interpreter after receiving letters from defendant about the asserted communication problem. To that end, a Vietnamese interpreter was physically present at all the hearings as well as at the trial and was also present via speakerphone for all pretrial preparations; defendant did not assert any issue regarding the telephonic interpretation services at the plea hearing. Under those facts, even though the interpreter was not physically present for pretrial preparations, there was no evidence that

defendant was unable to meaningfully participate in the case or court proceedings with the interpreter participating telephonically during pretrial preparations. Therefore, defendant received the foreign-language interpretation services required by MCR 1.111(B)(1) and MCL 775.19a, and the trial court did not err under those authorities by failing to require the interpreter's physical presence during defendant's pretrial meetings with trial counsel.

2. The Sixth Amendment of the United States Constitution and Article 1, § 20 of Michigan's 1963 Constitution guarantee a criminal defendant the right to counsel, which includes the right to consult with counsel and prepare a defense. The right to counsel does not attach until after adversarial legal proceedings are initiated; the right extends to every critical stage of the proceedings, including the pretrial period because it encompasses counsel's constitutionally imposed duty to investigate the case. For that reason, when a defendant is unable to communicate with his or her attorney during pretrial preparations because the person did not receive the interpretation services required under MCL 775.19a and MCR 1.111, the Sixth Amendment is implicated because the attorney is unable to fulfill his or her duty to investigate and prepare possible defenses. It is not necessary to show prejudice when trial counsel is either totally absent or prevented from assisting the defendant during a critical stage of the proceeding. In this case, defendant had a constitutional right to an interpreter during the pretrial preparations with his trial counsel, which he received when the interpreter participated telephonically during the attorney-client meetings. Defendant's argument that he was denied his right to counsel because he could not communicate effectively with trial counsel without the interpreter being physically present was without merit; trial counsel's actions—arranging for an interpreter by speakerphone for each meeting once defendant notified him of the communication issue and indicating in a letter to defendant that trial counsel was satisfied with the results of the arrangement—demonstrated that he worked closely and diligently with defendant to prepare a defense. Accordingly, on the facts of the case, defendant was not constructively deprived of his right to counsel by the interpreter not being physically present during the pretrial preparations.

3. Defendant was not denied effective assistance by trial counsel's failure to request that the interpreter be physically present at all pretrial meetings; defendant failed to demonstrate that having the interpreter available by speakerphone constituted deficient performance. Defendant's remaining ineffective-

assistance-of-counsel claims—that is, the failure to impeach Nguyen, the failure to rebut certain evidence, the failure to obtain forensic DNA evidence, the failure to introduce an alleged letter from Nguyen to defendant, and the failure to introduce telephone calls between defendant and Nguyen when defendant was in jail—were also without merit.

Affirmed.

1. CRIMINAL LAW — INTERPRETERS — DUTY TO APPOINT — PRETRIAL PREPARATIONS — TELEPHONIC INTERPRETATION SERVICES DURING PRETRIAL PREPARATIONS.

MCL 775.19a provides that a trial court must appoint a qualified person to act as an interpreter if an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language; under MCR 1.111(B)(1), a court must appoint a foreign-language interpreter for a person who is a party if the person requests such an interpreter and the court determines those services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that those services are necessary for a person to meaningfully participate in the case or court proceeding; a defendant must receive foreign-language interpretation services during pretrial preparations when necessary for the defendant to meaningfully participate in the case or court proceedings; the requirements of MCL 775.19a and MCR 1.111 are not violated by telephonic interpretation services during pretrial preparations if the services allow the defendant to meaningfully participate in the case and court proceedings.

2. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO COUNSEL — INTERPRETERS — DUTY TO APPOINT — PRETRIAL PREPARATIONS.

The Sixth Amendment of the United States Constitution and Article 1, § 20 of Michigan's 1963 Constitution guarantee a criminal defendant the right to counsel, which includes the right to consult with counsel and prepare a defense; the right extends to every critical stage of the proceedings, including the pretrial period because it encompasses counsel's constitutionally imposed duty to investigate the case; a defendant's constitutional right to counsel is implicated when a defendant is unable to communicate with his or her attorney during pretrial preparations because of a language barrier.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Robert Stratton*, Prosecuting Attorney, and *David H. Goodkin*, Assistant Prosecuting Attorney, for the people.

Hieu Van Hoang, *in propria persona*, and *Laurel Kelly Young* for defendant.

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

CAMERON, J. Defendant, Hieu Van Hoang, appeals his jury-trial convictions of assault with intent to commit murder, MCL 750.83, attempted murder, MCL 750.91, and first-degree arson, MCL 750.72. The trial court sentenced Hoang as a second-offense habitual offender, MCL 769.10, to life imprisonment for each offense. On appeal, Hoang argues that he was denied his Sixth Amendment right to counsel because his court-ordered Vietnamese interpreter was not physically present during his pretrial meetings with his attorney. He also raises numerous errors that he contends denied him the effective assistance of counsel. We affirm.

I. BACKGROUND

Hoang and his then wife, Anh Thi-Ngoc Nguyen, lived in an apartment above a nail salon that they owned and operated in Sault Ste. Marie. Nguyen testified that on June 16, 2015, she and Hoang had been arguing before she went to bed alone. Later that night, Hoang woke Nguyen by throwing a phone at her. Hoang was shouting at her as he poured gasoline on the bed. Hoang threatened to stab Nguyen if she tried to leave the room, and he pushed his wife back toward

the bed and lit either a match or a lighter.[1] Because her clothing was soaked in gasoline, Nguyen opened the window to escape, causing the unsecured air-conditioning unit to fall out of the window opening, and she jumped out the second-story window to the sidewalk below. Nguyen suffered severe injuries from the fall requiring hospitalization.

A neighbor testified that she saw an air-conditioning unit fall out of Nguyen's apartment window and then saw Nguyen jump down immediately after. The neighbor called 911 and then went to assist Nguyen. An on-duty United States Border Patrol agent saw the neighbor with Nguyen, who was sitting on the sidewalk crying. The agent looked up and, seeing smoke billowing from the apartment window, called central dispatch. Firefighters, paramedics, and police officers responded to the scene, and the fire was quickly contained. The paramedics treated Nguyen, who smelled strongly of gasoline, and they took her to the hospital in an ambulance. In the apartment, firefighters found a gas can in the bedroom, a broken back window, and a broken back door; they alerted the police to these suspicious circumstances. The fire department's investigator recovered a green cigarette lighter from outside the building near the blood on the sidewalk where Nguyen had landed and placed it into evidence. A police investigator concluded that the fire was the result of arson because of the irregular burn pattern on the mattress, the presence of gasoline in the bedroom, and the presence of gasoline in samples collected from the mattress, the bedding, and the clothing worn by Nguyen and Hoang.

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[1] Nguyen was not clear at trial whether Hoang used matches or a lighter to start the fire.

A police officer transported Hoang from the hospital to the police station where a police detective interviewed Hoang. According to the detective, while Hoang appeared intoxicated and at times spoke in broken English, the two were able to communicate without an interpreter. In fact, Hoang denied an offer for an interpreter and gave a statement to the police about the circumstances of the fire, claiming that he was asleep when the fire started. Hoang was then arrested on the charge of assault with intent to commit murder.

At the outset of the proceedings, the trial court appointed Hoang a Vietnamese interpreter who was physically present and provided interpretation services for all hearings and the trial. In March 2016, Hoang sent the first of many letters from jail to the trial court insisting that he needed an interpreter for his pretrial discussions with his attorney. Other inmates, who were apparently fluent in both Vietnamese and English, transcribed the letters for Hoang. The first letter, sent in March 2016, asserted that Hoang needed an interpreter "because of the language barrier" between him and his attorney. Hoang also asserted that the translation of the jail calls between him and Nguyen was not accurate, and he asked the trial court to have the recordings retranslated. Six days later, Hoang wrote another letter, requesting "to have his court appointed interpreter present to go over plea offers and evidence because of his language barrier," and he again asked that the jail calls be retranslated. Hoang then wrote another letter in March, expressing his desire "to go over all evidence and plea offers with his interpreter so there are no misunderstandings before court proceedings continue." In April 2016, before his plea hearing, Hoang wrote another letter to the trial court in which he acknowledged that an interpreter was available via speakerphone when he

met with his attorney. According to Hoang, however, he needed to have the interpreter physically present at the meeting to go over evidence "so there is no confusion." Hoang expressed his need to personally meet with the interpreter on the day of his upcoming hearing in order to understand the evidence.

On April 19, 2016, the trial court held a plea hearing. The interpreter was physically present at the hearing, and Hoang explained to the trial court that he wanted the jail calls between him and his wife retranslated because the transcripts of the calls were inaccurate and incomplete because they included only a portion of their conversations. The trial court denied Hoang's request, explaining that the evidence of the jail calls was an issue for trial. Thereafter, Hoang confirmed that he wanted his case to proceed to trial. During the hearing, neither Hoang nor his attorney raised the issue that an interpreter needed to be physically present during attorney-client discussions at the jail.

After the plea hearing, however, Hoang wrote another letter to the trial court, stating again that although the interpreter had participated in his recent discussion with his attorney via speakerphone, she was not physically present. Hoang challenged the trial court in his letter: "How [am I] suppos[ed] to review all the evidence and pleas with someone over a phone that does not have the same paperwork [I have]?" According to Hoang, he could not accept a plea offer "when he does not understand the evidence or the evidence is incomplete." In three more letters sent to the trial court before trial, Hoang continued to express his need for an interpreter to be physically present when meeting with his attorney to review the paperwork and evidence in his case. Hoang explained that "[t]he

interpreter has only appeared via speakerphone, which [he] has found to be fruitless." Hoang also reiterated that he had not received the complete transcripts of the jail calls with his wife.

The trial began on September 19, 2016. Hoang testified at trial that on the night of the fire he drank one or two beers, as he did every night before bed, and fell asleep before Nguyen went to bed. He stated that he was asleep when the fire started but that his wife was still awake. When Hoang awoke, he saw a fire on his side of the bed. He claimed that he was able to jump out of bed and avoid injury from the fire but that in doing so he kicked the gas can, which had been moved to the bedroom earlier that day because their dogs had knocked it over where it was usually stored.

The jury found Hoang guilty of assault with intent to commit murder, attempted murder, and first-degree arson. The trial court sentenced Hoang to life imprisonment for each offense. On appeal, Hoang filed an appellate brief, claiming a denial of his Sixth Amendment right to counsel because his court-appointed interpreter was not physically present to help Hoang review discovery and facilitate communications with trial counsel. Additionally, Hoang filed a Standard 4 brief, along with a motion to remand in this Court, requesting an evidentiary hearing to develop the record regarding his claims that trial counsel (1) failed to impeach Nguyen's testimony; (2) failed to introduce a letter Nguyen allegedly wrote to Hoang stating that she lied to the police about him starting the fire; and (3) failed to introduce evidence of the jail calls between Nguyen and Hoang, which were improperly translated and proved his innocence.

This Court remanded the case to allow Hoang the opportunity to submit the letter from Nguyen, for the appointment of a new translator, and to have the trial

court determine whether an evidentiary hearing was required.[2] On remand, the trial court inquired into the letter that Nguyen allegedly wrote and had a different translator retranslate two of the jail calls between Nguyen and Hoang. After reviewing an affidavit from trial counsel, a letter from Nguyen stating that no such letter to Hoang existed, and the new translations of the jail calls, the trial court determined that an evidentiary hearing was not warranted. The trial court entered an order following remand, concluding that there was insufficient evidence to corroborate Hoang's claim that Nguyen wrote an exculpatory letter and that the new translations were substantially similar to the old ones. Therefore, the trial court denied an evidentiary hearing, completing all actions in compliance with our Court's remand. Having retained jurisdiction, this Court now addresses Hoang's claims on appeal.

II. THE USE OF AN INTERPRETER DURING PRETRIAL PREPARATIONS

In his appellate brief, Hoang argues that he was denied his Sixth Amendment right to counsel at critical stages of the proceedings—trial preparation and plea discussions—because his court-appointed interpreter was not physically present during his attorney-client discussions, including when reviewing the evidence, developing a trial strategy, and determining whether defendant should accept a plea offer. We disagree.

A. STANDARD OF REVIEW

Generally, whether a defendant's right to counsel was violated is a constitutional issue that this Court reviews

[2] *People v Hoang*, unpublished order of the Court of Appeals, entered November 20, 2017 (Docket No. 336746).

de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). Additionally, we review de novo the proper interpretation of statutes and court rules. *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018); *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018).

B. ANALYSIS

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. The Sixth Amendment states, in relevant part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence." US Const, Am VI. The Michigan Constitution states, "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense[.]" Const 1963, art 1, § 20. "The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment; absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions will be construed to afford the same protections." *People v Marsack*, 231 Mich App 364, 373; 586 NW2d 234 (1998).

One's right to counsel does not attach until "after adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment," *id*. at 376-377, and the right extends to every critical stage of the proceedings, *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). "The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case," and " '[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by

the defendant.' " *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003) (reviewing our Supreme Court's decision after the defendant filed a petition for habeas relief and concluding that the defendant was denied his Sixth Amendment right to counsel when his attorney was suspended for 30 days during the pretrial period and was unable to communicate with the defendant and form a trial strategy), quoting *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 657 (1984).

Hoang argues that he was denied his Sixth Amendment right to counsel because his interpreter was not physically present during trial preparation and plea discussions with his attorney, making it difficult to review the paperwork and the evidence in the case. Thus, without an interpreter physically present at the meetings between himself and his attorney, Hoang claims that he and his attorney were unable to properly prepare for trial and that Hoang could not fully understand any offered pleas, which effectively denied him his right to counsel during a critical stage of the proceedings. This argument is without merit.

Hoang's argument implicates both statutory and constitutional considerations, neither of which have been directly addressed by this Court. Significantly, our courts have yet to determine whether the absence of an in-person interpreter during the pretrial stage of the proceedings implicates a defendant's constitutional right to counsel. However, on the record in this case, we do not detect a statutory or constitutional error with regard to the trial court's appointment of an interpreter or trial counsel's utilization of that interpreter.

1. RIGHT TO AN INTERPRETER UNDER MCL 775.19a AND MCR 1.111

MCL 775.19a provides the standard upon which trial courts must appoint an interpreter:

> If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter.

In 2013, our Supreme Court adopted MCR 1.111, which governs the use of foreign-language interpreters. Under MCR 1.111(B)(1),

> [i]f a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person . . . is a party.

While not raised by Hoang, we first consider the statute and court rule governing interpretation services. The record shows that the trial court complied with the requirements provided under both MCL 775.19a and MCR 1.111(B)(1). At the outset of the case, the trial court appointed Hoang a Vietnamese interpreter, and the interpreter was physically present and provided interpretation services during all hearings and at trial. Thereafter, the trial court had an ongoing obligation under MCR 1.111(B)(1) to ensure that Hoang received such interpretation services as were necessary to "meaningfully participate in the case or court proceeding . . . ." For example, under MCR 1.111(F)(3), the trial court is allowed to appoint more than one interpreter after considering the nature and duration

of the proceeding, the number of parties in interest and witnesses requiring interpretation services, the languages of those people, and the quality of remote technology used to ensure effective communication.

Importantly, our court rules define "case or court proceeding" as "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A). Therefore, a party shall receive interpretation services as necessary for the person "to meaningfully participate" in any hearing, trial, etc. Fundamental to meaningful participation in preliminary examinations, plea hearings, and trial is the ability to engage in pretrial preparation with trial counsel. Therefore, we conclude that the broad standard set forth under MCR 1.111(B)(1) mandates interpretation services during pretrial preparations when necessary for a defendant to meaningfully participate in the case or court proceeding.

In this case, Hoang was entitled under the court rule to interpretation services during pretrial preparations with his attorney. We further conclude, however, that Hoang received such services and, therefore, cannot show a violation under MCL 775.19a and MCR 1.111. As will be discussed in more detail later, Hoang's trial counsel did not detect a communication breakdown. However, after receiving letters from his client, trial counsel ensured that Hoang had access to an interpreter. Hoang's interpreter participated telephonically during pretrial preparations between Hoang and his attorney, and Hoang did not raise any issue regarding interpretation services at the plea hearing. Hoang has not shown that he could not meaningfully participate in the case or court proceedings. Accordingly, we do not

detect any violation of the court rule or the relevant statute, and the trial court did not err under those authorities by failing to ensure the interpreter's physical presence during pretrial meetings with trial counsel.

2. SIXTH AMENDMENT RIGHT TO COUNSEL

A defendant also has a constitutional right to consult with counsel and prepare a defense. As stated in *Mitchell*, "[b]ecause the Supreme Court [of the United States] has repeatedly made clear that there is a duty incumbent on trial counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he or she fails to consult with his or her client." *Mitchell*, 325 F3d at 744.[3] We conclude there are both state and federal constitutional implications—based on a defendant's right to counsel during critical stages of the proceedings—when a defendant who is entitled to an interpreter is prevented from communicating with his attorney because he has been denied an interpreter.

This Court has held that without a valid waiver from a defendant, the failure to use when necessary an interpreter for simultaneous translation during a defendant's trial implicates both state and federal constitutional protections. In *People v Gonzalez-Raymundo*, 308 Mich App 175, 181-182; 862 NW2d 657 (2014), the trial court appointed a Spanish interpreter, but at the

[3] The court in *Mitchell* explained that "[i]t cannot seriously be argued that defense counsel's obligation to consult with his client at least once is a new or novel obligation being imposed on the government or that the Supreme Court's cases in *Powell*[*v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932)], *Strickland*, and [*United States v*] *Cronic*, [466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984),] do not compel this result." *Mitchell*, 325 F 3d at 744 n 5.

start of trial, the trial court granted defense counsel's request to waive the interpreter's services because of the possible prejudice that defense counsel speculated such services might have on the jury; defense counsel indicated that the interpreter would then " 'explain things to the defendant on break.' " The *Gonzalez-Raymundo* Court concluded that this was not a valid waiver because the defendant did not personally waive his right and because "[t]he lack of simultaneous translation implicated defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions." *Id*. at 188. Moreover, this Court held that "a defendant's lack of understanding of the proceedings against him renders him effectively absent," and the "lack of simultaneous translation impairs a defendant's right to confront witnesses against him and participate in his own defense." *Id*. This Court held that "[t]he right at issue is thus not merely statutory as codified by MCL 775.19a, but constitutional, and thus subject to every reasonable presumption against its loss." *Id*.

Depriving a defendant of the ability to communicate with his or her attorney during pretrial preparations—a critical stage of the proceedings—prevents the attorney from fulfilling the attorney's duty to investigate and prepare possible defenses. See *Powell v Alabama*, 287 US 45, 59; 53 S Ct 55; 77 L Ed 158 (1932) ("[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."). In *Powell*, the trial court had appointed "all the members of the bar" to represent seven African-American men during their arraignment on charges of raping two white women. *Id*. at 49, 56. However, the one-day trials for each of the men commenced six days from their arraignment, and the trial court did not

identify the defendants' trial attorneys until the day trial began. *Id*. at 56. In the words of the Supreme Court, the trial court's appointment of counsel was "little more than an expansive gesture, imposing no substantial or definite obligation upon any one[.]" *Id*. According to the *Powell* Court, "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id*. at 57. Thus, the *Powell* Court held that the effective deprivation of counsel was a violation of the defendants' constitutional rights. See *United States v Cronic*, 466 US 648, 661; 104 S Ct 2039; 80 L Ed 2d 657 (1984) ("*Powell* was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial.").

The United States Court of Appeals for the Sixth Circuit, relying on cases like *Powell* and *Cronic*, has addressed the deprivation of a defendant's right to counsel even though the trial court had appointed a trial attorney. In *Mitchell*, the court explained that "[w]hen counsel is appointed but never consults with his client and is suspended from practicing law for the month preceding trial, and the court acquiesces in this constructive denial of counsel by ignoring the defendant's repeated requests for assistance," there is a violation of the defendant's constitutional right to counsel as governed by the Supreme Court of the United States' decision in *Cronic*. *Mitchell*, 325 F3d at 744. In *Cronic*, the Supreme Court of the United States stated that it

"has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 US at 659 n 25.

While we conclude that Hoang had a constitutional right to use an interpreter during attorney-client pretrial preparations, under the facts of this case, there was no Sixth Amendment violation. Hoang acknowledges that he was granted the appointment of an interpreter. He further admits that an interpreter participated via speakerphone while Hoang and his attorney prepared the case and discussed the prosecution's plea offer. Hoang contends, however, that because the interpreter was not physically present while Hoang met with his attorney, he was prevented from fully understanding his attorney, from preparing his case, and from understanding any plea offers from the prosecution. Consequently, Hoang's contention is not that he was denied his right to counsel because the trial court failed to provide an interpreter, but that he was denied his right to counsel because he could not *effectively* communicate with his trial counsel through the interpreter. Hoang's argument is without merit. Before trial, trial counsel wrote a letter to Hoang and explained that they had communicated effectively in writing and in person on several occasions while preparing the case. In fact, trial counsel told Hoang, "The day I told you what the plea offer was you then told me that you did not speak English, or read or write English." At that point, trial counsel took steps to ensure that the interpreter was available via speakerphone. Trial counsel's letter also shows that trial counsel was satisfied with using the interpreter via speakerphone. Thus, unlike the circumstances in *Powell* and *Mitchell*, trial counsel's

actions showed that he worked closely and diligently with Hoang to prepare a defense.[4] We cannot conclude that the failure to have an interpreter physically present during Hoang's pretrial meetings with his attorney amounted to the constructive deprivation of counsel. Therefore, we conclude that there was no violation of Hoang's constitutional right to counsel.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, Hoang argues that trial counsel was ineffective because (1) he should have requested that the interpreter be physically present during pretrial preparations, (2) he failed to impeach Nguyen at trial, (3) he failed to provide rebuttal evidence, (4) he failed to obtain forensic evidence, (5) he failed to introduce a letter from Nguyen, and (6) he failed to introduce the complete and accurately translated transcripts of jail calls defendant made to Nguyen. We disagree.

A. STANDARD OF REVIEW

Generally, an ineffective-assistance-of-counsel claim presents a "mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Constitutional questions are reviewed de novo, while findings of fact are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews an unpreserved ineffective-assistance-of-counsel claim for errors apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

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[4] We note that the trial court—located in the Upper Peninsula—also ensured that an interpreter from the southern region of the Lower Peninsula was physically present for all hearings and the trial.

B. ANALYSIS

To demonstrate ineffective assistance of counsel, a "defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Matuszak*, 263 Mich App at 57-58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citation omitted). A defendant must establish a factual basis for an ineffective-assistance-of-counsel claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Matters of strategy that were not successful, in hindsight, do not constitute deficient performance. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). When reviewing an ineffective-assistance-of-counsel claim, "the inquiry is not whether a defendant's case might conceivably have been advanced by alternate means." *LeBlanc*, 465 Mich at 582.

1. REQUEST FOR AN INTERPRETER DURING PRETRIAL PREPARATIONS

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *Cronic*, 466 US at 654 (quotation marks and citation omitted). "Cases on the continuum range from actual to constructive denial of counsel to instances where the performance of counsel is so deficient that there has been a functional denial of counsel guaranteed by the Sixth Amendment." *People v Mitchell*, 454 Mich 145, 153; 560 NW2d 600 (1997), vacated on other grounds in *Mason v Mitchell*, 536 US 901 (2002). While Hoang argues in his appellate brief that there was an actual denial of his right to counsel, he argues in his

Standard 4 brief that he was denied the effective assistance of counsel when his requests for an interpreter to be present at attorney-client meetings went unanswered. Hoang's argument fails.

First, Hoang has not shown that his trial counsel's action—i.e., having an interpreter available via speakerphone—constituted deficient performance. In fact, trial counsel responded to Hoang's requests in a July 2016 letter and explained that he had not detected any communication issues between the two of them but that, after Hoang expressed his concerns, trial counsel had ensured that an interpreter was made available to Hoang during pretrial preparations. We cannot conclude that trial counsel's use of the interpreter via speakerphone constitutes deficient performance sufficient to prove an ineffective-assistance-of-counsel claim.

Finally, even if trial counsel should have requested that the interpreter be physically present for trial preparation to ensure that Hoang understood the proceedings, any deficient performance in this regard was not prejudicial. Hoang's contention is that without an interpreter to help him review the file, he could not fully understand the evidence against him or the terms of the plea offer. However, Hoang had every opportunity to discuss his file—including the plea offer—at his meetings with the interpreter. Additionally, Hoang never raised any concern regarding the terms of the plea offer to the trial court at the plea hearing. Instead, he continually maintained his innocence and focused only on the fact that he wanted the accurate and complete transcripts of his jail calls with his wife—which he believed would exonerate him. For that reason, Hoang has not shown that he would have taken the plea had the interpreter been physically present during trial preparation; therefore, we do not detect prejudice.

2. FAILURE TO IMPEACH WITNESS

In his Standard 4 brief, Hoang challenges several strategic decisions made by trial counsel, including arguing that the failure to impeach Nguyen's testimony constituted deficient performance. Hoang first argues that trial counsel failed to impeach Nguyen's testimony with her own contradictory testimony. This argument is unavailing because trial counsel did, in fact, impeach Nguyen's testimony in an attempt to create a reasonable doubt about Hoang's guilt. Trial counsel highlighted Nguyen's inconsistent statements during trial, noting that she first claimed Hoang had used a match to light the fire but later said that he had used a lighter. Trial counsel then highlighted Nguyen's inconsistent testimony from the preliminary examination, wherein she had stated that she saw Hoang with only a lighter, not matches. After being confronted with her conflicting testimony, Nguyen insisted that she meant a lighter and explained that the inconsistency was the result of the translation. Hoang argues that trial counsel should have asked the interpreter to clarify Nguyen's conflicting testimony, especially because she alleged that the difference in her testimony was due to translation errors. Hoang is essentially asserting that trial counsel should have called the interpreter to testify about the translation of the words for match and lighter. However, trial counsel adequately brought the issue to the jury's attention. Therefore, trial counsel's performance was not deficient.

Hoang also argues that trial counsel should have impeached Nguyen's trial testimony that she and Hoang did not normally keep a gas can in the apartment given that she had testified at the preliminary hearing that they normally kept a gas can in the bathroom. Hoang's argument fails because trial counsel asked

Nguyen about the gas can at trial and elicited confusing and inconsistent testimony from her about whether and where they had kept the gas can in the apartment.

Hoang makes several other claims challenging specific areas of trial counsel's cross-examination. Hoang contends that Nguyen contacted him in jail and sent him money in jail, evidenced by the purportedly incorrect translations of the jail calls. Hoang argues that trial counsel failed to question Nguyen about this contact with Hoang despite a no-contact order. However, trial counsel questioned Nguyen about her communications with Hoang after he was arrested, and Nguyen admitted that she sent him money after he called her and asked for it. Accordingly, trial counsel did ask Nguyen about her contact with Hoang, and trial counsel's decision not to persist in questioning Nguyen about this contact was entirely reasonable.

Hoang also contends that his consoling of Nguyen after she jumped out of the window and at the hospital were inconsistent with guilt and that trial counsel should have highlighted Nguyen's reaction to Hoang immediately after her injuries. Hoang fails to explain the relevance of this testimony, and regardless, any decision on the part of trial counsel to refrain from eliciting testimony on the subject constitutes trial strategy. Considering the evidence as a whole, trial counsel could very well have avoided the subject because a jury might reasonably infer that Hoang manipulated the situation to look like he was playing the part of a worried husband to avoid suspicion but was really using it as an opportunity to talk to Nguyen alone and to coach her about what to say to the authorities about the fire.

Lastly, Hoang contends that Nguyen's testimony was inconsistent as to when gasoline was poured on

her clothing relative to when the fire started. Hoang also argues that the police did not recover the phone in the apartment that Hoang allegedly threw at Nguyen to wake her, that the police found his and Nguyen's phones in Nguyen's car, and that Hoang was not given copies of the police reports by counsel. Hoang has provided this Court with no factual support for these claims, and he has not made a documented request for the police records. Therefore, these claims have no merit. Hoang is correct that trial counsel did not ask Nguyen about every aspect of her testimony, but again, he has failed to defeat the presumption that counsel's failure to inquire into these matters was a strategic decision designed to highlight only the most inconsistent evidence without bogging the jury down with insignificant details. Cross-examining a victim in an attempted murder case about every potentially inconsistent detail in the victim's testimony can be counterproductive and draw attention to details that support an inference of guilt. For example, our Supreme Court has approved of a defense attorney's decision not to call an expert witness to rebut the prosecution's expert witness when trial counsel explained that creating a battle of the experts tended to bolster the importance of the testimony of the expert witnesses, particularly the prosecution's expert witness. *LeBlanc*, 465 Mich at 580-583. In sum, Hoang has not demonstrated that trial counsel's handling of the defense was anything but reasonably strategic. Witness credibility is a matter for the jury to decide. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Accordingly, having heard both Nguyen's and Hoang's testimony, the jury reasonably chose to credit Nguyen's testimony, in addition to the corroborating evidence, to find Hoang guilty.

3. FAILURE TO REBUT EVIDENCE

Hoang argues that trial counsel should have rebutted Nguyen's testimony regarding a jewelry box that fell off the air-conditioning unit when she opened the window. When Nguyen testified about opening the window to jump out of the apartment to avoid the fire, she stated that she had stacked things, including a jewelry box, on top of the air-conditioning unit. According to Hoang, trial counsel failed to demonstrate that it was impossible for a jewelry box to sit on top of the air-conditioning unit and that it therefore could not have fallen to the ground when his wife opened the window. Hoang claims that the available space on top of the air-conditioning unit was too small. Trial counsel asked some of the police officers who testified at trial about the jewelry box and about the photographs taken of the bedroom, which showed the jewelry box lying on the ground, but the officers were not able to provide any details about the size or contents of the jewelry box or where it was located during the fire.

Hoang appears to be suggesting that Nguyen set the fire to kill him and take the jewelry with her, or some variation on this theme, but the string of inferences necessary to arrive at this conclusion is speculative and does not warrant reversal on this record. Further, on cross-examination, trial counsel did ask Nguyen whether she was upset that Hoang may have been having an affair and confirmed that Nguyen would become the sole owner of the nail salon if they divorced. After this line of questioning, trial counsel ended cross-examination, having attempted to leave the jury with the impression that Nguyen had a motive for lying about Hoang starting the fire. Trial counsel's performance was not deficient for failing to rebut the evidence presented.

4. FAILURE TO OBTAIN FORENSIC EVIDENCE

Hoang raises other challenges to his trial counsel's strategy, specifically challenging his counsel's failure to obtain forensic evidence. Hoang cites trial counsel's closing argument about the lighter to argue that trial counsel should have had the lighter tested for DNA or fingerprints because that evidence would have shown that Nguyen, not Hoang, actually started the fire. In his closing argument, trial counsel argued that the lighter was the only piece of evidence the police failed to test for DNA or fingerprints. Trial counsel made this argument after attacking Nguyen's credibility, arguing that she was jealous about an affair Hoang was having and stating that she should not have received the entire business because they were only married for one year before divorcing. Read in context, trial counsel's point in raising the police's failure to test the lighter was to plant a seed of doubt in the jurors' minds to argue for an acquittal. Hoang's argument on appeal is flawed because it presupposes that testing the lighter would return exonerating evidence. But Hoang has presented no factual basis to support this presupposition and to show that counsel was ineffective for not having the lighter tested, especially because counsel highlighted the police's failure to test the lighter as a point in Hoang's favor.

Hoang also argues that trial counsel was ineffective for failing to clarify whether gasoline found on Hoang's shoes was on the top of the shoes, consistent with splashing, or on the bottom of the shoes, consistent with stepping in gasoline. A forensic scientist testified that there was gasoline on the shoes without specifying where on the shoes. Hoang does not adequately explain why this detail matters or how it would show that Hoang did not start the fire, particularly in light of

witness testimony that the apartment, Hoang, and Nguyen all smelled of gasoline. Therefore, this argument is without merit.

5. FAILURE TO INTRODUCE LETTER

In his Standard 4 brief, Hoang also argues that trial counsel failed to introduce into evidence a letter that Nguyen allegedly wrote to Hoang, and failed to question Nguyen about the letter, in which Nguyen purportedly explained that the police had threatened to charge her with conspiracy to commit arson if she did not tell them that Hoang had started the fire and in which she apologized to Hoang for lying to the police. Hoang preserved this issue by pursuing a remand for an evidentiary hearing. On remand, trial counsel produced an affidavit stating that Hoang had given him no such letter, and Nguyen wrote a letter stating that she had no further contact with Hoang after they spoke when he was in jail and she sent him money. During the jail calls, Nguyen told Hoang that the police told her not to deny knowing what happened and asked her whether she and her husband were plotting something. Nguyen's description of what the police said to her does not support Hoang's claim that the police directed Nguyen to say that Hoang started the fire, nor does this conversation between Nguyen and Hoang substantiate the existence of a letter to Hoang in which Nguyen stated that she lied to the police. In addition, the police had other evidence and other witnesses showing that Hoang started the fire and attempted to kill Nguyen, and the jury chose to credit that evidence. Hoang has not shown that it was unreasonable for the jury to credit the other witnesses' testimony over his version of events.

6. FAILURE TO INTRODUCE JAIL CALLS

Hoang argues that trial counsel failed to introduce complete and accurate transcripts of the jail calls, which Hoang continues to maintain were translated erroneously. Hoang raised this issue when he sought a remand for an evidentiary hearing, and the trial court had the recordings of the jail calls retranslated by a different translator. First, the transcripts of the calls show that Hoang initiated the calls and that he told Nguyen to say that nothing happened when she testified at the preliminary examination. Hoang also told Nguyen the story he told the police. When Hoang raised the issue of the transcripts at the sentencing hearing, trial counsel stated that he did not introduce the transcripts of the calls into evidence because they tended to show Hoang's guilt. We have reviewed the transcripts and agree with trial counsel. Further, Hoang has described no attempt to have a third party interpret the recordings, and he has provided no details about what part of the recordings were incorrectly translated. Hoang has not supported this claim with a factual basis that warrants remand.

In an affidavit attached to the Standard 4 brief, Hoang stated that the interpreter did not interpret everything that the witnesses said at trial, that the interpreter and trial counsel refused to respond to Hoang's concerns, and that the interpreter refused to ask the trial court and trial counsel for clarification of witness testimony on his behalf, including his belief about the location of the gas can. Hoang also claims that he did not understand when trial counsel tried to explain the plea offer to him and that trial counsel got frustrated with Hoang when he refused to plead guilty. Hoang did not raise this issue in the remand motion or in his arguments on appeal. Nonetheless, even accept-

ing these statements as properly presented arguments, they are inconsistent with the specificity of Hoang's claims that trial counsel failed to impeach Nguyen's testimony properly, failed to introduce an exculpatory letter that Nguyen allegedly wrote to Hoang, and failed to introduce transcripts of calls between Nguyen and Hoang. Accordingly, these claims have no merit and do not warrant a new trial.

In sum, Hoang raises challenges to various aspects of the trial court proceedings, but the specificity of his ineffective-assistance-of-counsel claims, particularly those presented in the Standard 4 brief, belie his overall claim that he did not understand what was happening throughout the proceedings. Further, Hoang has not demonstrated a factual basis supporting his claims. Neither a remand for an evidentiary hearing nor a new trial is warranted.

Affirmed.

SWARTZLE, P.J., and CAVANAGH, J., concurred with CAMERON, J.

SULLIVAN v STATE OF MICHIGAN

Docket No. 343018. Submitted April 2, 2019, at Lansing. Decided May 7, 2019, at 9:10 a.m.

Donald Sullivan, Jr., brought an action in the Court of Claims seeking compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., for the years he spent in prison before his felony-murder conviction was vacated and the charges against him were dismissed. Following a jury trial in the Recorder's Court in Detroit, Sullivan was convicted of first-degree felony murder for his role in the 1974 robbery of a jewelry store and the death of its owner, and in 1975, Sullivan was sentenced to life imprisonment. Lawrence Patton, a codefendant, had entered into a plea agreement with the prosecution, and Patton's testimony was the primary evidence in support of Sullivan's conviction. In 1981, Patton recanted, and he executed two affidavits in which he admitted that he had lied about Sullivan's involvement in the robbery and murder. Sullivan moved for a new trial on the basis of Patton's recantation, and Patton testified at an evidentiary hearing, authenticating his affidavits and reiterating that his original trial testimony was false. Patton was given a polygraph examination regarding the truthfulness of his recantation, and the examiner's opinion was that Patton was not deceptive in his exoneration of Sullivan. The trial court granted Sullivan's request for a new trial, and the prosecution prepared to retry Sullivan for the robbery and murder. However, after the trial court denied the prosecution's motion to use Patton's trial testimony from the first trial as evidence at Sullivan's retrial, the prosecution conceded that without the testimony, it could not proceed with the retrial. Accordingly, in 1982, the trial court dismissed the charges against Sullivan, and he was released from custody. In September 2017, Sullivan filed his complaint for compensation under the WICA. The Court of Claims, MICHAEL J. TALBOT, J., granted the state of Michigan's motion for summary disposition and denied Sullivan's cross-motion for summary disposition. The Court of Claims concluded that Sullivan failed to prove by clear and convincing evidence that there existed new evidence that ultimately resulted in the dismissal of the charges against him. Sullivan appealed.

The Court of Appeals *held*:

1. To prevail on a claim under the WICA, MCL 691.1755(1) requires a plaintiff to prove by clear and convincing evidence all of the following: (1) the plaintiff was convicted of a crime under Michigan law, was sentenced to a term of imprisonment in a state correctional facility, and served at least part of the sentence; (2) the plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined to be not guilty on retrial; and (3) new evidence demonstrated that the plaintiff did not perpetrate the crime and was not an accomplice or an accessory to the crime, the new evidence resulted in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and the new evidence ultimately resulted in either the dismissal of all the charges or a finding of not guilty of all the charges on retrial. Under MCL 691.1752(b), "new evidence" is any evidence that was not presented in the proceedings leading to the plaintiff's conviction but does not include a recantation unless there is "other evidence" to support the recantation or the prosecuting attorney or attorney general that prosecuted the case agrees that the recantation constitutes new evidence, even without other evidence to support it. Sullivan argued that Patton's recantation was new evidence because Patton's affidavits, his testimony at the evidentiary hearing, and his answers to the questions in the polygraph examination were separate and distinct pieces of "other evidence" that supported the recantation. "Other" means "not the same" or "different." Therefore, Patton's recantation must have been supported by evidence that was "not the same" as his recantation or that was "different" from his recantation. But each piece of proposed "other evidence" was essentially the same recantation in three different forms. In addition, the language the Legislature used in MCL 691.1752(b) requires that the "other evidence" must "support the recantation." "Support" means to "provide with substantiation," "corroborate," "assist," or "help." Therefore, the recantation must be substantiated or corroborated by evidence that is different from the recantation itself. But the affidavits, new-trial hearing testimony, and assertions made during the polygraph test were merely different iterations of the same recantation. Therefore, the trial court properly granted the state of Michigan's motion for summary disposition of Sullivan's WICA claim and denied Sullivan's motion for summary disposition.

2. With one narrow exception, results of a polygraph examination are not admissible at trial in criminal or civil cases; polygraph results may be considered, within the trial judge's discretion, to enable a decision to be reached at a postconviction hearing for a

new trial. The procedures at trial and at a postconviction hearing for a new trial are significantly different because the purposes of each procedure are significantly different. The purpose of a trial is to determine guilt or innocence; it is a final procedure. The purpose of a postconviction hearing for a new trial is to determine whether there should be a new trial; it is a preliminary procedure. Sullivan's WICA claim was not like a motion for a new trial. It was a civil action, and his claim had to have been proved during his case-in-chief; polygraph results are not admissible during a case-in-chief. Accordingly, the Court of Claims did not err by granting the state of Michigan's motion for summary disposition and dismissing Sullivan's WICA claim because polygraph results are not admissible and thus do not satisfy the definition of "new evidence" under MCL 691.1752(b) and do not qualify as the "other evidence" required to support a recantation's status as "new evidence."

3. Even if the polygraph results had been admissible and had constituted "new evidence," Sullivan still could not have prevailed. MCL 691.1755(1)(c) requires that the new evidence result in the reversal or vacation of the judgment of conviction and that the new evidence ultimately result in either the dismissal of all the charges or a finding of not guilty of all the charges on retrial. The polygraph results did result in the reversal or vacation of Sullivan's conviction—because the trial court concluded that the recantation testimony was reliable, the court vacated Sullivan's conviction and granted him a new trial. Critically, however, the case was not dismissed because of the polygraph results. After the trial court granted Sullivan a new trial, the prosecution expressed its intent to retry Sullivan when it moved to use Patton's testimony from Sullivan's initial trial. The trial court denied the motion, and the prosecution explained that it could not proceed to trial without Patton's testimony. The dismissal of the charges was a result of the prosecution's inability to use Patton's prior trial testimony; the charges were not dismissed because of the polygraph results.

Affirmed.

1. WRONGFUL IMPRISONMENT COMPENSATION ACT — NEW EVIDENCE — RECANTATIONS — OTHER EVIDENCE IN SUPPORT OF RECANTATIONS.

To prevail on a claim under the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*., a plaintiff must, among other things, produce new evidence demonstrating that he or she did not perpetrate the crime; the new evidence must result in the reversal or vacation of the charges in the judgment of conviction, and the new evidence must ultimately result in either the

dismissal of all the charges against the plaintiff or a finding of not guilty of all the charges on retrial; a recantation is not new evidence unless there exists other evidence to support the recantation or the prosecution agrees that the recantation constitutes new evidence; iterations of the same recantation in different forms, e.g., affidavits, testimony at an evidentiary hearing, and answers to polygraph-test questions, do not constitute other evidence in support of the recantation.

2. POLYGRAPH-EXAMINATION RESULTS — ADMISSIBILITY — WRONGFUL IMPRISONMENT COMPENSATION ACT CLAIMS.

The results of a polygraph examination are not admissible to prove a claim under the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Garett L. Koger*, Assistant Attorney General, for the state of Michigan.

Martin S. Baum, PC (by *Martin S. Baum*) for Donald Sullivan, Jr.

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

CAMERON, J. Plaintiff, Donald Sullivan, Jr., filed this lawsuit for compensation based on the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., after his murder conviction was vacated and the charges against him were dismissed. Sullivan appeals the order of the Court of Claims granting summary disposition in favor of defendant, the state of Michigan, and dismissing Sullivan's case. On appeal, Sullivan challenges the Court of Claims' determination that he was not entitled to compensation under the WICA because he failed to show "new evidence" that satisfied the requirements of MCL 691.1755(1)(c). Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1975, Sullivan was sentenced to life in prison after a jury convicted him of first-degree felony murder for his role in the robbery of a jewelry store and the death of its owner. A codefendant, Lawrence Patton, entered into a plea agreement with the prosecution and provided trial testimony that was the primary evidence used to support Sullivan's conviction.

Several years later, Patton recanted his trial testimony. He executed two affidavits in 1981, admitting in both that he lied about Sullivan's involvement in the robbery and murder of the jewelry store owner. In December 1981, Sullivan moved for a new trial on the basis of Patton's recantation. In support of his motion, Sullivan provided Patton's two affidavits. The trial court granted an evidentiary hearing at which Patton testified, authenticated his affidavits, and reiterated that the trial testimony he offered against Sullivan was false. The prosecution questioned Patton's veracity and succeeded in having Patton be given a polygraph examination administered by the Michigan State Police regarding the truthfulness of his recantation. During the polygraph examination, Patton reaffirmed that Sullivan was not involved in the crimes. In the opinion of the examiner, the test results indicated that Patton was not deceptive in his exoneration of Sullivan.[1] Thereafter, the trial court granted Sullivan's motion for a new trial.

The prosecution, apparently unpersuaded of Sullivan's innocence, took steps to prosecute Sullivan again

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[1] The polygraph examiner concluded his report with this statement: "It is the opinion of the undersigned examiner, based on the analysis of [Patton's] polygraph examination that in the area of [Sullivan's] being actively involved in the robbery/homicide, there is no deception."

for the robbery and murder. However, after the trial court denied the prosecution's motion to use Patton's prior trial testimony as evidence against Sullivan at his retrial, the prosecution conceded that "[w]ithout the use of [Patton's] previous testimony from the previous trial, we cannot proceed at this time in this case." Accordingly, the trial court dismissed the charges against Sullivan, and he was released from custody.

In September 2017, Sullivan filed a WICA complaint seeking compensation for the approximately seven years that he was imprisoned. The Court of Claims granted the state of Michigan's motion for summary disposition and, in turn, denied Sullivan's cross-motion for summary disposition. In doing so, the Court of Claims concluded that Sullivan failed to prove by clear and convincing evidence that there existed "new evidence" that demonstrated that he did not perpetrate the crime, that resulted in the reversal or vacation of his convictions, and that ultimately resulted in dismissal of the charges. MCL 691.1755(1)(c).

II. ANALYSIS

On appeal, Sullivan argues that the Court of Claims erred when it granted the state of Michigan's motion for summary disposition and denied Sullivan's cross-motion for summary disposition. We disagree.

We initially note that the state of Michigan filed its motion for summary disposition under MCR 2.116(C)(7), and Sullivan claimed that he was entitled to summary disposition under MCR 2.116(I)(2). The Court of Claims, however, specified in its order that summary disposition was granted under MCR 2.116(C)(8) and (C)(10). Importantly, a tort action against a governmental entity generally raises two

issues: (1) whether the plaintiff has pleaded in avoidance of governmental immunity, and (2) whether the plaintiff can establish the elements of his or her claim. *Glancy v Roseville*, 457 Mich 580, 588; 577 NW2d 897 (1998). We do not construe the state of Michigan's motion as one brought under MCR 2.116(C)(7) because Sullivan's claim concerns whether he can establish the elements under the WICA. "A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). Furthermore, because the Court of Claims ruled on the motions for summary disposition before the commencement of discovery, we believe it is appropriate to analyze the motions on the basis of the pleadings alone and review them under MCR 2.116(C)(8). See *id*.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528; 660 NW2d 384 (2003). "A motion brought under [MCR 2.116(C)(8)] tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Id*. at 304-305.

We also review de novo issues of statutory interpretation. *In re Mich Cable Telecom Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000). When interpreting a statute, our goal "is to ascertain and give effect to the intent of the Legislature." *Portelli v I R Constr Prod Co, Inc*, 218 Mich App 591, 606; 554 NW2d 591 (1996). "Undefined statutory terms must be

given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). This Court must avoid interpreting a statute in a way that would make any part of it meaningless or nugatory. *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003).

To prevail on a claim under the WICA, a plaintiff must prove by clear and convincing evidence all of the following:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) *New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial*. [MCL 691.1755(1) (emphasis added).]

The WICA defines "new evidence" as "any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction."

MCL 691.1752(b). However, when the proposed new evidence depends on the reliability of a recantation, the WICA provides an additional requirement:

> New evidence does not include a recantation by a witness unless there is *other evidence* to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation. [MCL 691.1752(b) (emphasis added).]

A. PATTON'S RECANTATION EVIDENCE

Sullivan first argues that Patton's recantation constituted "new evidence" sufficient to meet the standards enumerated in MCL 691.1755(1)(c). We disagree.

Sullivan claims that he is entitled to compensation under the WICA because Patton's recantation constitutes "new evidence." MCL 691.1752 precludes the use of a recantation as new evidence unless it is supported by "other evidence." In this case, Sullivan claims that Patton's affidavits, his testimony at the evidentiary hearing, and his answers to questions in the polygraph report are separate and distinct pieces of "other evidence" that support Patton's recantation. Essentially, Sullivan argues that repeating the same recantation in different forms meets the definition of "other evidence" because each form is separate and distinct from the others. This argument is without merit.

The WICA does not define "other evidence." *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "other" as "not the same" or "different." Therefore, Patton's recantation must be supported by evidence that is "not the same" as his recantation or that is "different" from his recantation. With respect to

Patton's affidavits, his testimony, and his oral statements made during the polygraph examination, the substance of each piece of proposed evidence is essentially the same—Sullivan simply provided the same recantation in three different forms. None of these recantations meets the plain meaning of "other evidence" under the statute because the latter recantations are not materially "different" from the initial recantation. Thus, we conclude that the recantation evidence Sullivan provided in different forms was not "other evidence" under MCL 691.1752(b).

Moreover, the Legislature requires that the "other evidence" "support the recantation . . . ." MCL 691.1752(b). Dictionary definitions of "support" include "to provide with substantiation," "corroborate," "assist," or "help." *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, a recantation must be substantiated or corroborated by evidence that is different from the recantation itself. To allow Sullivan to use the recantation affidavits and similar evidence to support Patton's recantation would render meaningless the statute's requirement that there be "other evidence to support the recantation"; a recantation cannot support itself. Otherwise, there would be no need for the Legislature to use the verb "support" in the statute. We do not interpret "other evidence" as Sullivan suggests because it would render the text of the WICA statute meaningless or nugatory. See *Sweatt*, 468 Mich at 183. We conclude that the affidavits, new-trial hearing testimony, and assertions made at the polygraph test were merely different iterations of the same recantation; none of the iterations satisfied the requirement in MCL 691.1752(b) that a recantation be supported by "other evidence."

B. PATTON'S POLYGRAPH RESULTS

Sullivan also argues that the Court of Claims erred by concluding that the polygraph *results* alone did not qualify (1) as "new evidence" sufficient to satisfy the statute, or (2) as "other evidence" that supported Patton's recantation. We disagree.

Results of a polygraph examination are not admissible at trial in criminal or civil cases. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); see also *Stone v Earp*, 331 Mich 606, 610-611; 50 NW2d 172 (1951); *Mich State Employees Ass'n v Civil Serv Comm*, 126 Mich App 797, 805; 338 NW2d 220 (1983). Polygraph results are inadmissible because "there is simply no consensus that polygraph evidence is reliable." *United States v Scheffer*, 523 US 303, 309; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (plurality opinion). However, the Michigan Supreme Court has carved out one narrow exception for when the results of a polygraph examination may be considered: "[P]olygraph results may be considered, within the discretion of the judge, to enable a decision to be reached at a postconviction hearing for a new trial." *People v Barbara*, 400 Mich 352, 415; 255 NW2d 171 (1977). Our Supreme Court created this narrow exception for the admission of polygraph results at postconviction hearings, but the Court has consistently declined to admit evidence of the results of a polygraph examination in a party's case-in-chief. See *id*. at 416; *Stone*, 331 Mich at 610-611.

Sullivan argues that because a civil proceeding under the WICA is more like a postconviction hearing on a motion for a new trial than it is like an actual civil trial, the polygraph results should be admissible evidence in his civil lawsuit under the narrow exception established in *Barbara*. However, the rationale for the

exception does not support its expansion in this case. The *Barbara* Court explained that polygraph results could be considered when deciding a postconviction motion for a new trial but not as evidence at a criminal trial because

> the procedure at trial and at a post-conviction hearing for new trial is different and significantly so. The procedures are significantly different because their purposes are significantly different. The purpose of a trial is to determine the guilt or innocence of the defendant. The purpose of a post-conviction hearing for a new trial is, as its name suggests, an action to determine whether there should be such a trial. It is a preliminary, not a final procedure. [*Barbara*, 400 Mich at 411.]

Although the Court in *Barbara* considered the admissibility of polygraph results in a criminal case, the same logic applies to Sullivan's WICA claim. As in *Barbara*, Sullivan's underlying criminal case involved a motion for a new trial. Indeed, the trial court considered the polygraph evidence in deciding to grant Sullivan's motion for a new trial. If the case proceeds to a civil trial involving Sullivan's WICA claim, the polygraph results would not be admissible to prove Sullivan's case-in-chief because, as explained in *Barbara*, a postconviction motion is categorically different from a trial on the merits, whether deciding guilt in a criminal trial or liability in a civil trial. Therefore, we decline Sullivan's invitation to treat his WICA claim like a motion for a new trial. Sullivan's claim is a civil action and must be proved during his case-in-chief, and polygraph results are not admissible during the case-in-chief. Accordingly, we hold that the Court of Claims did not err by granting the state of Michigan's motion for summary disposition and dismissing Sullivan's WICA claim because the polygraph results are not admissible and thus do not satisfy the definition of

"new evidence" under MCL 691.1752(b) and do not qualify as the "other evidence" required to support a recantation's status as new evidence under MCL 691.1752(b).

Furthermore, even if the polygraph results were admissible and constituted "new evidence" under MCL 691.1755, Sullivan still cannot prevail. Sullivan must satisfy four requirements under MCL 691.1755(1)(c) before he is entitled to compensation under the WICA: (1) the proffered evidence must meet the definition of "new evidence" under MCL 691.1752(b), (2) the new evidence must demonstrate that Sullivan did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis for the conviction, (3) the new evidence must result in the reversal or vacation of the charges in the judgment of conviction, and (4) the new evidence must result in dismissal of all the charges or a finding on retrial of not guilty on all the charges.

Sullivan must, therefore, show that the polygraph examination resulted in the reversal or vacation of the charges in the judgment of conviction as well as the dismissal of those charges. We agree that the results of the polygraph examination resulted in the reversal or vacation of Sullivan's robbery and murder convictions. On the basis of the polygraph results, the trial court concluded that the recantation testimony was reliable, and the court therefore vacated the convictions and granted Sullivan a new trial. However, the case was not dismissed as a result of the polygraph results. After the trial court granted the motion for a new trial, the prosecution expressed its intent to pursue a new trial and moved for permission to use Patton's testimony from Sullivan's initial trial. The trial court, however, denied the prosecution's request to use Patton's testi-

mony as evidence against Sullivan. Following the denial, the prosecution explained that it could not proceed to trial without Patton's testimony, and *for that reason*, the trial court dismissed the charges. Thus, the dismissal of the charges was a result of the prosecution's inability to use Patton's prior trial testimony—the charges were not dismissed because Patton "passed" a polygraph examination.

Affirmed.

SWARTZLE, P.J., and CAVANAGH, J., concurred with CAMERON, J.

HOLETON v CITY OF LIVONIA

Docket Nos. 341624 and 341847. Submitted April 9, 2019, at Detroit. Decided May 7, 2019, at 9:15 a.m.

John Holeton and Pauline Holeton brought an action in the Wayne Circuit Court in 2014 against the city of Livonia and the members of the Livonia City Council, individually and in their official capacities, alleging that defendants had violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., by, among other things, engaging in conduct designed to discourage or limit their participation in public city council meetings concerning the installation of advanced metering infrastructure, commonly known as "smart meters." The allegations were based, in part, on an incident in which defendant Maureen Brosnan, who was chairing a 2012 meeting of the city council's infrastructure committee, had Pauline Holeton removed from the meeting by a Livonia police officer for violating a rule requiring that her comments be addressed to the chair and not to the audience. The trial court, Robert L. Ziolkowski, J., granted summary disposition to defendants on the ground that plaintiffs' claims were time-barred under MCL 15.273, and it also denied plaintiffs' motion to file an amended complaint to include claims against the unnamed police officer who had removed Pauline Holeton from the committee meeting. Plaintiffs appealed. The Court of Appeals, HOEKSTRA, P.J., and JANSEN and METER, JJ., in an unpublished per curiam opinion issued July 21, 2015 (Docket No. 321501), affirmed the trial court's decision to grant summary disposition to defendants on the alternative ground that plaintiffs' claims were barred by the doctrine of laches but reversed in part the court's denial of plaintiffs' motion for leave to amend the complaint, and it remanded the case to the trial court. After their motion for reconsideration was denied, plaintiffs sought leave to appeal in the Supreme Court, which vacated the portion of the Court of Appeals judgment holding that plaintiffs' claims were barred by the doctrine of laches and ordered the Court of Appeals first to remand the case to the trial court to determine whether defendants had been prejudiced by plaintiffs' delay in bringing their action and then to reconsider its decision that plaintiffs' claims were barred by laches. 499 Mich 898 (2016). On remand, the trial

court determined that defendants had not been prejudiced by plaintiffs' delay, and the same Court of Appeals panel affirmed in an unpublished per curiam opinion issued August 2, 2016 (Docket No. 321501), holding this time that laches did not bar plaintiffs' action and remanding the case for further proceedings. Plaintiffs then filed an amended complaint that alleged various claims against the unnamed police officer and a claim under 42 USC 1983 that the officer and Brosnan had violated plaintiffs' constitutional rights. The court, Daniel A. Hathaway, J., denied defendants' motion for summary disposition of plaintiffs' claim for declaratory relief and the motion for summary disposition of the claims under 42 USC 1983, but granted the motion with respect to the remaining claims and dismissed them with prejudice. Brosnan appealed this order in Docket No. 341624, the city council appealed in Docket No. 341847, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The trial court erred when it denied Brosnan's motion to dismiss plaintiffs' claims under 42 USC 1983. To establish a claim under 42 USC 1983, a plaintiff must plead and be able to prove that the defendant deprived him or her of a right secured by the United States Constitution or the laws of the United States and that the defendant was acting under color of state law when he or she deprived the plaintiff of the right. Plaintiffs argued that the address-the-chair rule was selectively applied and that Pauline Holeton's expulsion violated her right to petition the committee. They also suggested that acts by the committee members at past meetings, such as interrupting plaintiffs and making dismissive remarks, showed that Brosnan and the other council members were motivated by a desire to violate plaintiffs' speech and petition rights. However, while the First Amendment prevents governments from interfering with the speech of private individuals on the basis of the message expressed, it does not prevent governments from enacting content-neutral restrictions that impose incidental limitations on speech. For a limited public forum, such as the committee meeting at issue, the state may impose reasonable regulations on speech so as to reserve the forum for its intended purposes, as long as the regulation does not suppress expression on the basis of the speaker's view. Plaintiffs did not allege or present any evidence that Brosnan implemented an address-the-chair rule in order to curtail anyone's speech on the basis of the content or viewpoint expressed. They also did not allege or present evidence that the rule was unreasonable for the forum. They did not allege or present any evidence that they had

actually been prevented from speaking at a previous meeting or that the implementation of the rule denied them the right to petition the committee at the meeting in March 2012. In fact, it was undisputed that plaintiffs had been able to speak on this subject at previous meetings. Plaintiffs failed to allege or present evidence that Brosnan or the council members engaged in a pattern or plan of harassment and intimidation that prevented them from exercising their First Amendment rights premised on the content of their speech or their viewpoint. Although removing Pauline Holeton for a violation of the rule absent a breach of the peace might have amounted to a violation of Michigan's OMA under MCL 15.263(6), a violation of the OMA does not itself establish that Brosnan's actions also deprived Holeton of her rights under the First and Fourteenth Amendments. It is also not a violation of the Equal Protection Clause of the Fourteenth Amendment for a municipality to favor commentary by its own citizens over noncitizens, as long as the rule does not discriminate on the basis of the speaker's view. On this record, no reasonable jury could find that Brosnan implemented the address-the-chair rule to retaliate against plaintiffs or that she otherwise deprived them of their rights by enforcing the rule.

2. The trial court erred when it refused to grant Brosnan's motion for summary disposition on the basis of qualified immunity. An official has qualified immunity from suits under 42 USC 1983 when the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Before allowing a claim to proceed, a court must first decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. If the plaintiff has satisfied this step, the court must then decide whether the right at issue was clearly established at the time of defendant's alleged misconduct. In order to survive summary disposition of the claim alleged in this case, plaintiffs had to show that it was clearly established that the First Amendment or Fourteenth Amendment prevented a committee chair from enforcing an otherwise reasonable and viewpoint-neutral procedural rule—the address-the-chair rule—by expelling a person who does not comply with the rule under similar facts. To do so, plaintiffs relied solely on the fact that the OMA prohibited expulsion absent a breach of the peace at the meeting. However, the requirements of the OMA do not establish the parameters of the rights protected under the First and Fourteenth Amendments, and under the state of the law applicable to limited public fora, a reasonable chairperson might conclude that, consistent with the First and Fourteenth Amendments, he or she could

properly enforce an otherwise reasonable and viewpoint-neutral rule by expelling a member of the audience who repeatedly violated the rule and was thereby disrupting the orderly progress of the meeting. No reasonable jury could find that a reasonable chairperson in Brosnan's shoes would have understood that she was violating Pauline Holeton's First Amendment rights by implementing and enforcing the address-the-chair rule under those circumstances. With respect to plaintiffs' claims that they were deprived of liberty without due process, they did not identify the specific right violated and did not show that a reasonable chairperson in Brosnan's position would have known that her acts or omissions violated a clearly established right under the Fourteenth Amendment. It was undisputed that Pauline Holeton had notice of the address-the-chair rule, was admonished to follow the rule, and failed to do so. She had notice and an opportunity to comply before being expelled. There was also no evidence that anyone physically handled Holeton or otherwise inhibited her freedom of movement. Accordingly, the trial court should also have dismissed plaintiffs' claim under 42 USC 1983 to the extent that it relied on a deprivation of a right other than the rights guaranteed under the First Amendment.

3. The trial court erred when it denied the city council's motion for summary disposition of plaintiffs' claim under 42 USC 1983. A municipality can be sued under 42 USC 1983 for a deprivation of rights protected by the Constitution of the United States or a federal statute. However, its liability cannot be predicated on a respondeat superior theory. Rather, the plaintiff must plead and be able to prove that the municipality's policy or custom directly led to the deprivation of the federal constitutional or statutory right at issue. Plaintiffs failed to show that Brosnan's actions deprived them of a right protected under the First or Fourteenth Amendment. Brosnan's address-the-chair rule was reasonable and viewpoint neutral, as permitted for limited public fora. Moreover, Brosnan could ensure the orderly progress of the meeting by enforcing the rule, and expulsion was not a constitutionally suspect remedy. Further, plaintiffs could not rely on a violation of the OMA to establish a violation of a right protected by the First or Fourteenth Amendments, and the trial court record showed that Brosnan's actions were permissible under those amendments. Because plaintiffs failed to establish a question of fact for the jury as to whether Brosnan's implementation and enforcement of the address-the-chair rule violated their constitutional rights, even if Brosnan acted pursuant to a policy or procedure implemented by Livonia, a reasonable jury could not find that the policy caused a deprivation of rights. For these

reasons, the trial court should have dismissed plaintiffs' claim under 42 USC 1983 as to all defendants.

Reversed and remanded for further proceedings.

1. CONSTITUTIONAL LAW — FREEDOM OF SPEECH — LIMITED PUBLIC FORA — CONTENT-NEUTRAL SPEECH RESTRICTIONS.

The First Amendment of the United States Constitution prevents the government from interfering with the speech of private individuals on the basis of the message expressed; however, it does not prevent governments from enacting content-neutral restrictions that impose incidental limitations on speech; in a limited public forum, the state may impose reasonable regulations on speech so as to reserve the forum for its intended purposes, as long as the regulation does not suppress expression on the basis of the speaker's view.

2. CONSTITUTIONAL LAW — FREEDOM OF SPEECH — DUE PROCESS — OPEN MEETINGS ACT — VIOLATIONS.

The Open Meetings Act, MCL 15.261 *et seq*., provides that a person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting; removing a speaker from a meeting in violation of this provision does not itself establish a violation of the speaker's rights under the First or Fourteenth Amendments of the United States Constitution (MCL 15.263(6)).

John Holeton and Pauline Holeton *in propriis personis*.

Paul A. Bernier and *Eric S. Goldstein* for defendants.

Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

PER CURIAM. These consolidated appeals originated in a claim that defendants violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., or otherwise wrongfully interfered with the rights of plaintiffs, John and Pauline Holeton, to participate in meetings held by Livonia's city council. In Docket No. 341624, defendant Maureen Miller Brosnan appeals by right the trial

court's order denying her motion for summary disposition of the Holetons' claim under 42 USC 1983, premised in part on her assertion of governmental immunity. In Docket No. 341847, defendants—City of Livonia, City of Livonia City Council, City of Livonia City Council's Infrastructure Community Transit Committee (the Infrastructure Committee), Laura M. Toy, Maureen Miller Brosnan, John R. Pastor, Brandon M. Kritzman, James C. McCann, Joe Laura, Thomas A. Robinson, and an unknown police officer—appeal by leave granted the trial court's order denying in part their motion for summary disposition of the same claim. For the reasons more fully explained below, we reverse the trial court's decision to deny defendants' motions to dismiss the Holetons' claim under 42 USC 1983.

I. BASIC FACTS

The individual defendants, other than the unknown police officer, were, or are, members of Livonia City Council. The Holetons are self-styled "community activists" who want to raise public awareness about the harms they believe are associated with DTE Energy's advanced metering infrastructure—otherwise known as "smart meters"—and do so in part by attending local governmental meetings, such as those held by the City Council. The Holetons sued defendants in January 2014 for violating the OMA. The case reached this Court, then our Supreme Court, and was eventually remanded for further proceedings. See *Holeton v Livonia (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued August 2, 2016 (Docket No. 321501).

In August 2017, the Holetons filed an amended complaint that stated additional claims, including a

claim that Brosnan violated their rights guaranteed by the First and Fourteenth Amendments of the United States Constitution when she expelled Pauline from a meeting of the Infrastructure Committee held in March 2012. Brosnan ostensibly ordered Pauline to leave for violating an address-the-chair rule. Defendants each moved for summary disposition of the Holetons' claims in September 2017. Although the trial court dismissed many of the Holetons' claims, it allowed the Holetons' claims under 42 USC 1983 to proceed against Brosnan and the City Council.

These appeals followed.

II. BROSNAN'S APPEAL IN DOCKET NO. 341624

In her appeal, Brosnan argues that the trial court erred when it denied her motion to dismiss the Holetons' claims under 42 USC 1983. Specifically, she argues that the trial court should have granted her motion because the Holetons failed to identify a federal constitutional or statutory right that she violated. In the alternative, she maintains that the Holetons failed to overcome her qualified immunity.

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 Brosnan had qualified immunity for her actions. See *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

Congress provided a cause of action for persons who have been deprived of their rights by persons acting under color of state law:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . [42 USC 1983.]

In order to establish a claim under 42 USC 1983, the plaintiff must plead and be able to prove that the defendant deprived him or her of a right secured by the United States Constitution or the laws of the United States and that the defendant was acting under color of state law when he or she deprived the plaintiff of the right. See *Morden*, 275 Mich App at 332.

In this case, the Holetons alleged that their participation in the public meetings implicated their rights under the First Amendment—their right to petition the government and their right to freely speak their views. They further alleged that Brosnan intentionally or with callous disregard for their rights caused Pauline to be removed from a meeting, which violated their rights to free speech and to petition the government. They claimed that Brosnan's actions deprived Pauline of her rights under the Fourteenth Amendment as well, and they suggested that she was deprived of liberty. They indicated that there was no probable cause to remove Pauline from the meeting held on March 19, 2012.

It is apparent that the Holetons' claim under 42 USC 1983—as alleged—arose solely from Brosnan's conduct at the meeting of the Infrastructure Committee held in March 2012. More specifically, they alleged that Brosnan's decision to order Pauline to leave the meeting amounted to a deprivation of her federal constitutional rights.

In her motion for summary disposition, Brosnan properly noted that she was entitled to summary disposition on the ground that the Holetons failed to show that Brosnan unlawfully deprived Pauline of her rights under the First Amendment or the Fourteenth Amendment. She also identified grounds for concluding that she had qualified immunity and that the Holetons could not establish grounds for avoiding her qualified immunity. Because she filed a properly supported motion for summary disposition on those grounds, the Holetons had to respond and establish that there was, at the very least, a question of fact as to whether Brosnan violated an identifiable right and that the right was so clearly established that no reasonable chairperson would have acted in the way that Brosnan did. See *Barnard Mfg*, 285 Mich App at 374-375.

In response, the Holetons argued that the address-the-chair rule was selectively applied and favored Livonia's citizens. They then argued that Pauline's expulsion violated her right to petition the committee. However, they did not discuss the relevant law, whether the evidence showed that Pauline actually violated the address-the-chair rule, the reasonableness of the rule, or the reasonableness of Brosnan's decision to ask Pauline to leave in response to Pauline's purported failure to comply with the rule and her behavior at the podium. Rather, the Holetons appeared to argue that expelling a member of the public for violating a rule was per se a violation of that person's First Amendment rights to speak and petition because expulsion can only be done under the OMA when someone disturbs the peace. They similarly argued that the requirements of the OMA were clear and, therefore, Brosnan did not have qualified immunity. They also suggested that acts by the committee members at past meetings, such as interrupting the Holetons and mak-

ing dismissive remarks, showed that Brosnan and the other council members were motivated by a desire to violate Pauline's speech and petition rights.

It is well settled that the First Amendment prevents government from interfering with the speech of private individuals on the basis of the message expressed. See *Turner Broadcasting Sys, Inc v Fed Communications Comm*, 512 US 622, 641; 114 S Ct 2445; 129 L Ed 2d 497 (1994). The amendment does not, however, prevent governments from enacting content-neutral restrictions that impose incidental limitations on speech. *Id*. at 662. That is so because the First Amendment does not protect the right to publicize one's views whenever, however, and wherever one pleases. See *Wood v Moss*, 572 US 744, 757; 134 S Ct 2056; 188 L Ed 2d 1039 (2014). Additionally, as Brosnan correctly notes on appeal, the committee meeting at issue was a limited public forum. See *Perry Ed Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45-47; 103 S Ct 948; 74 L Ed 2d 794 (1983); *Reza v Pearce*, 806 F3d 497, 502-503 (CA 9, 2015) (stating that city council meetings are dedicated solely to the discussion of certain topics and, therefore, are a limited public forum); *Rowe v City of Cocoa*, 358 F3d 800, 803 (CA 11, 2004) ("As a limited public forum, a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand."). For a limited public forum, the state may impose reasonable regulations on speech so as to reserve the forum for its intended purposes, as long as the regulation does not suppress expression on the basis of the speaker's view. *Perry Ed Ass'n*, 460 US at 45-46. The First Amendment also prohibits government officials from punishing individuals for engaging in protected speech, see *Lozman v Riviera Beach*, 585 US ___, ___; 138 S Ct 1945, 1949; 201 L Ed 2d 342 (2018), and secures the

right to petition the government for redress of grievances, see *BE & K Constr v Nat'l Labor Relations Bd*, 536 US 516, 524; 122 S Ct 2390; 153 L Ed 2d 499 (2002). These protections apply to the states through the Fourteenth Amendment. See *Mills v Alabama*, 384 US 214, 218; 86 S Ct 1434; 16 L Ed 2d 484 (1966).

In this case, the Holetons did not allege or present any evidence that Brosnan implemented an address-the-chair rule in order to curtail anyone's speech on the basis of the content or viewpoint expressed. They also did not allege or present evidence that the rule was unreasonable for the forum. See *Perry Ed Ass'n*, 460 US at 45-46. They did not allege or present any evidence that they had actually been prevented from speaking at a previous meeting or that the implementation of the rule denied them the right to petition the committee at the meeting in March 2012.

It is undisputed that the Holetons had been able to speak at previous meetings. Similarly, the evidence showed that Pauline was invited to express her views at the committee's meeting in March 2012 and was given the opportunity to express her views at that meeting. The Holetons failed to allege or present evidence that Brosnan or the council members engaged in a pattern or plan of harassment and intimidation that prevented them from exercising their First Amendment rights premised on the content of their speech or their viewpoint. See *Lozman*, 585 US at ___; 138 S Ct at 1954-1955. Instead, the Holetons premised their claim under 42 USC 1983 on the fact that Brosnan took steps to end Pauline's speech and petition activities for failing to comply with an address-the-chair rule; they suggest that Brosnan could not do so absent a breach of the peace by Pauline. Stated another way, the Holetons did not allege or argue that

Brosnan or the council had formulated a plan to retaliate against the Holetons on the basis of their previously expressed viewpoints. See *id*. They relied solely on Brosnan's decision to implement an address-the-chair rule and enforce that rule.

The evidence showed that the City Council scheduled the meeting to address citizen concerns about smart meters, which previous meetings of the City Council had shown to be a contentious issue. By requiring commentary to be directed to the chair, Brosnan ensured that commentators would not be inciting other attendees to heckle or debate the commentator or otherwise disrupt the orderly progress of the commentary. The City Council had a significant governmental interest in conducting orderly and efficient meetings. See *Rowe*, 358 F3d at 802-803. The rule was on its face reasonably calculated to ensure the orderly participation of the community members who wished to express their views without targeting the content or their viewpoint. Accordingly, the rule was reasonable and consistent with the requirements of the First Amendment for limited public fora. See *Perry Ed Ass'n*, 460 US at 45-46.

As noted, the address-the-chair rule did not by itself target the speaker's viewpoint and did not prevent anyone from petitioning the Infrastructure Committee. Brosnan also provided reasonable notice of the rule by explaining the nature of the rule before the meeting of the Infrastructure Committee. The mere existence of the rule—without regard to the propriety of its promulgation—did not violate the Holetons' First Amendment rights or their right to due process under the Fourteenth Amendment. Additionally, although removing Pauline for a violation of the rule might have amounted to a violation of Michigan's OMA, see MCL

15.263(6), a violation of the OMA does not itself establish that Brosnan's actions also deprived Pauline of her rights under the First and Fourteenth Amendments. See, e.g., *Davis v Scherer*, 468 US 183, 194-196; 104 S Ct 3012; 82 L Ed 2d 139 (1984) (rejecting the contention that a violation of a related state statute or regulation necessarily renders the state actor's actions unreasonable for purposes of determining qualified immunity). Indeed, because a council meeting is a limited public forum, the council can promulgate rules limiting the content and extent of the commentary and can provide for the expulsion of persons who disrupt the orderly progress of the meeting. See *Eichenlaub v Indiana Twp*, 385 F3d 274, 281 (CA 3, 2004) (upholding removal of a member of the public where the evidence showed that the speaker was repetitive and truculent and explaining that restricting such behavior prevented the speaker from hijacking the proceedings, which would infringe the First Amendment rights of other would-be participants); see also *White v Norwalk*, 900 F2d 1421, 1425-1426 (CA 9, 1990) (holding that an ordinance was not facially invalid under the First Amendment because it allowed the moderator of a city council's meeting to eject an audience member for disruptions short of a breach of the peace). It is also not a violation of the Equal Protection Clause of the Fourteenth Amendment for a municipality to favor commentary by its own citizens over noncitizens, as long as the rule does not discriminate on the basis of the speaker's view. See *Rowe*, 358 F3d at 803 ("It is reasonable for a city to restrict the individuals who may speak at meetings to those individuals who have a direct stake in the business of the city—*e.g.*, citizens of the city or those who receive a utility service from the city—so long as that restriction is not based on the speaker's viewpoint.").

In this case, the evidence showed that Brosnan gave Pauline a reasonable opportunity to address the committee at the meeting. It is true that Brosnan immediately admonished Pauline to address the chair and referred to previous encounters, but the video evidence showed that Brosnan's remarks were occasioned by the fact that Pauline immediately began to address the audience rather than the chair. And Pauline did so after another commentator had resorted to personal attacks on the DTE representatives and a general increase in the tensions at the meeting. Nevertheless, there was no evidence that Brosnan selectively applied the address-the-chair rule on the basis of the speaker's viewpoint, or enforced it without warning or in a capricious or arbitrary manner. Indeed, the evidence showed that she applied the rule to several previous speakers from both Livonia and outside communities. The evidence also demonstrated that Brosnan twice admonished Pauline to comply with the rule but still provided her with an opportunity to start over. The evidence showed that Brosnan allowed John Holeton to speak without interruption for several minutes after Pauline left the meeting, which belies the notion that Brosnan used the rule as a pretext to discriminate against the Holetons on the basis of their previously expressed views. The video also showed that Pauline was dismissive and demeaning toward Brosnan and the representative from DTE Energy. Brosnan's efforts to moderate the meeting were reasonable given the limited forum. See *Perry Ed Ass'n*, 460 US at 45-46. The Holetons failed to establish that Brosnan violated Pauline's constitutional rights by admonishing her to follow the rule and then asking her to leave when she was unwilling to comply with the rule. On this record, no reasonable jury could find that Brosnan implemented the address-the-chair rule to retaliate against the Holetons or that she otherwise de-

prived them of their rights by enforcing the rule. See MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 367, 547 NW2d 314 (1996) (recognizing that the nonmoving party must present evidence sufficient "to permit a reasonable jury" to find in favor of the nonmoving party).

The trial court also erred when it refused to grant Brosnan's motion on the basis of qualified immunity. An official has qualified immunity from suits under 42 USC 1983 when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v Hughes*, 584 US ___, ___; 138 S Ct 1148, 1152; 200 L Ed 2d 449 (2018) (quotation marks and citation omitted). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v Callahan*, 555 US 223, 231; 129 S Ct 808; 172 L Ed 2d 565 (2009) (quotation marks and citation omitted). Before allowing a claim to proceed, courts must determine that the plaintiff has established two elements that defeat qualified immunity:

> First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. [*Id*. at 232 (quotation marks and citations omitted).]

The focus of the inquiry is on whether the official had "fair notice that her conduct was unlawful," and, for that reason, the reasonableness of the act must be judged against the backdrop of the law at the time of

the conduct. *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citations omitted). The allegations and facts must show that it would have been clear to a reasonable official in the defendant's position that his or her conduct was unlawful under the situation that he or she confronted. *Wood*, 572 US at 758. The Supreme Court of the United States has also repeatedly admonished lower courts "not to define clearly established law at a high level of generality." *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citation omitted). Although there need not be a case directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id*. It was, therefore, not sufficient for the Holetons to assert that it was clearly established that the First Amendment protects speech and the right to petition government, or that the Fourteenth Amendment ensures the right to due process. In order to survive summary disposition of the claim alleged in this case, the Holetons had to show that it was clearly established that the First Amendment or Fourteenth Amendment prevented a committee chair from enforcing an otherwise reasonable and viewpoint-neutral procedural rule—the address-the-chair rule—by expelling a person who does not comply with the rule under similar facts. This they did not do.

The Holetons relied solely on the fact that the OMA prohibited expulsion absent a breach of the peace at the meeting. The requirements of the OMA do not establish the parameters of the rights protected under the First and Fourteenth Amendments. See *Davis*, 468 US at 194-196. And it has been held that an ordinance that allows expulsion short of a breach of the peace is constitutional. See *White*, 900 F2d at 1425-1426. Under the state of the law applicable to limited public

fora, a reasonable chairperson might conclude that, consistently with the First and Fourteenth Amendments, he or she could properly enforce an otherwise reasonable and viewpoint-neutral rule by expelling a member of the audience who repeatedly violated the rule and was thereby disrupting the orderly progress of the meeting. This is especially true when—as in this case—the chairperson warned the speaker and gave the speaker the opportunity to comply with the rule. No reasonable jury could find that a reasonable chairperson in Brosnan's shoes would have understood that she was violating Pauline's First Amendment rights by implementing and enforcing the address-the-chair rule under those circumstances. See *Kisela*, 584 US at ___; 138 S Ct at 1153-1154. The Holetons failed to establish that Brosnan was not entitled to qualified immunity for resorting to expulsion rather than some other less drastic remedy for the rule violation.

As Brosnan correctly notes on appeal, it was unclear from the amended complaint and arguments made before the trial court how Brosnan purportedly violated the Holetons' rights under the Fourteenth Amendment. The First Amendment applies to state actors through the Fourteenth Amendment. Accordingly, the Holetons' claim under 42 USC 1983 could be viewed as a First Amendment claim. However, the Holetons failed to establish a violation of their First Amendment rights. They also asserted that Brosnan and the unnamed officer deprived Pauline of liberty without due process of law. But they did not clarify the nature of the claim in response to Brosnan's motion for summary disposition. They did not identify the specific right violated and did not show that a reasonable chairperson in Brosnan's position would have known that her acts or omissions violated a clearly estab-

lished right under the Fourteenth Amendment. See *Kisela*, 584 US at ___; 138 S Ct at 1153-1154.

Once Brosnan made a properly supported motion for summary disposition of the Holetons' claim under the Fourteenth Amendment, the Holetons were obligated to demonstrate the nature of the right at issue and that qualified immunity did not apply. It was not enough that a state actor's actions might have had some conceivable effect on life, liberty, or property. See *Moore v Detroit*, 128 Mich App 491, 501-502; 340 NW2d 640 (1983). It was undisputed that Pauline had notice of the rule, was admonished to follow the rule, and failed to do so. She had notice and an opportunity to comply before being expelled. That process may have been sufficient under the circumstances. See *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). There was also no evidence that anyone physically handled Pauline or otherwise inhibited her freedom of movement. On this record, the Holetons failed to identify an independent violation of a right guaranteed under the Fourteenth Amendment, which could have supported a claim under 42 USC 1983. Accordingly, the trial court should also have dismissed the Holetons' claim under 42 USC 1983 to the extent that it relied on a deprivation of a right other than the rights guaranteed under the First Amendment.

III. THE CITY COUNCIL'S APPEAL IN DOCKET NO. 341847

The City Council also argues on appeal that the trial court erred when it denied its motion for summary disposition of the Holetons' claim under 42 USC 1983. The City Council argues that the trial court erred to the extent that it denied its motion because the City Council could be held liable for Brosnan's acts under a

theory of respondeat superior and erred because the City Council is not an entity that is capable of being sued.

It is well settled that a municipality is a person that can be sued under 42 USC 1983 for a deprivation of rights protected by the United States Constitution or a federal statute. See *Johnson v VanderKooi*, 502 Mich 751, 762; 918 NW2d 785 (2018). However, it is equally clear that a plaintiff cannot predicate liability on a respondeat superior theory. *Id*. at 763. Rather, the plaintiff must plead and be able to prove that the municipality's policy or custom directly led to the deprivation of the federal constitutional or statutory right at issue. *Id*. at 762. "A constitutional violation is attributable to a municipality if 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' " *Id*. at 762, quoting *Monell v Dep't of Social Servs of the City of New York*, 436 US 658, 690; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

As discussed in Brosnan's appeal, the Holetons failed to show that Brosnan's actions deprived them of a right protected under the First or Fourteenth Amendment. Brosnan's address-the-chair rule was reasonable and viewpoint neutral, as permitted for limited public fora. See *Perry Ed Ass'n*, 460 US at 45-46. Moreover, Brosnan could ensure the orderly progress of the meeting by enforcing the rule, see *Rowe*, 358 F3d at 803, and expulsion was not a constitutionally suspect remedy, see *White*, 900 F2d at 1425-1426. The Holetons further could not rely on a violation of the OMA to establish a violation of a right protected by the First or Fourteenth Amendments. See *Davis*, 468 US at 194-196. On the record before the trial court,

Brosnan's actions were permissible under the First and Fourteenth Amendments. The Holetons failed to establish a question of fact for the jury as to whether Brosnan's implementation and enforcement of the address-the-chair rule violated their constitutional rights. Therefore, even if Brosnan acted pursuant to a policy or procedure implemented by Livonia, a reasonable jury could not find that the policy caused a deprivation of rights. See *Johnson*, 502 Mich at 762. For these reasons, the trial court should have dismissed the Holetons' claim under 42 USC 1983 as to all defendants. See *Barnard Mfg*, 285 Mich App at 374-375.

IV. CONCLUSION

Because the Holetons failed to identify a deprivation of their rights under the First and Fourteenth Amendments of the United States Constitution, the trial court should have dismissed their claims under 42 USC 1983 as to all defendants. For that reason, we reverse the trial court's decision to deny the motions for summary disposition of the Holetons' claims under 42 USC 1983 in both dockets, and we remand this case for entry of an order dismissing the claims.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because this appeal involved issues of importance to the general public, we order that none of the parties may tax their costs. See MCR 7.219(A).

MURRAY, C.J., and SAWYER and REDFORD, JJ., concurred.

HUTCHINSON v INGHAM COUNTY HEALTH DEPARTMENT

Docket No. 341249. Submitted May 2, 2019, at Lansing. Decided May 9, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 982 (2020).

Zanetta Hutchinson filed a medical malpractice action in the Ingham Circuit Court against the Ingham County Health Department, Carol Salisbury, N.P., and Peter Gulick, D.O., in connection with Salisbury's and Gulick's treatment of plaintiff for a lump in her left breast. Salisbury ordered a mammogram for plaintiff in late summer 2013 after plaintiff reported the lump, which was not painful or tender to the touch. The radiologist who read the images concluded that plaintiff had a benign-appearing calcification in her left breast; Gulick reviewed and electronically signed the mammogram report. The lump continued to grow, but at a follow-up appointment in November 2013, Salisbury informed plaintiff that her breast tissue was dense, that the lump was benign, and that the lump was a calcification. Plaintiff had three additional appointments with Salisbury between November 2013 and June 2014 before plaintiff moved to Arkansas later that year; plaintiff reported at each appointment that the lump had grown in size, and, according to plaintiff, Salisbury continued to assure her that the lump was a calcification. Plaintiff did not consult with other doctors about the issue or do independent research regarding the issue because Salisbury had explained that the lump was a calcification, but she still did daily breast self-examinations because she was concerned with the size of the lump. On May 1, 2015, plaintiff reported the lump to her new physician in Arkansas, who ordered a mammogram. Plaintiff had the mammogram on June 1, 2015; the Arkansas radiologist recommended a biopsy of the lump because of her concern that it could be cancerous; the lump was biopsied on June 9, 2015; and plaintiff received the results and a cancer diagnosis on June 15, 2015. Plaintiff mailed her notice of intent to defendants on December 4, 2015, and later filed her complaint. Gulick moved to dismiss, arguing that plaintiff's claim was barred under MCL 600.5838a(2) because the claim was filed more than six months after plaintiff discovered or should have discovered the existence of her claim. The court, James S. Jamo, J., granted Gulick's motion as to all defendants, reasoning that plaintiff should have

discovered her possible cause of action in 2013 or 2014 or, at the latest, on June 1, 2015, when the radiologist informed her that a biopsy was necessary because the lump could be cancerous. Plaintiff appealed by delayed leave granted.

The Court of Appeals *held*:

MCL 600.5838a(2) provides that an action involving a medical malpractice claim may be commenced within the applicable period prescribed in MCL 600.5805 or MCL 600.5851 to MCL 600.5856 or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later; a medical malpractice action is barred if it is not commenced within that time frame or any other time frame prescribed by that subsection. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least six months before the expiration of the period otherwise applicable to the claim is on the plaintiff. When there are no disputed facts, the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial court. With regard to the possible-cause-of-action theory, an objective standard must be used when determining when a plaintiff should have discovered his or her injury; in other words, the question is whether a reasonable person, not a reasonable physician, would or should have discovered his or her injury. While a plaintiff does not have to be aware of the full extent of his or her injury before the statute of limitations begins to run, the plaintiff must possess at least some minimum level of information that, when viewed in totality, suggests a nexus between the injury and the negligent act; thus, the possible-cause-of-action standard is not an anything-is-possible standard. When applying this flexible approach, courts should consider the totality of information available to the plaintiff, including the plaintiff's own observations of physical discomfort and appearance, the plaintiff's familiarity with the condition through past experience or otherwise, and the physician's explanations of possible causes or diagnoses of the condition. The possible-cause-of-action standard must be applied with a substantial degree of flexibility when the cause of a plaintiff's injury is difficult to determine because of a delay in diagnosis. Significantly, the Legislature chose the phrase "should have" rather than "could have" in the statutory text. Therefore, the inquiry is whether it was probable, not possible, for a reasonable lay person to have discovered the existence of the claim. An individual does not have to conduct an extensive investigation,

such as performing independent research or seeking out medical records to attain more information than he or she has been given by a medical professional. The facts concerning plaintiff's course of treatment were undisputed in this case; thus, the only dispute was when plaintiff discovered or should have discovered her possible cause of action. Therefore, the question when plaintiff discovered or should have discovered her potential claim was not one for the jury to decide, and the trial court correctly considered the issue in a summary-disposition motion. The facts of this case were distinguishable from those in *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997), and *Solowy* therefore did not control the outcome. In 2013 and 2014, Salisbury informed plaintiff at multiple appointments that the lump in plaintiff's left breast, which continued to grow in size, was a calcification. While plaintiff had subjective concerns as a layperson regarding the lump, the record did not contain objective facts that would have led her to conclude that the lump was cancerous. Plaintiff reasonably relied on Salisbury's assurance that the growing lump was a benign calcification, and while plaintiff knew the lump was growing, she had no past experience with breast cancer that would have informed her the diagnosis may have been wrong. Therefore, the record did not support the view that plaintiff should have known of the existence of her possible cause of action in 2013 or 2014. Similarly, although the Arkansas radiologist informed her after the June 1, 2015 mammogram that a biopsy of the lump was necessary because of a general concern that it was cancer, it was not reasonable to conclude that plaintiff should have discovered her possible cause of action on that date because plaintiff did not know that she had cancer when speaking with the radiologist, had not been diagnosed with cancer previously, and did not have prior experience with cancer that would have made her familiar with a cancer diagnosis. Thus, plaintiff did not discover and should not have discovered her possible cause of action against defendants until she was informed on June 15, 2015, that the lump was cancerous. Plaintiff's notice was timely filed for purposes of MCL 600.5838a(2) because she mailed the notice of intent on December 4, 2015, less than six months after she knew or should have known about her possible cause of action. For that reason, the trial court erred by granting Gulick's motion for summary disposition in favor of all defendants.

Reversed.

McKeen & Associates, PC (by *Brian J. McKeen* and *John LaParl, Jr.*) for Zanetta Hutchinson.

Cohl, Stoker & Toskey, PC (by *Bonnie G. Toskey* and *Gordon J. Love*) for the Ingham County Health Department and Carol Salisbury.

Hall Matson, PLC (by *Marcy R. Matson* and *Sandra J. Lake*) for Peter Gulick.

Before: BOONSTRA, P.J., and METER and FORT HOOD, JJ.

FORT HOOD, J. In this medical malpractice case, plaintiff, Zanetta Hutchinson, appeals by delayed leave granted[1] the trial court's order granting summary disposition in favor of defendants, Ingham County Health Department; Carol Salisbury, N.P.; and Peter Gulick, D.O., pursuant to MCR 2.116(C)(7). For the reasons set forth in this opinion, we reverse and remand to the trial court for proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In her first amended complaint, plaintiff alleged that she was a patient of the Ingham County Health Department and was treated by Salisbury, a nurse practitioner, and Gulick, a physician specializing in internal medicine.[2] Plaintiff further alleged that when she informed Salisbury that she had a lump in her left breast in the late summer of 2013, Salisbury, supervised by Gulick, ordered a mammogram for plaintiff, and a mammogram was performed on September 4, 2013. Plaintiff's first amended complaint alleged that

[1] *Hutchinson v Ingham Co Health Dep't*, unpublished order of the Court of Appeals, entered June 26, 2018 (Docket No. 341249).

[2] Gulick, according to the record, is also a board-certified infectious-disease physician.

she underwent a " 'MAMMO SCREEN DIGITAL W CAD PANEL BILAT' " at Sparrow Health System, and that the radiologist, Alfredo P. La Fe, M.D., stated with regard to the results:

> "The tissue of both breasts is heterogeneously dense. This may lower the sensitivity of mammography . . . . There is a benign appearing calcification in the right breast. There are also benign appearing calcifications in the left breast. No significant masses, calcifications, or other finding [sic] are seen in either breast."

According to the first amended complaint, Gulick reviewed and "electronically signed" the mammogram results on September 5, 2013. Plaintiff alleged that Gulick was negligent in not providing appropriate care and treatment to plaintiff by not monitoring and managing her treatment properly when she complained of a lump in her breast and by not ordering a diagnostic mammogram for plaintiff as opposed to a screening mammogram. Specifically, plaintiff alleged, among other things, that Gulick should have ordered a biopsy performed on plaintiff once her mammogram showed "suspicious calcifications in her left breast" and that Gulick was negligent in his supervision of Salisbury. Plaintiff made similar claims against Salisbury, alleging that Salisbury failed to ensure that "[plaintiff's] physician [was] properly informed of [her] breast complaints and mammogram results."[3] After plaintiff moved to Arkansas in 2014, she sought medical care at the University of Arkansas for Medical Sciences. On June 1, 2015, a mammogram of plaintiff's left breast was performed, and following a June 9, 2015 biopsy, plaintiff was diagnosed with breast cancer on June 15,

[3] Plaintiff's three-count first amended complaint alleged medical negligence against Gulick, Salisbury, and the Ingham County Health Department.

2015. The parties do not dispute that plaintiff mailed her notice of intent in this case on December 4, 2015. See MCL 600.2912b(1) and (2).

In her deposition in this case, plaintiff recalled that in August 2013, she attended an appointment with Salisbury and that Salisbury ordered a mammogram for her after feeling a knot in her left breast. According to plaintiff, the knot she described "was never tender or it never hurt; it was just growing." While plaintiff would do her own monthly breast exams, it was her partner at the time who discovered the knot in her left breast. In plaintiff's words, her partner observed "a small-like pea shaped knot in [her] breast." Plaintiff stated that during her initial visit with Salisbury[4] concerning the lump in her left breast, "[Salisbury] had me lay back, and she did the breast exam and she felt the lump." After Salisbury felt the lump, plaintiff recalled that "[Salisbury] said that we would do a mammogram." Plaintiff denied that she felt any pain or tenderness when Salisbury was examining the lump. Plaintiff further described the ensuing events as follows:

> So I went to [Sparrow Hospital] and I did the mammogram as scheduled and waited on the results to come back. So at my next checkup appointment, [Salisbury] told me that it was calcifications from me delivering my son late at 40. And they don't prescribe dry up breast milk pills anymore, so that's what she told me at 40. So I took her word as what it was. I know no different. I'm not a doctor.

According to plaintiff, she had her mammogram on September 4, 2013. At the time that she had her mammogram, plaintiff was not experiencing pain, tenderness, or discharge from her left breast. Plaintiff did not discuss her mammogram results with Gulick be-

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[4] While plaintiff could not recall the exact date of the appointment, it appears from the record that it took place on August 28, 2013.

cause he was not "the doctor that actually [was assigned] to be administrator; [Salisbury] was." According to the records of the Ingham County Health Department, plaintiff did not return to see Salisbury after her mammogram until November 2013, but plaintiff could not independently recall the date of her follow-up appointment with Salisbury. However, plaintiff was adamant during her deposition testimony that Salisbury informed her that the lump in her breast "was just calcifications." Plaintiff testified that she was eager to follow up with Salisbury following her mammogram because "I wanted to know what the results were for the lump because the lump was still in my breast growing; it was getting bigger, and I wanted to know what it was."

Following her September 4, 2013 mammogram, plaintiff continued to conduct her own self-examinations of her left breast, and the following colloquy took place between plaintiff and defense counsel on this subject:

Q. And you continued to do monthly self-exams?

A. Right. I continued to feel the knot every day.

Q. So at this point, you weren't doing it monthly, you're doing it daily?

A. Yeah. I am, like, touching that spot every day.

Q. And it was actually getting bigger?

A. Yeah.

Q. So between September, when you had the mammogram, and November, which would've been the next time that you actually saw NP Salisbury, every day you noticed this lump and you noticed it was actually getting bigger?

* * *

A. Well, right. When I did see [Salisbury] again, the knot had gotten bigger. And she felt it, and she did an exam; I pointed it out to her. And she felt it, and she said, "Yes. But it does seem to be bigger, but it's still—I just think it's calcifications because you had a baby at 40, and they don't give breastmilk pills anymore." So you know? What can I say? I'm not a doctor. I had to take her word for it.

While plaintiff could not recall the exact specifics of her conversation with Salisbury during the appointment in which they discussed the results of her September 4, 2013 mammogram, she was very clear that Salisbury told her that the lump in her left breast was "calcifications." Plaintiff also recalled that Salisbury told her that her breast tissue was dense, that the lump was benign, and that made it difficult for "them to actually view what exactly [the lump] was." Plaintiff did not have any follow-up treatment with regard to the lump. Plaintiff denied that Salisbury informed her that she should return for a repeat mammogram in a year. In plaintiff's words, "[t]hey ruled it as calcifications, and they left it at that. And the lump continued to grow, and I continued to show her. They never did nothing else other than what they had did [sic]."

Plaintiff saw Salisbury three more times before she moved to Arkansas on an unspecified date in 2014. Each time, plaintiff told Salisbury that the lump was getting bigger, and Salisbury would feel the lump but "[Salisbury] did nothing." According to plaintiff, Salisbury acknowledged during their appointments that the lump did appear to be growing. Plaintiff did not do any independent research on the subject of calcifications, she did not talk to anyone else about the lump in her breast, and she did not consult with any other doctors about the issue. While the lump continued to grow, plaintiff did not experience any tenderness, pain, or

discharge. Plaintiff saw Gulick on February 14, 2014, for a reason unrelated to the lump in her breast, but they did not discuss the lump in her breast or her mammogram results.

After plaintiff moved to Little Rock, Arkansas, she began to treat with Dr. Moses;[5] during her first appointment on May 1, 2015, plaintiff told Moses about the lump in her breast and Moses ordered a mammogram. Plaintiff described the first appointment with Moses as follows:

> Well, [Moses] did the breast exam, and she noticed the mass; that is what she called it. And she said that she was unsure and got a little worried about that. And it was pretty big, and she wanted to get it checked out. So she referred me for a mammogram, and they took it from there.

According to the record, plaintiff's last appointment with Salisbury was in June 2014, and she did not consult with any other doctors before seeing Moses on May 1, 2015. Defense counsel continued to question plaintiff as follows regarding her initial visit with Moses in Little Rock:

> *Q*. And did [Moses] tell you what she was worried about?
>
> *A*. Not exactly. Just that the mass was—how big the mass was. She wanted to see what it was because it was kind of huge for my little breast. It was a pretty big tumor in there.
>
> *Q*. Okay. Did she say to you that she was concerned it might be breast cancer?
>
> *A*. No, she didn't say that. She just said she was concerned and she wanted to see what it was.

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[5] During her deposition, plaintiff indicated that she thought Moses's first name was "Tricia."

Q. Were you concerned that it might be breast cancer?

A. I was concerned that it could've been anything; you know?

Q. Was cancer one of the things you were concerned about?

A. Well, yeah. It don't [sic] run in my family in the girls, but yeah; you know?

Q. Just living in our society that is something you're aware of?

A. Yeah.

Between her last appointment with Salisbury and her first appointment with Moses, plaintiff continued to feel the lump in her left breast on a daily basis and observed that it continued to grow. When defense counsel asked plaintiff if she was concerned that it was breast cancer, plaintiff answered in the following manner:

> Actually, I didn't know what to think it was. I just assumed it was what they said it was, but I knew it was getting bigger. And I don't—I'm not a doctor, but I didn't think calcification pockets grow like that. So, I mean, common sense, you would think it was something else. You would be alarmed, so yeah. I was scared it could've been something serious as it was, and it was.

However, later in her deposition, during questioning by her own counsel, plaintiff stated that because she was informed by Salisbury that the lump was a calcification, she had not been particularly worried about the lump. Plaintiff had her mammogram on June 1, 2015. According to plaintiff, after more images were ordered, she was informed on an unspecified date[6] by

[6] In their brief on appeal, the Ingham County Health Department and Salisbury "concede that the exact date on which Plaintiff was informed of the mammogram result is unknown."

Dr. Frost,[7] a radiologist, that she would need a biopsy. Plaintiff testified that Frost told her that a biopsy was necessary "[b]ecause of the mass, the size of the mass, and they wanted to be sure of what it was because it was actually . . . formed in my milk ducts in my breast." Plaintiff testified further regarding the substance of her communications with Frost:

> *Q*. Did they say to you that they were concerned [the lump] could be cancerous?
>
> *A*. Yes, she did.
>
> *Q*. And because there was a concern that it could be cancerous, she wanted you to actually have a biopsy to find out what it exactly is?
>
> *A*. Exactly.

Plaintiff's deposition testimony continued, in pertinent part:

> *Q*. And it looks like you had the biopsy on June 9?
>
> *A*. That sounds about right.
>
> *Q*. So it was pretty quickly after you had the mammogram that you talked to Dr. Frost?
>
> *A*. Right.
>
> *Q*. And she said, "This could be cancer. We need to do a biopsy. We need to find out what's going on?"
>
> *A*. Right.

Plaintiff received her biopsy results on June 15, 2015, and was diagnosed with breast cancer. Specifically, plaintiff was diagnosed with "[i]nvasive ductal carcinoma," and "[l]ymphvascular invasion [was] identified." Plaintiff was informed she would need chemotherapy and radiation and that her left breast would need to be removed because the tumor was 10 cm in

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[7] Frost's first name could not be discerned from the record.

diameter and "had wrecked a lot of [her] breast tissue." Plaintiff opted to have a double mastectomy for preventative reasons. Plaintiff also testified that she has Medicaid for her medical coverage and that once she arrived in Arkansas, there was a 45-day waiting period for coverage to begin. At the time of her deposition, plaintiff's cancer was in remission. Plaintiff testified that she did not discuss the lump in her breast with an obstetrician-gynecologist at the Ingham County Health Department during an appointment after the September 4, 2013 mammogram for the following reasons:

> I believed in what [Salisbury] was telling me it was what it was. I—you know, I had no reason to question their capabilities. I'm not a doctor. I don't know. So I believed what they were telling me until . . . [the lump] kept growing.

Plaintiff mailed her notice of intent to sue to defendants on December 4, 2015.

Relevant to this appeal, Gulick moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claims were barred by the six-month discovery rule. Specifically, Gulick contended that, considering precedent from the Michigan Supreme Court, *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), plaintiff was aware of her possible cause of action—and the limitations period began to run—no later than June 1, 2015. In support of his motion, Gulick noted that plaintiff testified at her deposition that during the period spanning 2013 to 2014, she continually performed daily self-exams of her left breast, she noticed that the lump was growing in size, and she was concerned that the lump could be something more serious than a calcification. According to Gulick: "Plaintiff had sufficient suspicions in 2013 and

2014 that perhaps she needed additional testing to rule out cancer. These suspicions were sufficient to trigger the discovery rule." Gulick also noted that plaintiff testified that following a June 1, 2015 mammogram, she was informed by Frost that she would require a follow-up biopsy "because of the likelihood that the lump was cancer." Specifically, Gulick claimed that because plaintiff was informed on June 1, 2015, that the lump in her breast might be cancerous, she discovered the existence of her possible claim as of June 1, 2015, and that therefore, pursuant to MCL 600.5838a(2), the six-month limitations period expired on November 30, 2015. Gulick asserted that the claim was time-barred because plaintiff's notice of intent was not filed until December 4, 2015.

In her response to Gulick's motion, plaintiff denied that she could have discovered her possible cause of action in 2013 or 2014 because Salisbury had informed her that the lump in her left breast was benign, even after she had told Salisbury that the lump was continuing to grow. Instead, plaintiff argued that the six-month discovery period began on June 9, 2015,[8] when she received the biopsy results and was diagnosed with breast cancer. Notably, plaintiff disagreed with Gulick's assertion that she should have been aware of her possible cause of action on June 1, 2015, when she was informed that her mammogram was "suspicious for cancer." Specifically, plaintiff claimed that the present case was factually distinguishable from *Solowy* because the plaintiff in *Solowy* had already been diagnosed with cancer and was familiar with its symptoms when it reoccurred. Plaintiff also claimed that even though she was diagnosed with

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[8] The record reflects that plaintiff received her biopsy results and was informed she had breast cancer on June 15, 2015.

breast cancer on June 9, 2015, she was not aware of a possible connection between the alleged malpractice of Salisbury, Gulick, and the Ingham County Health Department until June 15, 2015, "when [plaintiff] was informed [by her medical providers in Arkansas] that the 2013 mammogram should have prompted follow up screening." Reiterating that her claim was filed in a timely manner given that the six-month discovery period did not begin to run until June 9, 2015, plaintiff requested that the trial court deny Gulick's motion for summary disposition.

Plaintiff also filed a supplemental response to Gulick's motion in which she attached her September 27, 2017 affidavit. In her affidavit, plaintiff averred as follows:

> 1. After my mammogram in September 2013, I repeatedly informed Carol Salisbury, N.P., that the lump in my left breast was continuing to grow. Each time I spoke to Ms. Salisbury regarding the lump, she assured me that the lump was just a benign calcification.
>
> 2. After I stopped treating with Ms. Salisbury, I continued to rely on her assurances that, despite the fact the lump was growing, it was a benign calcification.
>
> 3. I have no medical training or specialized medical knowledge, and trusted that Ms. Salisbury had been correct when she had repeatedly assured me that the lump was a benign calcification.
>
> 4. I had a mammogram performed on June 1, 2015, after which I was told the scan was suspicious for cancer in my left breast, and that I would need to have a biopsy performed to determine whether I actually had breast cancer.
>
> 5. I only became aware that I did in fact have breast cancer after the biopsy was performed on June 9, 2015.
>
> 6. I learned that I had a possible malpractice claim on approximately June 15, 2015, after I was informed by my

treating physicians that the findings on the 2013 mammogram should have prompted additional scans and a biopsy.

In reply, Gulick argued that MCL 600.5838a(2) required plaintiff to initiate her lawsuit within six months after she discovered or should have discovered the existence of her claim, whichever occurred later, and that the statute did not require that plaintiff have "actual" knowledge of her claim, including injury and causation. Gulick also asserted that even though plaintiff was not a medical doctor, given that she testified in her deposition that the lump in her breast continued to grow and that she was concerned it was cancer, she had a duty to follow up on her suspicions that the lump could be cancerous. Accordingly, Gulick reiterated his argument that plaintiff should have discovered her possible cause of action as early as 2013 or 2014 or at the latest, on June 1, 2015, when she was informed that the lump was being tested for cancer.

Following a hearing on Gulick's motion, the trial court, ruling from the bench, concluded that plaintiff should have discovered her possible cause of action in 2013 or 2014 or, at the latest, when she was informed by Frost that a biopsy was necessary because the lump could be cancerous. The trial court concluded that plaintiff's cause of action was time-barred with regard to all defendants as a result. Plaintiff now appeals by delayed leave granted.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion brought pursuant to MCR 2.116(C)(7) determining that an action is barred by the applicable statute of limitations. *Fraser Twp v Haney*, 327 Mich App 1, 4; 932 NW2d 239 (2018).

In reviewing a trial court's ruling that a claim is barred by the applicable statute of limitations, the following legal principles are of guidance:

> "[T]his Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." [*Id*. at 5, quoting *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010).]

III. ANALYSIS

The thrust of plaintiff's argument on appeal is that the trial court erred by granting summary disposition in favor of defendants on the basis of its conclusion that plaintiff should have discovered her possible cause of action against defendants in 2013 or 2014, or, at the latest, when she was informed by Frost, following her June 1, 2015 mammogram, that the lump in her breast could be cancerous. We agree.

A. GOVERNING LAW

The parties acknowledge that plaintiff did not file her claim within the two-year limitations period for medical malpractice actions set forth in MCL 600.5805(6).[9] Accordingly, this appeal turns on

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[9] At the time plaintiff filed her complaint, the applicable limitations period was set forth in MCL 600.5805(6). See 2012 PA 582. The statute

whether plaintiff timely initiated her claim within the six-month discovery period set forth in MCL 600.5838a(2) which provides, in pertinent part:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805] or [MCL 500.5851 to MCL 600.5856], *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later . . . . The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff*. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. [Emphasis added.]

The leading case from the Michigan Supreme Court regarding what is also known as the six-month discovery rule is *Solowy*, 454 Mich 214. In *Solowy*, the Court was asked to determine whether the six-month discovery period began to run when the plaintiff learned of two potential causes for a lesion on her ear—one of which was "potentially actionable" against medical providers and the other not—or whether the six-month discovery period commenced only when her physician actually confirmed "the potentially actionable diagnosis." *Id*. at 215-216.

However, before delving into the substance of the parties' arguments with respect to when plaintiff discovered, or should have discovered, a possible cause of action against defendants, MCL 600.5838a(2); *Solowy*, 454 Mich at 221, 223, it is first necessary to address plaintiff's argument that "[t]he determination of when

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was amended effective June 12, 2018, by 2018 PA 183, and the applicable limitations period is now set forth in MCL 600.5805(8).

a plaintiff discovered or should have discovered the alleged malpractice is a question of fact for the jury where the relevant facts are in dispute." (Emphasis omitted.) As defendants correctly observe in their briefs on appeal, plaintiff did not raise this specific issue before the trial court in her response to Gulick's motion for summary disposition or during oral argument in the trial court, and she also did not argue it in her delayed application seeking leave to appeal in this Court. Notably, this Court's order granting plaintiff's delayed application for leave to appeal specifically states that this appeal "is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4)." *Hutchinson*, unpub order at 1.

In any event, plaintiff's argument is clearly without merit because in *Solowy*, 454 Mich at 230, the Michigan Supreme Court, quoting its earlier decision in *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993), reiterated that " 'in the absence of disputed facts, the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial judge.' " Moreover, contrary to plaintiff's assertions in her brief on appeal, the facts in this case concerning plaintiff's course of treatment for the lump in her breast are not disputed. Rather, what is disputed is *when* plaintiff discovered or *should have* discovered her possible cause of action against defendants. For example, the parties do not dispute that plaintiff had a mammogram performed on September 4, 2013, at Sparrow Hospital and that in a follow-up visit to Salisbury, plaintiff was informed that the lump in her left breast was a benign calcification. Moreover, there is no dispute that plaintiff recognized that the lump was growing in the months following her September 4, 2013 mammogram, reported the growth to Salisbury, and was assured that the growth was a

benign calcification. The parties also do not disagree concerning the course of treatment plaintiff received in Arkansas, although there is some confusion[10] among the parties with regard to the specific dates of plaintiff's treatment. For example, Gulick contends that plaintiff spoke to the radiologist, Frost, about a possible breast cancer diagnosis on June 1, 2015. However, a review of plaintiff's deposition testimony reflects that the date that plaintiff spoke with Frost is unclear, and the Ingham County Health Department and Salisbury concede this fact. Again, what the parties disagree on is *when*, given the facts in the record presented to the trial court and to this Court, plaintiff discovered or *should have* discovered her possible cause of action. Because the trial court's ruling in favor of defendants involved a legal determination on the basis of undisputed facts, plaintiff's argument that the question when she discovered or should have discovered her claim should be presented to the jury is unpersuasive. *Solowy*, 454 Mich at 216, 230, 232.

In *Solowy*, the Michigan Supreme Court held that the six-month discovery period for the plaintiff's medical malpractice claim began to run when the plaintiff "learned that one of two possible diagnoses for her lesion [on her ear] was potentially actionable because it was at this point that she should have discovered a possible cause of action." *Id*. at 216. The plaintiff had originally been treated for a cancerous lesion on her left ear in 1986, and she alleged that one of the

[10] The confusion among the parties with regard to the date of plaintiff's conversation with Frost following her mammogram in Arkansas is not material to the disposition of this appeal given our conclusion, following the analysis of applicable Michigan precedent, that pursuant to the specific circumstances of this case, plaintiff did not and should not have discovered her possible cause of action until she received her diagnosis of breast cancer on June 15, 2015.

physicians treating her had informed her during her earlier treatment that the cancer was "gone" with no chance of it reoccurring. *Id*. at 216-217. The plaintiff also claimed that she was not informed that she should return to see her physicians for additional follow-up treatment. *Id*. at 217. "In January 1992, about five years after her last treatment" with the defendant physicians, the plaintiff found a similar lesion on her left ear in approximately the same location. *Id*. Notably, her symptoms were "nearly identical" to those she had experienced five years earlier, and she testified in her deposition that she felt the experience had " 'started all over again.' " *Id*. When she consulted with a dermatologist on March 27, 1992, the plaintiff was informed that there were two possible diagnoses for the new lesion, one of which was cancerous, and one of which was not. *Id*. Following a biopsy, the plaintiff was informed on April 9, 1992, that the lesion on her ear was once again cancer. The plaintiff underwent extensive surgery, removing the top portion of her left ear to remove the cancer. *Id*. The plaintiff filed her medical malpractice lawsuit on October 5, 1992, and the defendant physicians moved for summary disposition, claiming that the plaintiff's action was time-barred by the statute of limitations. *Id*. at 217-218. The trial court agreed with the defendant physicians, this Court affirmed the trial court's ruling, and the plaintiff filed an application for leave to appeal in the Michigan Supreme Court. *Id*. at 218-219.

On appeal in the Michigan Supreme Court, the plaintiff contended that the "possible cause of action" standard that the trial court and the Court of Appeals had relied on, first articulated in *Moll* and applied in *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994), should not apply in the context of medical malpractice actions. The Michigan Supreme Court

disagreed and affirmed the use of the "possible cause of action" standard in discerning when the six-month discovery period begins to run. *Id*. at 221, 223. As the *Solowy* Court explained, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id*. at 223. In applying the "possible cause of action" standard to the plaintiff's medical malpractice claim in *Solowy*, the Court observed that an objective standard must be used when determining when a plaintiff should have discovered his or her injury and that a plaintiff "need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Id*. at 223-224. The Michigan Supreme Court ultimately held that the record confirmed that the plaintiff was aware of her possible cause of action on March 27, 1992, when she first consulted with a dermatologist and was informed that the lesion on her left ear could potentially be cancerous. *Id*. at 224. Notably, the *Solowy* Court emphasized that the plaintiff was aware that her symptoms "were identical to those she had experienced five years earlier." *Id*.

Additionally, given that the plaintiff alleged in her complaint that she was not informed by the defendant physicians that her cancer could recur and that she should proceed with follow-up treatment, the *Solowy* Court determined that as of March 27, 1992, the plaintiff knew of her injury—the progression of a potentially cancerous lesion on her ear—and the possible cause: the alleged failure of the defendant physicians in 1986 to advise her that her cancer could return and that she needed follow-up treatment. *Id*. Observing that the "possible cause of action" standard did not require that the plaintiff "be aware of the full extent of her injury before the clock begins to run," the *Solowy*

Court held that as of March 27, 1992, the plaintiff "was armed with the requisite knowledge to diligently pursue her claim." *Id*. at 224-225.

In *Solowy*, the Court went on to elaborate that a "delay in diagnosis may delay the running of the six-month discovery period in some cases" because under some circumstances, an illness or a diagnosis may not be possible until a test, or a series of such tests, are performed. *Id*. at 226.

> In such a case, it would be unfair to deem the plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission. While according to *Moll*, the "possible cause of action" standard requires less knowledge than a "likely cause of action standard," it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the "possible cause of action" standard is not an "anything is possible" standard. [*Id*.]

Thus, the *Solowy* Court cautioned that a flexible approach must be employed in applying the "possible cause of action" standard and that when invoking such a flexible approach, courts should weigh the following:

> In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition. [*Id*. at 227.]

Again, the *Solowy* Court emphasized that the plaintiff, even before her 1992 cancer diagnosis, was aware that her symptoms were the very same as what she had experienced five years earlier and that "her observations of the discomfort and of the appearance and

condition of her ear should have aroused suspicion in her mind that the lesion might be cancer." *Id*. at 227-228. Under the specific facts of that case, the plaintiff's personal observations of her condition and symptoms, together with her dermatologist explaining that her cancer could have returned, "supplied [the plaintiff] with enough information to satisfy the standard." *Id*. at 228. The *Solowy* Court summarized its reasoning with respect to cases that involve a delayed diagnosis in the following manner:

> In summary, we caution that when the cause of a plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. In such a case, courts should be guided by the doctrine of reasonableness and the standard of due diligence and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. While the standard should be applied with flexibility, it should nevertheless be maintained so that the legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions are honored. [*Id*. at 230.]

More recently, in *Jendrusina v Mishra*, 316 Mich App 621, 624; 892 NW2d 423 (2016), the plaintiff filed a medical malpractice action against his primary care providers, and after the defendants moved for summary disposition, claiming that the plaintiff had not filed his action in a timely manner, the trial court granted the defendants' motion, concluding that the plaintiff had not filed his claim in compliance with the six-month discovery period set forth in MCL 600.5838a(2). The plaintiff was diagnosed with kidney failure in January 2011, and he claimed that he did not become aware of his medical malpractice claim until September 20, 2012, when he consulted with a nephrologist, who informed him that he ought to have been

referred earlier to a nephrologist for treatment. *Jendrusina*, 316 Mich App at 625. The next day the plaintiff contacted his attorney, and this Court, disagreeing with the trial court, concluded that after calculating the six-month discovery period from September 20, 2012, the plaintiff had filed his case in a timely manner. *Id*. at 626-627.

Noting the importance of being "strictly guided" by the plain language of MCL 600.5838a(2), this Court observed that the Legislature used the language "should have" rather than "could have" in the text of MCL 600.5838a(2) when referring to the discovery of a plaintiff's claim. *Jendrusina*, 316 Mich App at 626. Referring to the dictionary definitions of "could" and "should," this Court observed that the difference between the two is that the word "could" is employed to reflect a *possibility*, while the word "should" denotes a *probability*. *Id*. at 626. This Court also clarified, in pertinent part:

> Therefore, the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; rather, the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim. [*Id*.]

In *Jendrusina*, the plaintiff's medical chart, which the defendant physician maintained, indicated that the plaintiff was experiencing abnormal and worsening levels of two blood measures indicative of poor kidney function. *Id*. at 627. This Court emphasized that the existence of those records was not relevant to the determination of when the plaintiff should have discovered his claim unless the record reflected that the plaintiff was made aware of the results. *Id*. at 627-628. Contrasting the plaintiff's case with *Solowy*, this Court noted that the plaintiff in *Solowy*, who had

been diagnosed with cancer in the past, "knew that her doctor might have committed malpractice as soon as the tumor" returned, but she waited to determine whether "she was in fact injured as a result of [her doctor's] actions." *Id*. at 630. Additionally, the *Jendrusina* Court noted that the record did not indicate that the plaintiff in *Jendrusina* should have been aware of a possible cause of action, particularly given that the plaintiff did not have a history of kidney disease and he was not aware of any blood-test results indicating the progression of his condition. *Id*. at 630. Specifically, this Court stated, in pertinent part:

> [A]fter diagnosis in January 2011, plaintiff knew he was sick, but he lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical difference between plaintiff in this case and the plaintiff in *Solowy* is that the plaintiff in *Solowy* neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history. She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur until January 2011 when it precipitated his hospitalization. [*Id*. at 630-631.]

This Court also offered additional guidance with respect to the Supreme Court's admonition that discerning when a plaintiff knew of their "possible cause of action" is to be done with reference to the "objective facts," *id*. at 631, stating:

> An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable

> physician (or medical malpractice attorney) would know. Therefore, the question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease. [*Id*.]

Moreover, although the defendant physician in *Jendrusina* had ordered a kidney ultrasound performed after the plaintiff experienced edema and "a slightly elevated lab report in 2008" with the results of the ultrasound being normal, this Court rejected the defendants' suggestion that the plaintiff should have realized that he had kidney disease in 2008. *Id*. at 632-633. Specifically, this Court stated that "[t]he mere *performance* of a noninvasive, commonly administered kidney-imaging study that yielded a normal result" did not amount to an " 'objective fact' " that would lead the plaintiff to conclude that he had a possible cause of action when he was subsequently diagnosed with kidney disease. *Id*. at 633. While recognizing that it was possible for the plaintiff in *Jendrusina* to have discovered his claim after being diagnosed with kidney failure, the Court noted that to have done so, the plaintiff would have had to independently "undertaken an extensive investigation to discover more information than he had." *Id*. Observing that the plaintiff would have had to study the myriad causes of kidney disease and the way it progressed, as well as independently review his earlier blood-test results to determine if they yielded indications of the progression of kidney disease, this Court stated that "there is no basis in statute, common law or common sense to impute such a duty to people who become ill." *Id*. at 634.

Perhaps most relevant to the present case is the *Jendrusina* Court's response to the defendants' suggestion that "the diagnosis of any serious illness in and of

itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician *tested* an organ involved in a later diagnosis and reported normal results." *Id*. The Court stated:

> Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an "objective fact," but it is a substantial leap to conclude that this fact alone *should* lead any reasonable person to *know* of a possible cause of action. We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual *could* consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made. *That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature*. [*Id*. (some emphasis added).]

Accordingly, under such circumstances, the *Jendrusina* Court concluded that the plaintiff's elevated levels of creatinine in his blood tests in prior years "[was] of no moment," particularly given that the plaintiff was not aware of the blood-test results and the record did not suggest he understood what creatinine levels were or the causes, treatment, and progression of kidney disease. *Id*. at 634-635. Put simply, this Court clearly rejected the defendants' intimation that a diagnosis of an illness places the onus on a reasonable person to discover a potential claim of medical malpractice against a medical provider if, in the past, the medical provider had tested the organ involved in the diagnosis and the earlier test yielded normal results:

> To hold as defendants suggest would not merely be inconsistent with the text of the statute, but it would also be

> highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the Legislature intended such a result, it would have used the phrase "could have discovered," not "should have discovered." [*Id*. at 635.]

B. APPLICATION

On appeal, plaintiff claims that the six-month discovery period started to run when she first became aware that she was diagnosed with breast cancer. According to plaintiff, while she was certainly aware of the lump in her breast throughout 2013 and 2014, she had no reason to know of a possible cause of action until June 15, 2015, when she received her biopsy results demonstrating that the lump was malignant. In plaintiff's view, until she received her biopsy results, she had every right to trust that defendants had provided her with a correct diagnosis concerning the lump in her breast. Plaintiff also asserts that she cannot be held to the standard of a medical professional and that a reasonable, ordinary person would not have been aware of a possible cause of action under the circumstances of this case until plaintiff was made aware of her biopsy results.

Conversely, defendants argue that the six-month discovery period started to run in 2013 and 2014, or at the latest, when plaintiff was informed by Frost that she would need a biopsy following her June 1, 2015 mammogram in Arkansas. In support of their argument that the six-month discovery period started to run in late 2013 or 2014, defendants repeatedly draw attention to the fact that plaintiff testified during her deposition that following her September 4, 2013 mammogram, she continued to examine her left breast and noted that the lump in her breast was continuing to

grow. Defendants also state that because plaintiff testified that she was subjectively concerned that the lump could possibly be cancer, the trial court correctly determined that plaintiff should have discovered her possible cause of action in 2013 and 2014. In making this argument, defendants cite the statutory language of MCL 600.5838a(2), observing that because plaintiff was noting the appearance of the lump in her breast, she should have discovered her possible cause of action at that time. Defendants also compare plaintiff to the plaintiff in *Solowy*, arguing that because plaintiff was aware of the changing size of the lump in her breast and had suspicions that it could be cancer, she was aware of her injury and its possible cause. Moreover, defendants contend that at the very latest, the six-month discovery period began to run when plaintiff was informed by Frost that a biopsy was necessary to determine whether the lump in her breast was cancerous.[11]

During her deposition, plaintiff testified that while she was being treated by Salisbury following her September 4, 2013 mammogram until June 2014, she repeatedly raised with Salisbury the fact that the lump was growing. Plaintiff further testified that Salisbury acknowledged the growth of the lump, but did not take any further action, and that Salisbury continued to inform her that the lump was a calcification. According to plaintiff, she "took [Salisbury's] word for it." By her own admission, plaintiff did not undertake any additional independent research or speak to another doctor about the lump in her breast. While plaintiff, in response to pointed questioning by defense counsel during her deposition, voiced her subjective concerns

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[11] As noted, the specific date of this conversation is unclear from the record.

that the lump could have been something more serious, such as cancer, in *Solowy* the Court, citing *Moll*, stated that "the discovery rule period begins to run when, *on the basis of objective facts*, the plaintiff should have known of a possible cause of action." *Solowy*, 454 Mich at 222, 232 (emphasis added). The *Solowy* Court further recognized that "[*o*]*nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action*." *Id.*, quoting *Moll*, 444 Mich at 24. While the record reflects that in 2013 and 2014 plaintiff was aware that she had a calcified lump in her breast, aside from her subjective concerns as a layperson, the record does not yield objective facts that would have led plaintiff to conclude that the lump was in fact cancer. This is particularly so given that the record demonstrates that her medical provider, Salisbury, continued to tell plaintiff that the calcified lump was benign, and plaintiff, who is not a medical professional, reasonably relied on the repeated assurances of her medical professional. The factual scenario in this case is therefore decidedly different from that in *Solowy* because the plaintiff in that case had already undergone a bout of cancer in her ear, she was well familiar with the symptoms, and by her own admission in her deposition testimony, the symptoms she was experiencing in March and April of 1992 were so similar that she stated, " '[I]t started all over again.' " *Solowy*, 454 Mich at 216-217, 227-228.

Further, in *Solowy*, 454 Mich at 226, the Michigan Supreme Court took care to caution lower courts "that a delay in diagnosis may delay the running of the six-month discovery period . . . ." In particular, the *Solowy* Court expressed its concern that it would be unfair to "deem [a] plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission." *Id.* Put

simply, the "possible cause of action" standard nonetheless requires that a plaintiff possess at least "some minimum level of information, that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id*. In an unequivocal manner, the *Solowy* Court renounced any suggestion that the "possible cause of action" standard may be considered an "anything is possible standard." *Id*. Therefore, employing the "flexible approach" that the *Solowy* Court articulated and considering the totality of information available to plaintiff in 2013 and 2014, while plaintiff was no doubt aware that the lump in her breast was growing, she did not have any familiarity with breast cancer "through past experience or otherwise." *Id*. Moreover, according to plaintiff's deposition testimony, Salisbury repeatedly assured her that the lump, even while growing, was a calcified mass as demonstrated through the September 4, 2013 mammogram. Under these circumstances, we disagree with the trial court's conclusion that plaintiff, who exercised due diligence by consulting with medical professionals and trusted and relied on the advice given and the observations made by Salisbury, should have discovered her possible cause of action in 2013 or 2014. *Id*. at 230, 232.

We reach this conclusion because the record confirms that plaintiff had sought medical treatment and relied on Salisbury's assurance that the lump in her breast was benign; plaintiff had no reason to know otherwise until the biopsy established that the lump was malignant. Therefore, "it would be unfair to deem . . . plaintiff aware of a possible cause of action before [she] could reasonably suspect a causal connection to the alleged negligent act or omission." *Id*. at 226. Plaintiff had no reason to suspect that her medical providers were negligent because she reasonably relied on what she was told—i.e., that her lump was a benign

calcification. While plaintiff undoubtedly was aware of the growth of the lump and admitted that it was causing her subjective fear and concern, she notably did not have a history of breast cancer herself or in her family, and she was justifiably relying on her medical provider's explanation of the cause of the lump. *Id*. at 227; MCL 600.5838a(2).

Importantly, this Court in *Jendrusina* emphasized that the objective standard requires an evaluation of what "a reasonable, ordinary person would know" about their injury and its cause, not what a reasonable physician or medical malpractice attorney would know. *Jendrusina*, 316 Mich App at 631-632. This Court also explained that requiring an individual to undertake "an extensive investigation," such as performing independent research or seeking out medical records to glean more information than he or she has been given by their medical professional, is a requirement that is not consistent with Michigan common law, statutory authority, or "common sense." *Id*. at 633-634. Therefore, applying the doctrine of reasonableness, weighing plaintiff's conduct against the standard of due diligence, and considering all of the information that plaintiff had in 2013 and 2014 regarding her injury and its possible causes, the record does not support a conclusion that plaintiff should have discovered her possible cause of action in 2013 or 2014. See *Solowy*, 454 Mich at 230.

Similarly, although the record reflects that plaintiff was informed by Frost at some point following her June 1, 2015 mammogram that a biopsy was necessary because of a general concern that the lump in her breast could be cancer, the situation that plaintiff was presented with is also factually distinguishable from *Solowy*. Notably, unlike the plaintiff in *Solowy*, plain-

tiff had not had a prior cancer diagnosis and had not experienced similar symptoms in her breast in the past. *Solowy*, 454 Mich at 224. Moreover, unlike the plaintiff in *Solowy*, plaintiff was not informed that she could be faced with a recurrence of cancer, and aside from her dealings with Salisbury in 2013 and 2014, when she was assured that the lump in her breast was benign, plaintiff had no prior interactions with a medical professional concerning the possibility of cancer. *Id*. In contrast to the plaintiff in *Solowy*, plaintiff was not waiting "for final confirmation of what she already knew was very likely true" before pursuing her claim. *Jendrusina*, 316 Mich App at 631. Therefore, on the basis of the record, it is not reasonable to conclude that plaintiff should have discovered her possible cause of action when she was informed of the necessity of a biopsy. Moreover, the *Jendrusina* Court made it abundantly clear that the diagnosis of a serious illness will not place a burden on a reasonable person to discover a potential claim against his or her medical providers "if at any time in the past the physician tested an organ involved in [the] later diagnosis and reported normal results." *Id*. at 634 (emphasis omitted). To hold otherwise is not only incongruent with the plain language of MCL 600.5838a(2), but it would be "highly disruptive to the doctor-patient relationship . . . ." *Jendrusina*, 316 Mich App at 635. Accordingly, we disagree with the trial court's legal conclusion that plaintiff was aware of an injury in the form of breast cancer, and any possible causation relating to the alleged medical malpractice of defendants, before her definitive diagnosis of breast cancer. *Solowy*, 454 Mich at 222, 224. Considering the information that was available to plaintiff at the time of her conversation with Frost, plaintiff did not know whether the lump was cancerous or not, and unlike the plaintiff in

Solowy, she had not undergone a prior experience with cancer that would have informed her experience or made her familiar with a cancer diagnosis. *Id*. at 227. It was not until June 15, 2015, when plaintiff received a definitive diagnosis of cancer, that plaintiff discovered or should have discovered her possible cause of action—that is, the time when she became aware that she had breast cancer and could have surmised that Salisbury and Gulick were negligent in their treatment of the lump in her breast when she had consulted with them at the Ingham County Health Department. Given that her notice of intent was mailed on December 4, 2015, her cause of action was timely filed.

IV. CONCLUSION

We reverse the trial court's order granting summary disposition in favor of defendants and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

BOONSTRA, P.J., and METER, J., concurred with FORT HOOD, J.

ESTATE OF WANDA JESSE v LAKELAND SPECIALTY HOSPITAL AT BERRIEN CENTER

Docket No. 341805. Submitted May 1, 2019, at Lansing. Decided May 14, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 882 (2019).

Beverly J. Gray, as personal representative of the estate of Wanda Jesse, filed a complaint in the Berrien Circuit Court against Lakeland Specialty Hospital at Berrien Center for medical malpractice. Jesse died on September 15, 2013, allegedly due to Lakeland's malpractice. Pursuant to MCL 600.5805(8), the period of limitations for the medical malpractice claim would have expired on September 15, 2015, absent application of the saving provision in MCL 600.5852. The saving provision in MCL 600.5852(2) generally provides a personal representative with two years from the date letters of authority are issued to bring a claim on behalf of the estate although the statute of limitations has otherwise lapsed. Gray brought the action on September 22, 2017, and claimed that it was timely because it was filed within two years of September 25, 2017, the date on which the letters of authority were mailed. Lakeland moved for summary disposition under MCR 2.116(C)(7), arguing that the letters of authority were "issued" at the time they were signed—September 9, 2015—and that the period of limitations had expired two years from that date. The court, Dennis M. Wiley, J., agreed with Lakeland that the letters of authority "issued" on the date the letters were signed, not on the date they were mailed. Accordingly, the court ruled that the period of limitations expired on September 9, 2017, and the court granted Lakeland's motion for summary disposition. Gray appealed.

The Court of Appeals *held*:

Under MCL 600.5852, if a person dies during the period of limitations or within 30 days after the period of limitations has expired and a medical malpractice action survives by law, the action may be commenced by the personal representative of the decedent at any time within two years after letters of authority are issued to the first personal representative even though the period of limitations has expired. The question whether the word "issued" refers to the signature date or some later date was

answered in *Lentini v Urbancic*, 262 Mich App 552 (2004), which was vacated and remanded on other grounds in 472 Mich 885 (2005). In *Lentini*, the Court of Appeals held that letters of authority are "issued" on the date they are signed by the trial court and not on the date they are certified or on the date they are mailed. Although the *Lentini* opinion was vacated and therefore not binding, it correctly interpreted the word "issued" as it is used in MCL 600.5852. For the purpose of a statute of limitations saving provision, there must be a date certain, objectively verifiable, from which interested parties can calculate the various tolling and limitations periods. The date on which letters of authority are signed is an objectively verifiable, certain, and unchanging date that serves the purpose of the statute by providing an easily ascertainable date from which to calculate the running of the limitations saving provision. Therefore, letters of authority are issued on the date that they are signed by the register or the probate judge. Gray's complaint was not timely because it was filed more than two years after the letters of authority were signed.

Affirmed.

STATUTES OF LIMITATIONS — MEDICAL MALPRACTICE CLAIMS — ESTATES — SAVING PROVISIONS.

Under MCL 600.5852, if a person dies during the period of limitations or within 30 days after the period of limitations has expired and a medical malpractice action survives by law, the action may be commenced by the personal representative of the decedent at any time within two years after letters of authority are issued to the first personal representative even though the period of limitations has expired; for purposes of MCL 600.5852(2), letters of authority are issued on the date they are signed by the register or probate judge and not on the date they are certified or the date they are mailed to the personal representative.

Stempien Law, PLLC (by *Eric Stempien*) for the Estate of Wanda Jesse.

Henn Lesperance PLC (by *William L. Henn* and *Andrea S. Nester*) for Lakeland Specialty Hospital at Berrien Center.

Before: METER, P.J., and FORT HOOD and BORRELLO, JJ.

METER, P.J. Under the saving provision in MCL 600.5852(2), when the statute of limitations for a medical malpractice claim has otherwise lapsed, the personal representative of an estate is generally given two years "from the date letters of authority are issued" to bring a claim on behalf of the estate. In this case, we are called on to determine when letters of authority are "issued." Reviving the precedent temporarily set by *Lentini v Urbancic*, 262 Mich App 552, 555-559; 686 NW2d 510 (2004) (*Lentini I*), vacated and remanded on other grounds 472 Mich 885 (2005) (*Lentini II*), we conclude that letters of authority are "issued" on the date they are signed by the register or the probate judge. Because plaintiff did not file the action within two years of the date the probate register signed the letters of authority, we affirm the trial court's dismissal of the action as untimely. MCR 2.116(C)(7).

I. BACKGROUND

The facts underlying this dispute are not contested. Plaintiff's decedent, Wanda Jesse, died on September 15, 2013, allegedly due to defendant's malpractice. Under MCL 600.5805(8), the statute of limitations for decedent's medical malpractice claim expired on September 15, 2015, absent application of the saving provision set forth in MCL 600.5852. The probate register signed the letters of authority establishing decedent's estate on September 9, 2015, but the letters were not mailed to the personal representative of the estate, Beverly June Gray, until September 25, 2015. Plaintiff filed the instant complaint for medical malpractice on September 22, 2017.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that under MCL 600.5852(2), the statutory period of limitations had

ended on September 9, 2017—two years from the date the probate register signed the letters of authority. Plaintiff disagreed, arguing that the statutory period did not end until September 25, 2017—two years from the date the probate court mailed the letters of authority. The trial court agreed with defendant that the statutory period ended on September 9, 2017, and granted defendant's motion for summary disposition. This appeal followed.

II. ANALYSIS

The only issue presented to us in this appeal is a legal one: Does the statutory period set forth in the saving provision in MCL 600.5852(2) begin to run on the date letters of authority are signed or on the date they are mailed or otherwise distributed to the personal representative? MCR 2.116(C)(7) directs the trial court to grant summary disposition to a party when appropriate because of the statute of limitations. "This Court reviews de novo the grant or denial of summary disposition." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). MCL 600.5852 provides, in pertinent part:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.

(3) If a personal representative dies or is adjudged by a court to be legally incapacitated within 2 years after his or her letters are issued, the successor personal representative may commence an action alleging medical malpractice that survives by law within 1 year after the personal representative died or was adjudged by a court to be legally incapacitated.

There is no binding caselaw interpreting the term "issued" in the context of MCL 600.5852. Yet, this is not the first time that this question has been presented to this Court. Rather, we answered the question whether "issued" denotes the signature date or some later date in *Lentini I*, 262 Mich App at 555-559. The *Lentini I* panel concluded that letters of authority are "issued" on the date the probate judge[1] signs them, reasoning as follows:

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). The court must consider the object of the statute and the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

We hold that the trial court correctly decided that the letters of authority are "issued" on the date they are signed by the probate judge and not on the date they are certified or the date they are mailed to the fiduciary. For the purpose of a statute of limitations savings provision to be served, there must be a date certain, objectively verifiable, from

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[1] Although *Lentini I* referred to the date the probate judge signs the letters of authority, we note that the court register may also appoint the personal representative. MCL 700.3103.

which interested parties can calculate the various tolling and limitations periods. The merit of defendants' position and the trial court's ruling is that the date the letters of authority are signed by the trial court is an objectively verifiable, certain, and unchanging date. The signature date is the date by which deadlines for the expiration of the letters of authority and the due dates for the estate's inventory and annual account are set. Moreover, the probate court's "Case Summary" of a decedent's estate, which exists to provide a list of all the significant activity on a particular file, lists the signature date as the date that the personal representative of the estate was appointed on the basis of the letters of authority. And it is the date the fiduciary receives his authority to act on behalf of the estate. MCL 700.3103 states, "The issuance of letters commences an estate's administration." The signature date is also indicated on each and every certified copy and on the original letters of authority.

By holding that the signature date is the issuance date of the letters of authority, the trial court interpreted MCL 600.5852 in a way that served the purpose of the statute in that it provided an objectively verifiable, easily ascertainable date from which to calculate the running of limitations and limitations savings provisions. This interpretation also advances one of the purposes of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., "To promote a speedy and efficient system for liquidating a decedent's estate . . . ." MCL 700.1201(c).

Furthermore, we believe this interpretation is supported by our Supreme Court's recent decision in [*Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003)], which held that MCL 600.5852 allows *any* personal representative, not just the initial personal representative, to commence an action within two years after letters of authority are issued. Because a personal representative may not commence an action until he has authority to do so and he receives this authority on the date the probate judge signs letters of authority, it follows that the statutory period of limita-

tions and any saving provisions should begin to run from the date the personal representative has authority to commence an action.

We find defendant Urbancic's reference to MCR 2.602 and his comparison of the certified copy of the letters of authority to a true copy of an order of the circuit court to be apt. MCR 2.602(A)(2) provides that the date of the signing of an order or judgment is the date of entry of that order or judgment. By analogy, the date the letters of authority are signed is the date that they are issued. And it is the date that a circuit court order is signed that is used to refer to the order. The date that a true copy of an order is obtained by an interested party is not legally or procedurally significant. So it should be with the letters of authority.

The date letters of authority are certified is unworkable as the date of issuance because the certification date simply reflects the date that an interested party requests and obtains certified copies of the letters of authority. One could get a certified copy every day of the month, providing no date certain from which to calculate the statute of limitations and other deadlines. Further, the certification date is not verifiable absent the actual certified copy of the letters of authority. Unlike the date of the judge's signature, which is recorded in the court file and which remains on the original letters of authority contained in the court file, there is no record of the date that copies of the letters of authority are certified. Therefore, if the recipient of a certified copy of the letters of authority were to misplace his copy, there would be no means to determine the date of the certification and no way to calculate, with certainty, the date the statutory period of limitations expires. Clearly, the goal of ease and speed of application of statute of limitations provisions requires that the date of issuance of letters of authority be the date that they are signed by the court. For this reason, plaintiff's assertion that the issuance date should be determined by considering the factual circumstances of each case is also unworkable. [*Lentini I*, 262 Mich App at 555-558.]

Lentini I was subsequently vacated by our Supreme Court on other grounds. *Lentini II*, 472 Mich 885. On remand, we left open the issue of when the letters of authority were "issued." See *Lentini v Urbancic (On Remand)*, 267 Mich App 579; 705 NW2d 701 (2005). Thus, *Lentini I* has no precedential value.[2]

Nonetheless, we believe that *Lentini I* was rightly decided, and in lieu of restating what was so thoughtfully written by the prior panel, we adopt *Lentini I*'s interpretation of the term "issued" in MCL 600.5852. Accordingly, we conclude that the statutory period concluded on September 9, 2017, meaning that plaintiff's September 22, 2017 complaint was untimely.

Plaintiff does not disagree with *Lentini I*. In fact, plaintiff argues that *Lentini I* "makes sense." Nonetheless, plaintiff points out that *Lentini I* interpreted Subsection (1) of MCL 600.5852, whereas the relevant statutory section for plaintiff's complaint is MCL 600.5852(2). We believe that this distinction is irrelevant. "It is reasonable to conclude that words used in one place in a statute have the same meaning in every other place in the statute." *Little Caesar Enterprises, Inc v Dep't of Treasury*, 226 Mich App 624, 630; 575 NW2d 562 (1997). Indeed, in this statute, there is clear evidence that the Legislature intended the term "issued" to have a consistent meaning. Subsection (2)

[2] We disagree with defendant that *Lentini I* remains good law. "A Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding." *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003), citing *Fulton v William Beaumont Hosp*, 253 Mich App 70, 79; 655 NW2d 569 (2002). Our Supreme Court's order in *Lentini II* vacated *Lentini I* in its entirety, without expressing any opinion on this Court's interpretation of the term "issued." *Lentini II*, 472 Mich 885. Therefore, *Lentini I* has no relevant precedential value.

does not set forth a statutory period independent from Subsection (1). Rather, Subsection (2) states that "the 2-year period *under subsection (1)* runs from the date letters of authority are issued to the first personal representative of an estate." MCL 600.5852(2) (emphasis added). When Subsection (2) directly refers to Subsection (1) and its use of the term "issued," it would be illogical for this Court to interpret the term differently for each subsection.

III. CONCLUSION

Although there is no binding precedent interpreting use of the term "issued" in MCL 600.5852, this case does not pose an issue of first impression in the literal sense. Reviving *Lentini I*'s interpretation of the term, we conclude that letters of authority establishing an estate are "issued" on the date they are signed by the register or the probate judge. Because plaintiff did not file the complaint within two years of the date the register signed the letters of authority, the trial court properly dismissed the action as untimely. MCL 600.5852(2). Accordingly, we affirm the trial court's grant of summary disposition to defendant under MCR 2.116(C)(7).

FORT HOOD and BORRELLO, JJ., concurred with METER, P.J.

In re MONIER KHALIL LIVING TRUST (ON RECONSIDERATION)

Docket No. 341142. Submitted February 12, 2019, at Detroit. Decided March 12, 2019, at 9:00 a.m. Submitted April 30, 2019, on the reconsideration docket. Reconsideration granted and opinion vacated by Court of Appeals order entered May 14, 2019, and new opinion issued May 14, 2019, at 9:05 a.m.

Thomas Khalil and Sandra Khalil Benavides (petitioners) brought an action in the Wayne Probate Court against Evelyn Khalil, Melanie Khalil Zagar, and Mikhail Khalil (respondents), arguing that Mikhail unduly influenced Evelyn to allot him a disproportionate share of assets from the Monier Khalil Living Trust (the trust). Monier Khalil, who was the husband of Evelyn and father of Thomas, Sandra, Melanie, and Mikhail, created the trust in 1992. Following his death in 1994, Monier's assets flowed into two subtrusts, both of which were intended to provide for Evelyn for the remainder of her life. In 2007, Evelyn distributed certain trust properties to her children. In 2016, petitioners brought suit by filing a petition for accounting, arguing that Evelyn and Melanie, who were cotrustees, breached their duty of loyalty by giving Mikhail an unequal share of property from the trust and by depleting the trust for purposes other than Evelyn's care. Petitioners further contended that Mikhail had unduly influenced Evelyn into giving him control over the trust, which he used as his personal piggy bank. Petitioners later filed an amended petition. The probate court conducted virtually all of the proceedings that followed off the record. The court's notes indicate that at an in-chambers conference, the court verbally directed the parties to file "briefs in support" by May 19, 2017. Petitioners asserted that they had sought to take the deposition of Evelyn, but petitioners did not indicate on what date these pleas were made, and the court failed to conduct any phase of this proceeding in the courtroom or on the record; everything was discussed in chambers. During another in-chambers, off-the-record "hearing," the court ordered respondents to present an accounting within 30 days. The court scheduled a hearing on the "petition to allow account(s)" for September 13, 2017. However, respondents never filed a petition or motion to allow the accounts, and no hearing was ever held. The court adjourned the hearing to October 17 and then to October 31.

Petitioners were not satisfied with the proffered accounting, and following a telephone conference with the attorneys, the court ordered a forensic review and accounting of the trust by an independent accountant, which was completed and filed on October 26, 2017. Following the presentation of the forensic accounting, and before the October 31 date of the rescheduled hearing, the probate court, Freddie G. Burton, Jr., J., "denied" petitioners' first amended verified petition. The court noted that it had held "various hearings" and ultimately "took the matter under advisement." None of those "hearings" were conducted on the record, and therefore no transcripts could be ordered. The court also rejected petitioners' claim of undue influence, holding that petitioners failed to establish a fiduciary relationship. Accordingly, the probate court dismissed petitioners' claims in their entirety. Petitioners appealed, and on March 12, 2019, the Court of Appeals, GLEICHER, P.J., and K. F. KELLY and LETICA, JJ., issued an opinion vacating the probate court's opinion in part and remanding the case to the probate court. Evelyn moved for reconsideration, alleging that the March 12, 2019 Court of Appeals opinion contained factual inaccuracies. The Court of Appeals granted the motion for reconsideration and vacated the March 12, 2019 opinion.

On reconsideration, the Court of Appeals *held*:

1. The probate court prematurely dismissed petitioners' claims without a motion filed by respondents. Contrary to the lower-court docket sheet, respondents did not file a motion to allow the accounting. The hearing scheduled for October 31, 2017, was actually on petitioners' motion to remove the trustees and return property to the trust. Accordingly, the probate court acted without allowing the parties to argue at that hearing. Petitioners presented evidence to create a genuine issue of material fact that should have been addressed at the hearing, specifically that certain transfers identified in the accounting were not accurate and might have been fraudulent. The probate court ignored evidence regarding potentially fraudulent transfers despite having ordered the forensic accounting that revealed that evidence. Instead, the court pointed to trust language allowing Evelyn to dispose of trust property without mentioning that the accounting did not match Evelyn's version of events. Ultimately, the court sua sponte approved the accounting and dismissed petitioners' bids to remove the trustees and return property to the trust without a hearing. The probate court failed to consider the evidentiary contest before it and improperly dismissed the petition.

2. A presumption of undue influence arises when there is evidence of (1) a confidential or fiduciary relationship between the

grantor and a fiduciary, (2) the fiduciary or an interest he or she represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. The probate court stated that petitioners failed to establish the existence of a fiduciary relationship. However, although petitioners' briefs and pleadings were not artfully drafted, petitioners did allege that Mikhail was Evelyn's fiduciary and presented evidence tending to establish a fiduciary relationship. Petitioners presented evidence that Evelyn had placed her trust in Mikhail to manage the trust and its assets for her. Mikhail created the trust account's ledger, Evelyn instructed the bank to include Mikhail as a designated signor on the trust's account, and Mikhail signed checks from the trust. Petitioners presented a property listing for certain trust property and alleged facts tending to show that Mikhail was tasked with the property's sale. If these facts are proven, they tend to establish that Mikhail acted as Evelyn's agent. Petitioners also presented evidence that Mikhail had benefited from the trust transactions he managed, including that Mikhail had fraudulently used monies to repair buildings owned by his separate companies. There was enough evidence to challenge a premature summary disposition entered with no hearing. Further, petitioners contended that on the two occasions that Evelyn and Mikhail had appeared together in court, Evelyn expected Mikhail to answer any questions posed to her. However, these occasions were not captured in the record. Accordingly, the probate court's summary dismissal of petitioners' undue-influence claim was vacated and the case was remanded to the probate court to conduct the remainder of the proceedings on the record.

3. MCR 5.131 provides that the general discovery rules apply in probate proceedings. Under MCR 2.306(A)(1), a party may take the testimony of a person by deposition after an action is commenced. In this case, petitioners did not pursue discovery by written notification or by requesting a subpoena in writing. However, under MCR 2.119(A)(1), a party may make any motion orally at a court hearing. Petitioners asserted that they made an oral motion to depose Evelyn at more than one off-the-record, in-chambers "hearing" in the probate court. Because the court made no record of these proceedings, the accuracy of this statement could not be verified. Because the summary dismissal of petitioners' undue-influence claim was vacated, petitioners could seek to depose Evelyn on remand.

Vacated in part and remanded for further proceedings conducted on the record.

Dadich & Associates, PLLC (by *Joseph J. Dadich*) for Thomas Khalil and Sandra Khalil Benavides.

Barris, Sott, Denn & Driker, PLLC (by *Matthew J. Bredeweg*) for Evelyn Khalil.

ON RECONSIDERATION

Before: GLEICHER, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM. In this trust action, two of the trustee's children contended that a sibling unduly influenced their mother to allot him a disproportionate share of the trust's assets. The probate court dismissed the action without a hearing and despite that none of the parties filed a dispositive motion. The court inexplicably discounted the evidence presented by petitioners and failed to create an adequate record for this Court's review. We vacate the probate court's order summarily dismissing petitioners' undue-influence claim and remand for further proceedings, which must be conducted on the record.

I. BACKGROUND

This case involves a trust created by Monier Khalil in 1992. Monier died in 1994, leaving behind his wife, Evelyn, and their four children: Mikhail, Thomas, Sandra, and Melanie. After his death, Monier's assets (mostly Corktown real estate) flowed into two subtrusts: the marital trust and the residuary trust. Both were intended to provide for Evelyn for the remainder of her life. Evelyn and Melanie were designated as cotrustees for the subtrusts. When Evelyn passes away, any remaining assets will flow into the children's trust to be divided equally between Monier's children.

The marital and residuary trusts grant Evelyn prodigious power and authority to use and disburse trust assets. Evelyn may request distributions without limitation and for any reason and may exhaust the trust principals to provide for her needs. Evelyn may disburse trust assets during her lifetime, favoring one child over another in doing so. The trust also shelters Evelyn from "accountab[ility] or liab[ility] to" any of her children "for the manner in which [s]he, in good faith, exercises [her] powers and discretions; [her] judgment with respect to all matters shall be binding and conclusive upon all" her children.

Evelyn, Melanie, and Mikhail (respondents) contend that in 2007, Evelyn distributed certain trust properties to her children. Melanie, Thomas, and Mikhail received properties in Corktown, but Evelyn purchased a home for Sandra. Evelyn claims that the trust continues to make the mortgage, insurance, and tax payments for the home. Respondents further allege that Thomas sold his properties to Mikhail, but now regrets his decision.

In 2016, Sandra and Thomas (petitioners) launched this probate case by filing a "verified petition for accounting, surcharge of the trustee; the return of property to Hotch Potch; transferred as a result of undue influence and removal of trustees."[1] They later filed an amended petition. In these pleadings, petition-

[1] "Hotch Potch" is an antiquated probate term of art, more commonly referred to as "hotch pot." The Supreme Court has indirectly adopted the following definition: "Hotchpot is the bringing into the estate of an intestate an estimate of the value of advancements made by the intestate to his or her children, in order that the whole may be divided in accordance with the statute of descents." *In re Howlett's Estate*, 275 Mich 596, 600; 267 NW 743 (1936) (quotation marks and citation omitted). See also *Sprague v Moore*, 130 Mich 92, 102; 89 NW 712 (1902).

ers sought an accounting, claiming that respondents had denied previous requests for information. Petitioners asserted that Evelyn and Melanie breached their duty of loyalty by giving Mikhail an unequal share of property from the trust and by depleting the trust for purposes other than Evelyn's care. Petitioners further contended that Mikhail had unduly influenced Evelyn into giving him control over the trust, which he used as his personal piggy bank. They alleged that Mikhail had "usurped" the role of trustee by listing himself on the trust's bank accounts. Petitioners presented evidence that Mikhail managed the daily business of the trust properties and used trust funds to manage his separately owned properties. Petitioners raised three counts: "breach of duty of loyalty by the trustee['s] depletion of the trust assets,"[2] undue influence, and for an accounting, surcharge, and return of improperly transferred properties to the trust.

Respondents retorted that the language of the trust gave Evelyn great discretion to disburse property as she saw fit and even to designate Mikhail as a business representative. Respondents further contended that the property distributions challenged by petitioners were made in 2007 with petitioners' full knowledge and consent.

The probate court conducted virtually all of the proceedings that followed off the record, hampering our review. The court's notes indicate that at an in-chambers conference, the court verbally directed the parties to file "briefs in support" by May 19, 2017. Petitioners' brief contended that over a 10-year period, the trust transferred to Mikhail and his companies 11 of the trust properties. These transfers were a breach

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[2] Capitalization altered.

of Evelyn's fiduciary duty and her duty of loyalty to the trust beneficiaries and were accomplished as a result of Mikhail's undue influence, petitioners asserted. Petitioners also believed that Mikhail benefited from improper cash transfers that were not accounted for in the public record, and petitioners denied that they ever consented to them. In addition, petitioners contested respondents' assertion that the trust gave Evelyn broad power to make whatever transfers she wished; such unfettered authority, petitioners argued, would defeat the purpose of the trust, i.e., to ensure that Evelyn was financially provided for.

Petitioners further asserted that they "ha[d] twice addressed this Court and pleaded to take the deposition of Evelyn . . . to show to the Court that she is, in fact, under undue influence of Mikhail . . . ." Petitioners did not indicate on what date these pleas were made, and the court failed to conduct any phase of this proceeding in the courtroom or on the record; everything was discussed in chambers. Petitioners again asked to depose their mother "to establish whether such acts are of her own free will or as they appear to be the unvarnished undue influence of Mikhail . . . ." And petitioners asserted that they established a presumption of undue influence as Evelyn appeared on case-related matters only in the company of Mikhail, she shared joint representation with Mikhail, and Evelyn directed her other children to talk to Mikhail whenever they asked trust- or property-related questions.

Respondents filed their brief on May 19, asserting that the transfers made by Evelyn were authorized by the trust itself and by applicable law. Although any remainder will flow into the children's trust, "while Evelyn is living, none of the children[] has any right to distributions of trust assets or any right to an account-

ing of such assets." Evelyn's decisions in this regard were "binding and conclusive," precluding any liability to her children. Respondents contended that the petition was "a half-baked attempt to gain leverage in a sibling rivalry." Specifically, respondents insisted that petitioners wanted "to undo certain transfers of property from their mother's trust that were made ten years ago, with Petitioners' full consent and knowledge, and to their benefit, because they believe they can profit from it."

During another in-chambers, off-the-record "hearing," the court ordered respondents to present an accounting within 30 days, including the trust's assets as of January 1, 2007, all property and cash disbursements made to Evelyn's children since 2007, and a list of income generated by the trust since 2007 along with "a yearly disclosure of those monies paid to Evelyn . . . from said income . . . ." Petitioners were given two weeks to respond. The court scheduled a hearing on the "petition to allow account(s)" for September 13, 2017. However, respondents never filed a petition or motion to allow the accounts. Moreover, no hearing was ever held. The court adjourned the hearing to October 17, and then to October 31. As will be discussed later, the court rendered its final decision before the hearing was conducted.

Petitioners were not satisfied with the proffered accounting, contending that respondents engaged in creative accounting by claiming money was paid to children when it was not, and citing a number of cash transfers with no stated purpose. After a telephone conference with the attorneys, the court ordered a forensic review and accounting of the trust by an independent accountant, which was completed and filed on October 26, 2017. In the meantime, respon-

dents filed supplemental remarks to the initial accounting. Respondents noted that petitioners had recently presented additional information, including a "Quick Book Ledger for a certain bank account[.]" Those checks improperly identified Mikhail as a trustee. After reviewing several check copies, petitioners accused Mikhail of writing checks funded by the trust to make repairs on his personal properties and for services on Sandra's house that were actually funded by an insurance payout.

Following the presentation of the forensic accounting, and before the October 31 date of the rescheduled hearing, the probate court "denied" petitioners' first amended verified petition. The court noted that it had held "various hearings" and ultimately "took the matter under advisement . . . ." None of those "hearings" were conducted on the record, and therefore no transcripts could be ordered.

The court found that the trust "was created for the benefit of" Evelyn and afforded her great discretion and authority to do what she liked with the trust property. The court rejected that Evelyn violated the terms of the trust by transferring properties to Mikhail:

> Nothing in the trust prevents [Evelyn] as co-trustee from disposing [of] the trust assets as she deemed appropriate. In fact, the trust specifically authorized her to sell, convey, and dispose of any property as she deemed advisable. Moreover, the trust explicitly states that the settlor "intend[ed] to give the trustee the broadest, fullest and most complete power and authority." As co-trustee, [Evelyn] is granted the authority to exercise her powers as she determines to be advisable without being accountable or liable to any interested person as long as she acted in good faith. Petitioners do not assert that [Evelyn]'s actions were not taken in good faith. Under the trust, [Evelyn] was granted

> broad authority in the management and distribution of trust assets as surviving spouse and co-trustee with Melanie. Thus, petitioners failed to establish that [Evelyn] breached her duty of loyalty, and their claim must fail.

The court also rejected petitioners' claim of undue influence. The court determined that petitioners "wholly fail[ed] to allege, address, or establish the existence of a fiduciary or confidential relationship. . . . [T]he existence of a family relationship does not, by itself, establish a fiduciary relationship." The court found that petitioners "fail[ed] to allege or demonstrate that there was a reposing of confidence on one side and influence on the other" or that "Mikhail overcame the decedent's volition, destroyed her free agency, and impelled her to act against her free will." The court recited that Evelyn "affirmatively asserts that she has not been unduly influenced." Accordingly, the court dismissed petitioners' claims in their entirety.

II. TIMING OF DISMISSAL

Petitioners first challenge the probate court's summary dismissal of their claims as premature, noting that respondents had not filed a summary-disposition motion and that petitioners were not offered a rebuttal opportunity. We note that the probate court granted petitioners' request for an accounting, and no further relief can be granted on that claim. Moreover, petitioners have not challenged the probate court's dismissal of their breach-of-loyalty claim. The only issue before this Court is whether the probate court properly resolved petitioners' claim that Mikhail unduly influenced Evelyn to deplete the trust's assets.

We review for an abuse of discretion a probate court's decisions whether to remove or surcharge a trustee. *In re Baldwin Trust*, 274 Mich App 387,

396-397; 733 NW2d 419 (2007). We review for clear error any underlying factual findings made by the court. *Id*. at 396. The probate court's denial of petitioners' petition to remove and surcharge the trustees and for return of property to the trust was essentially a summary dismissal of the action pursuant to MCR 2.116(C)(10), which we review de novo. *Id*.

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

Petitioners rest their procedural challenge on the unpublished opinion in *In re Clemence Trust*, unpublished per curiam opinion of the Court of Appeals, issued October 31, 2017 (Docket No. 332099). Rebecca Clemence had four children. After her husband's 2005 death, Rebecca lived alone with her daughter Katherine. While they resided together, Rebecca updated her trust and will to leave the majority of her property to Katherine. Rebecca's other three children did not learn of the change until after their mother's death in 2013. The petitioners asserted that Rebecca exhibited signs of dementia and memory loss even before her husband's death and therefore lacked capacity to knowingly change her estate plan in 2005. They further contended that Katherine used their mother's faltering

health to her advantage and unduly influenced their mother to change her trust and will. *Id*. at 1-2.

The petitioners sought to remove Katherine as trustee, accusing Katherine of breaching her fiduciary duty and challenging the validity of the trust at the time of its inception based on Rebecca's incapacity. As the proceedings moved forward, the petitioners accused Katherine of withholding information about Rebecca's health and assets. *Id*. at 2. The petitioners filed a motion to compel Katherine to produce additional information regarding Rebecca's health, and the court ordered the petitioners to subpoena each of Rebecca's known doctors. Unfortunately, none of the doctors maintained records back to 2005. *Id*. at 3. The petitioners provided affidavits, however, describing their personal observations of their mother's mental and physical health since 2005. *Id*. at 3-4.

"[T]he probate court determined to take out of order Katherine's petition to disburse the remainder of the trust assets, essentially closing the case." *Id*. at 4. We noted that "[t]he court set out [on] this course despite that Katherine had not filed a motion to dispose of the claims petitioners raised in their petition." *Id*. The probate court described that the petitioners' discovery attempts had been unfruitful, no additional information could be had, and it was " 'time to close it down.' " *Id*. At a hearing conducted on the record, the petitioners complained that the probate court was summarily dismissing their claims while ignoring the evidence presented by the witnesses' affidavits, but the court ruled:

> "We've been over and over, nothing has been presented. I think it's too little, too late. I know you look confused, but you understand the process of appeal and you have that right.

> I find no merit, in your clients' position at all. I've given them every opportunity to present anything, that at the time the changes were made, there was any medical documentation to support severe enough impairment, to preclude her from having the capacity to make the changes that she made." [*Id*.]

We vacated the probate court's order and remanded for further proceedings, holding that the petitioners' affidavits regarding their first-hand knowledge of Rebecca's capacity "created a question of fact to be resolved before the trust assets were disbursed and the case closed." *Id*. at 6. We continued:

> The court took no notice of this contest, refusing to look beyond petitioners' inability to secure medical documentation.
>
> The probate court also took no consideration of petitioners' contention that Katherine unduly influenced her mother into changing her estate division while she was vulnerable due to the recent loss of her husband. The court noted on the record that it found Katherine's repeated claims of ignorance to be incredible. Katherine lived with her mother continually from her father's June 2005 death until her mother's October 2013 passing. Katherine obstinately denied being her mother's primary caregiver despite this arrangement, and despite that all documentation regarding the initiation of her home healthcare services and the management of Rebecca's aides was signed by Katherine. And at some point, Katherine was named Rebecca's power of attorney, giving her some level of financial control.
>
> This record evidence created a rebuttable presumption of undue influence. See *Bill & Dena Brown Trust* [*v Garcia*], 312 Mich App [684, 701; 880 NW2d 269 (2015)]. Specifically, Katherine served as a fiduciary for [her] mother, or at least was in a position of trust. She benefited from the amended trust by being granted her mother's house and 70% of all remaining property. Katherine had the opportunity to influence her mother's decisions from June through August

2005, as the two women lived alone together. The probate court was required to address this issue on some level before ordering the winding down of the trust.

Regardless of the state of the evidence, the probate court did not follow proper procedure, dismissing this matter out of hand and without motion from Katherine. Katherine was represented by counsel knowledgeable on the law. Yet Katherine never filed a motion to summarily dismiss petitioners' challenge for lack of evidentiary support. The only remaining conclusion is that the court dismissed the case as some sort of penalty against petitioners. The petitioners never violated a discovery order, however. . . . The court never ordered petitioners to do anything more. Petitioners deposed Katherine in a vain attempt to create a more complete picture of Rebecca's medical and financial conditions. Petitioners may have dragged their feet along the way, but not so much as to warrant dismissal without warning. [*Id*. at 6-7 (emphasis added).]

Respondents, on the other hand, rely on *Baldwin*, 274 Mich App 387, for their contention that the court properly dismissed petitioners' claims without a hearing and without a motion. In *Baldwin*, Thomas Shoaff alleged that Thomas Woods failed to protect creditors in his role as personal representative of an estate and trustee of a trust created by Duane Baldwin and therefore sought to remove Woods from those roles. *Id*. at 389.

Shoaff had been a business partner of Duane and Mark Baldwin. Duane did not reimburse Shoaff under a contractual indemnity agreement after Shoaff was forced to cover their failed business's loans. *Id*. at 390-391. Following Duane's death, Shoaff successfully petitioned the probate court to appoint a neutral trustee and personal representative for Duane's estate and trust. *Id*. at 392. Shoaff then secured an approximately $700,000 consent judgment in circuit

court against the estate and trust based on the indemnification agreement. *Id*. at 392-293. A bench trial followed on certain equitable claims; Shoaff prevailed, and the court set aside various property transfers made by the Baldwins to defraud their creditors. The court also awarded Shoaff more than $1.3 million. *Id*. at 393. This Court affirmed based on overwhelming evidence that Duane had created sham corporations and made fraudulent transfers to avoid personal liability on his debts. *Id*. at 395. Through these actions, Duane left himself insolvent. *Id*.

In the meantime, Shoaff sought to have Woods removed as trustee and personal representative because Woods failed to act in the best interests of Duane's creditors, specifically Shoaff. *Id*. at 393. The probate court denied the request but ordered Woods not to disburse any amount over $2,500 without court approval. *Id*. at 394. Shoaff renewed his petition to remove Woods when Woods took inadequate action to recover the fraudulently transferred properties and to pierce the corporate veils of Duane's sham companies. *Id*. At a pretrial conference, the probate court "sua sponte" denied Shoaff's petitions, concluding "that there was no genuine issue regarding any material fact that would justify removing Woods, sanctioning Woods, or awarding Shoaff any more money from the estate." *Id*. at 396.

In a brief analysis, this Court rejected Shoaff's challenge to the probate court's sua sponte grant of summary disposition in Woods's favor:

> Under MCR 2.401(C)(1)(*l*), during a pretrial conference, the court may consider any matters that may aid in the disposition of the action. Further, at any time after an action has commenced, if the pleadings show that a party is entitled to judgment as a matter of law, the court must render judgment without delay. MCR 2.116(I)(1). In that

> regard, if no factual dispute exists, a trial court is required to dismiss an action when a party is entitled to judgment as a matter of law, and a motion for summary disposition is unnecessary. *Sobiecki v Dep't of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006).
>
> Regarding Shoaff's reliance on Judge (now Justice) CORRIGAN's concurrence in *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84; 492 NW2d 460 (1992), this case is clearly distinguishable because the probate court's sua sponte grant of summary disposition was not based on a novel, substantive legal theory not raised by the parties, see *id*. at 86, but was based on the substantive legal theories pursued by Shoaff. We find that, procedurally, the probate court did not err in dismissing the petitions and that Shoaff was afforded due process because he had had ample opportunity to respond to the probate court's sua sponte raising of the issue. [*Baldwin*, 274 Mich App at 398-399.]

This case is more akin to *Clemence* than *Baldwin*. As in *Clemence*, the probate court jumped the gun and prematurely dismissed petitioners' claims without a motion filed by respondents. Contrary to the lower-court docket sheet, respondents did not file a motion to allow the accounting. The hearing scheduled for October 31, 2017, was actually on petitioners' motion to remove the trustees and return property to the trust. The probate court acted without allowing the parties to argue at that hearing.

Petitioners presented evidence to create a genuine issue of material fact that should have been addressed at the hearing, specifically that certain transfers identified in the accounting were not accurate and might have been fraudulent. For example, respondents contended that the trust purchased a house for Sandra and that it was of equivalent value to the Corktown properties transferred to her siblings. In actuality, the house was originally titled in Evelyn's name and later in the

name of Evelyn and Sandra's two children; Sandra never held a proprietary interest. But the forensic accounting appears to count $59,000 in repairs made to the house as cash transfers to Sandra. Sandra also presented an affidavit claiming that certain checks written to J. L. Hengy were not used to pay off loans owed by Thomas as the accounting asserted, but rather went toward repairs made to the home in which she lived. Moreover, Sandra claimed that she assigned more than $60,000 in insurance proceeds to Evelyn to cover these repairs. That $60,000 was never deposited into the trust and therefore no repairs should have been paid from the trust, Sandra contended. The probate court ignored this evidence despite having ordered the forensic accounting that revealed it. Instead, the court pointed to trust language allowing Evelyn to dispose of trust property without mentioning that the accounting did not match Evelyn's version of events.

Petitioners also presented evidence that Mikhail was managing the trust's business, not Evelyn or Melanie. Sandra attested that "the handwritten Check Register provided as part of Respondents['] accounting" was in Mikhail's handwriting. If Mikhail was actually running the businesses and properties held by the trust, this could create a fiduciary relationship, a fact relevant to petitioners' undue-influence claim.

Ultimately, the probate court sua sponte approved the accounting and dismissed petitioners' bids to remove the trustees and return property to the trust without a hearing. Petitioners had no "opportunity to respond to the probate court's sua sponte raising of the issue," making *Baldwin*, 274 Mich App at 399, inapposite. The court failed to consider the evidentiary contest before it and improperly dismissed the petition.

III. UNDUE INFLUENCE

Not only did the probate court prematurely dismiss petitioners' undue-influence claim without a motion and without a hearing, but the court also improperly dismissed the case in the face of conflicting evidence that created a genuine issue of material fact. Had the court conducted these proceedings in the courtroom so that a record could have been created, this error might have been apparent earlier.

A presumption of undue influence arises when there is evidence of (1) a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest he or she represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), overruled on other grounds by *In re Karmey Estate*, 468 Mich 68 (2003). When the presumption is established, the party seeking to enforce the trust must offer other evidence to rebut the presumption. *Kar*, 399 Mich at 542.

The probate court stated, "[P]etitioners wholly fail to allege, address, or establish the existence of a fiduciary or confidential relationship." Although petitioners' briefs and pleadings were not artfully drafted, petitioners did allege that Mikhail was Evelyn's fiduciary and presented evidence tending to establish a fiduciary relationship. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Petitioners presented evidence that Evelyn had placed her trust in Mikhail to manage the trust and its assets for her. Mikhail created the trust account's ledger, Evelyn instructed

the bank to include Mikhail as a designated signor on the trust's account, and Mikhail signed checks from the trust. Petitioners presented a property listing for certain trust property and alleged facts tending to show that Mikhail was tasked with the property's sale. If these facts are proven, they tend to establish that Mikhail acts as Evelyn's agent, "a person having express or implied authority to represent or act on behalf of another person . . . ." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 699; 930 NW2d 416 (2019) (quotation marks and citation omitted). An agency is a fiduciary relationship. *Id*. Contrary to the probate court's opinion, petitioners did not rely solely on the "mother-son relationship."

Petitioners also presented evidence that Mikhail had benefited from trust transactions he managed. Respondents and the court look only at the 2007 transfer of properties from the trust to Evelyn's children when disputing this element. However, petitioners alleged that several checks signed by Mikhail and described as "owners draws" were actually monies used to repair buildings owned by Mikhail's separate companies, although they presented no proof in this regard. Petitioners did present evidence of other potential fraud in the accounting. If Mikhail was in charge, he would have committed those frauds. Although the evidence is slimmer on this element, there was enough to challenge a premature summary disposition entered with no hearing.

Petitioners further supported that Mikhail had the opportunity to influence Evelyn. It is unclear why Evelyn chose to live with Mikhail and his wife (or at least in an apartment attached to Mikhail's house). Petitioners claim that Evelyn is dependent on Mikhail for transportation and that he holds her captive, that

Mikhail controls the flow of funds to Evelyn, and that Evelyn has complained to them that she does not have any spending money. Petitioners were unable to depose Evelyn to flesh out these charges. As the court prematurely dismissed this case, the inadequacy of evidence in this regard could also potentially be remedied.

Petitioners contend that on the two occasions that Evelyn and Mikhail had appeared together in court, Evelyn expected Mikhail to answer any questions posed to her. This was further evidence of Mikhail's sway over Evelyn, petitioners contend. Unfortunately, these occasions were not captured in the record. We have no way to know what questions were asked or whether Evelyn made any response. As this Court once noted in a case involving a child protective proceeding, a court's decision to consider interviews *in camera* "result[s] in an inadequate record for meaningful judicial review at the appellate level." *In re HRC*, 286 Mich App 444, 457; 781 NW2d 105 (2009). The same is true here.[3]

We vacate the probate court's summary dismissal of petitioners' undue-influence claim and on remand order the probate court to conduct the remainder of the proceedings on the record.

IV. DENIAL OF DISCOVERY

Finally, petitioners contend that the probate court improperly denied their request to depose Evelyn so that they could investigate whether Mikhail unduly influenced her property transfers. We review for an

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[3] The attorneys also deserve a share of the blame for our inability to properly review this case. It is incumbent on counsel to insist on a record of critically important proceedings, even in the face of judicial disapproval or disagreement. A written motion to create a record might have avoided the need for this appeal.

abuse of discretion a lower court's decision whether to allow discovery. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

"The general discovery rules apply in probate proceedings" and "[d]iscovery for civil actions in probate court is governed by subchapter [MCR] 2.300." MCR 5.131. Pursuant to MCR 2.306(A)(1), one party "may take the testimony of a person, including a party, by deposition" after an action is commenced. Petitioners did not pursue discovery by written notification or by requesting a subpoena in writing. See MCR 2.305; MCR 2.306(B). However, a party may make any motion orally at a court hearing. See MCR 2.119(A)(1).

Petitioners assert that they made an oral motion to depose Evelyn at more than one off-the-record, in-chambers "hearing" before the probate court. As the court made no record of these proceedings, we cannot verify the accuracy of this statement, let alone review the court's decision. As we are vacating the summary dismissal of petitioners' undue-influence claim and remanding for further proceedings to be conducted on the record, petitioners may again seek to depose Evelyn.

We vacate in part and remand for further proceedings, conducted on the record, consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and K. F. KELLY and LETICA, JJ., concurred.

In re TCHAKAROVA

Docket No. 345739. Submitted May 8, 2019, at Lansing. Decided May 14, 2019, at 9:10 a.m.

On September 6, 2018, a social worker at an Ann Arbor hospital petitioned the Washtenaw County Trial Court to order mental health treatment for respondent. At a hearing on September 12, 2018, the court, Julia B. Owdziej, J., determined that clear and convincing evidence had established that respondent had a mental illness and was a person requiring treatment under MCL 330.1401(1)(a) and (c). Washtenaw County Community Mental Health (CMH) recommended that respondent be hospitalized for up to 60 days and that hospitalization be followed by "alternative treatment." The court entered a 60/90-day order, which allowed for a maximum treatment period of 90 days, with up to 60 days of hospitalization. The court also ordered that respondent take medications as prescribed, that she follow treatment recommendations, and that the hospital and CMH be permitted to speak with respondent's husband and other treatment providers. Respondent appealed.

The Court of Appeals *held*:

1. A matter is moot if a court's ruling cannot for any reason have a practical legal effect on the existing controversy. In this case, even if the Court of Appeals were to determine that the trial court's order was improperly entered, its ruling could not alter the fact that by the time the matter went before a panel of the Court of Appeals, respondent may have already undergone 90 days of mental health treatment, including up to 60 days of hospitalization. However, whether the trial court order was properly entered was not a moot issue because collateral legal consequences remained as a result of the 60/90-day order, even though the order itself had expired. For example, because of respondent's involuntary commitment, she was ineligible to possess a firearm under the federal Gun Control Act, 18 USC 922(g)(4). Accordingly, even though the trial court's 60/90-day order had expired, collateral legal consequences remained in the form of restrictions on firearm possession so the issue was not moot, and appellate review was proper. Moreover, even when a

court's ruling cannot affect the existing controversy—that is, even when an issue is moot—the court may consider the issue if it is of public significance and likely to recur yet evade judicial review. Involuntary mental health treatment curtails a person's liberty, and the public has a significant interest in ensuring that orders curtailing a person's liberty are properly entered. In this case, the court-ordered hospitalization significantly limited respondent's freedom of movement, she was ordered to take medications as prescribed, and injections were recommended. Further, the issue was likely to recur, and it was likely to evade judicial review. A 60/90-day order is not uncommon, and the time frames governing the trial court order in this case all but guaranteed that no meaningful judicial review of the 60/90-day order could ever be conducted before the order expired because of the time specified by the court rules for filing the claim of appeal, the appellant's brief, the appellee's brief, and the reply brief. Accordingly, even if there were no lingering collateral consequences stemming from the trial court order, application of the mootness doctrine was not appropriate.

2. MCL 330.1465 requires clear and convincing evidence to establish that an individual has a mental illness and is a "person requiring treatment" under MCL 330.1401(1). The trial court did not err by finding that clear and convincing evidence established under MCL 330.1401(1)(a) that respondent was mentally ill and could reasonably be expected within the near future to intentionally or unintentionally seriously physically injure herself or another individual. Respondent asserted that her receipt of a reckless-driving ticket and a speeding ticket did not constitute clear and convincing evidence that she was a person requiring treatment who had engaged in an act or acts that were substantially supportive of the expectation of injury to herself or another individual. However, the traffic tickets constituted evidence of a reasonable expectation of physical harm to herself or someone else because the tickets were not isolated incidents; rather, the traffic tickets were part of an ongoing pattern of behavior dating back to 1993 when respondent suffered a traumatic brain injury in one of the multiple car accidents in her past. Testimony also made it plain that respondent's traffic tickets were linked to her ongoing mental illness. Respondent, whose delusions were related to her conduct in stalking professors on college campuses that once resulted in her arrest for criminal trespass, argued that the testimony against her was inadequate because it was not clear whether a testifying doctor was using the technical or colloquial definition of "stalking." Both the technical definition and the colloquial sense of the word contemplate actions, like those in this case, that are directed

against another person that could unintentionally result in physical harm. And both stalking and trespass involve unwanted contact directed against another person. Nor did the trial court err by finding that clear and convincing evidence also established that respondent had engaged in an act or acts or made significant threats that substantially supported the expectation of harm to herself or someone else—respondent's reckless driving, speeding, and trespassing were the "acts" required by MCL 330.1401(1)(a). And the trial court did not err by ruling that clear and convincing evidence established that respondent was a person requiring treatment under MCL 330.1401(1)(c). There was testimony that respondent's judgment was so impaired by her mental illness that she was unable to understand the need for treatment—she had previously left the county and the country to avoid treatment—and that her impaired judgment presented a significant risk of physical harm to herself and others in the near future. Accordingly, the trial court did not err by ruling that respondent was a person requiring treatment and did not abuse its discretion by entering a 60/90-day order for involuntary mental health treatment.

Affirmed.

APPEAL — MOOT ISSUES — INVOLUNTARY ORDERS OF COMMITMENT — EXPIRATION.

A matter is not moot when it may have collateral legal consequences for an individual; an order involuntarily committing an individual to a mental institution has collateral legal consequences even after the order has expired.

Brian L. Mackie, Prosecuting Attorney, and *Fawn Montgomery*, Assistant Prosecuting Attorney, for petitioner.

Susan A. Longsworth for respondent.

Before: SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ.

M. J. KELLY, J. Respondent, ST, appeals by right the probate court order granting the petition for involuntary mental health treatment and ordering respondent to undergo mental health treatment for up to 90 days, with up to 60 days of hospitalization. See MCL

330.1472a(1).[1] For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

On September 6, 2018, petitioner, a social worker at an Ann Arbor hospital, filed a petition seeking mental health treatment for respondent. The petition alleged that, as a result of mental illness, (1) respondent "can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure [herself] or others, and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation"; (2) respondent "is unable to attend to those basic physical needs that must be attended to in order to avoid serious harm in the near future, and has demonstrated that inability by failing to attend to those basic physical needs"; and (3) respondent's "judgment is so impaired by that mental illness that [she] is unable to understand [her] need for treatment, and whose impaired judgment, on the basis of competent clinical opinion, presents a substantial risk of significant physical or mental harm to [herself] or presents a substantial risk of physical harm to others in the near future." In support of the allegations, petitioner attached clinical certificates from a physician and a psychiatrist who observed respondent at the hospital. Both doctors diagnosed respondent with bipolar dis-

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[1] 2018 PA 593 amended MCL 330.1472a, effective March 28, 2019. The statute now provides for an initial order of combined hospitalization and assisted outpatient treatment for up to 180 days, with hospitalization for up to 60 days of the 180 days. MCL 330.1472a(1)(c). The statute also allows for an initial order of hospitalization alone for up to 60 days and assisted outpatient treatment alone for up to 180 days. MCL 330.1472a(1)(a) and (b). Alternative treatment is addressed in MCL 330.1469a.

order and determined that she displayed a likelihood of injuring herself and that she did not understand the need for treatment. One of the doctors recommended a course of treatment consisting of up to 60 days of hospitalization and a maximum of 90 days of treatment with permission to use injectable medication and communicate with respondent's family and other treatment providers.

The probate court ordered Washtenaw County Community Mental Health (CMH) to assess alternatives to hospitalization. Following its evaluation, CMH recommended respondent be hospitalized for up to 60 days, followed by "alternative treatment."

A hearing on the petition was held on September 12, 2018. Dr. Scott Mariouw, a psychiatrist, testified that he and a psychiatric resident met with respondent on September 6, 2018, the day after she was admitted to the hospital. Dr. Mariouw met with her every day since then for follow-up. Dr. Mariouw diagnosed respondent with schizoaffective disorder, bipolar type, which is a substantial disorder of both thought and mood. He explained that respondent exhibited delusions and disorganized thoughts and behaviors that impaired her ability to function in society. Respondent's husband had provided Dr. Mariouw with documentation of respondent's original diagnosis of bipolar disorder in 1991 and with photographs of numerous car crashes respondent was involved in because of her illness. Respondent had suffered a traumatic brain injury (TBI) in a car accident in 1993, and the TBI likely made respondent's prior symptoms worse and more difficult to treat.

Dr. Mariouw noted that respondent had been ticketed for reckless driving and speeding on September 1, 2018, and had been arrested on

September 4, 2018, for trespassing as a result of her delusions related to stalking professors on college campuses, which showed impairment of judgment. Dr. Mariouw believed that respondent could intentionally or unintentionally seriously injure herself or someone else in the near future because the reckless driving and the stalking showed that she might provoke or hurt someone else. Dr. Mariouw opined that respondent's judgment was so impaired that she did not understand that she needed treatment and did not believe she had a mental illness. He also stated that respondent had left the county or the country in the past to avoid court-ordered treatment. Dr. Mariouw did not believe that respondent had made progress since her hospitalization on September 5, 2018. And he confirmed that respondent was not taking medication at the time of the hearing.

Respondent also testified, stating that she had a mental illness "[a]s much as somebody can prove it." She did not believe she needed to be in the hospital, explaining that "for twenty-eight years, I have been detailed [sic] in mental hospital." She elaborated that the doctors rob her husband, "don't give my injection," and allowed her husband to "pay my expenses to escape the country." Respondent explained that "[d]octors prove doctors wrong and judges wrong and don't give me a shot and allow me to escape the country." She stated that "[t]he system is not so good," and the doctors were obligated by the system to "claim [she was] insane." Then, as her lawyer was summarizing his closing argument, respondent added that her medications do not stop her violence, and she indicated that her medications, in fact, caused her to be violent, and she stated, in vague terms, that she

“hit the government official, which is [a] felony,” but was excused because of her “mental sickness.”

Following the hearing, the trial court found by clear and convincing evidence that respondent was a “person requiring treatment” under MCL 330.1401(1)(a) and (c).

II. MOOTNESS

A. STANDARD OF REVIEW

Petitioner argued that if this appeal was not decided on or before February 12, 2019, respondent’s appeal of the September 12, 2018 involuntary commitment order would be moot and the case should be dismissed without reaching its merits. Whether an issue is moot is a question of law that this Court reviews de novo. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013).

B. ANALYSIS

The question of mootness is a threshold issue that a court must address before it reaches the substantive issues of a case. *In re MCI Telecom Complaint*, 460 Mich 396, 434-435 n 13; 596 NW2d 164 (1999). This is because “Michigan courts exist to decide actual cases and controversies . . . .” *Cooley*, 300 Mich App at 254. “A matter is moot if this Court’s ruling ‘cannot for any reason have a practical legal effect on the existing controversy.’ ” *Id.*, quoting *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

In this case, petitioner cursorily suggests that the matter is moot because the probate court order expired before the resolution of respondent’s appeal.[2] Petitioner

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[2] In support of its argument, petitioner directs this Court to the recent decision in *In re Horvath*, unpublished per curiam opinion of the Court

appears to contend that because the order has expired, our decision would not have any practical legal effect on the existing controversy even if this Court were to determine that the order was improperly entered. At first glance, this argument seems logical because if respondent has already received 90 days of mental health treatment, including hospitalization for up to 60 days, nothing this Court says will alter that fact. Nevertheless, there are collateral legal consequences flowing from that order. For instance, because of her involuntary commitment, respondent is ineligible to possess a firearm. The Gun Control Act prohibits numerous categories of people from gun ownership. 18 USC 922(g). Relevant to this appeal, § 922(g)(4) prohibits anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing a firearm. Federal regulations make clear that "committed to a mental institution" only applies to persons who are *involuntarily* committed by an appropriate lawful authority following due process safeguards. See 27 CFR 478.11 (defining the phrase "committed to a mental institution"). And the phrase "adjudicated as a mental defective" requires a determination by a lawful authority that a person, as a result of mental illness, among other conditions, (1) is a danger to himself or herself or (2) "[l]acks the mental capacity to contract or manage his or her own affairs." 27 CFR 478.11. Accordingly, even though the order in this case has expired, collateral legal consequences remain in the form of restrictions on the right to possess a firearm, so the issue is not moot. See *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990) (noting that an issue is not moot if it

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of Appeals, issued January 8, 2019 (Docket No. 344243). Unpublished opinions of this Court, however, are not binding precedent. MCR 7.215(C)(1).

"may have collateral legal consequences" for an individual), abrogated on other grounds *Turner v Rogers*, 564 US 431; 131 S Ct 2507; 180 L Ed 2d 452 (2011). See also *TM v MZ*, 501 Mich 312, 319-320; 916 NW2d 473 (2018) (holding that the mere expiration of a personal protection order (PPO) did not render a challenge to the propriety of the order moot when there remained a legal consequence stemming from the entry of the PPO).

Moreover, even if a claim is moot, as a practical matter "this Court may consider a legal issue that is one of public significance that is likely to recur, yet evade judicial review." *Cooley*, 300 Mich App at 254 (quotation marks and citation omitted). Here, the nature of the probate order all but guaranteed that no meaningful judicial review of the order could ever be conducted before the order expired. An issue is likely to evade judicial review if the time frames of the case make it unlikely that appellate review can be obtained before the case reaches a final resolution. See *Socialist Workers Party v Secretary of State*, 412 Mich 571, 582 n 11; 317 NW2d 1 (1982); *In re Midland Publishing Co, Inc*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984). The order was for a maximum treatment period of 90 days, with up to 60 days in the hospital. Given this short time frame, the issue is likely to recur, yet evade judicial review.[3] More-

[3] Under the Michigan Court Rules, respondent was entitled to an appeal of right from a final order affecting her rights under the Mental Health Code. See MCR 5.801(A)(4). Under MCR 7.204(A)(1)(a), an appellant has 21 days following the entry of the adverse order to file a claim of appeal. Thereafter, the appellant has 28 days after the occurrence of an event listed in MCR 7.204(A)(1)(a)(*i*) to file a brief in support of the claim of appeal, but the court rules provide that more time may be provided under certain circumstances. MCR 7.212(A)(1)(a)(*i*). The court rules further provide that after being served with an appellant's brief, the appellee has 21 days to file a responsive brief, although, again, that time may be extended. MCR

over, during the 90-day period that the order was in effect, respondent was ordered to "take medications as prescribed." Here, injections were being recommended. Further, the court order provided that the hospital "may speak/consult with [respondent's] husband" and "other treatment providers." Thus, respondent's medical information was made available to individuals without her express consent. Finally, given that hospitalization was authorized for up to 60 days, there was also a significant limit on her freedom of movement. Under these circumstances, we conclude that the issue is one of public significance. It is axiomatic that an individual subjected to involuntary mental health treatment will be significantly affected by the order because treatment decisions will be made for the individual and, if inpatient treatment is ordered, his or her freedom of movement will be limited. We conclude that the public has a significant interest in ensuring that such orders curtailing a person's liberty are properly entered. Accordingly, even if there were no lingering legal consequences stemming from the probate court order, application of the mootness doctrine would not be appropriate in this case.

The issue is not moot.

7.212(2)(a)(*i*). Finally, the appellant may file a reply brief within 21 days of being served with the appellee's brief. MCR 7.212(G).

The case is not necessarily heard immediately after the briefs have been filed. Instead, MCR 7.213(B) provides that after the briefs have been filed or the time for doing so has expired, the clerk must "notify the parties that the case will be submitted as a 'calendar case' at the next available session of the court." And although priority is given to cases involving mental health treatment under the Mental Health Code, MCR 7.213(C)(2), resolution of the matter before the expiration of a 90-day order is unlikely because of the time already set aside for filing the claim of appeal, the appellant's brief, the appellee's brief, and the reply brief.

III. PERSON REQUIRING TREATMENT

A. STANDARD OF REVIEW

Respondent argues that petitioner did not introduce clear and convincing evidence that she was a person requiring treatment as defined in MCL 330.1401(1)(a) and (c). This Court reviews de novo a matter of statutory interpretation. *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). In addition, this Court

> reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision. A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. A probate court's finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. [*Id*. at 328-329 (quotation marks and citations omitted).]

B. ANALYSIS

MCL 330.1401(1) provides, in relevant part, that the phrase "person requiring treatment" means:

> (a) An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.
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> (c) An individual who has mental illness, whose judgment is so impaired by that mental illness that he or she is unable to understand his or her need for treatment, and

> whose impaired judgment, on the basis of competent clinical opinion, presents a substantial risk of significant physical or mental harm to the individual in the near future or presents a substantial risk of physical harm to others in the near future.

" 'Mental illness' means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g). "A judge or jury shall not find that an individual is a person requiring treatment unless that fact has been established by clear and convincing evidence." MCL 330.1465. Respondent does not contest Dr. Mariouw's testimony that she has a mental illness. She only argues that Dr. Mariouw's testimony did not establish by clear and convincing evidence a reasonable expectation or substantial risk of harm to respondent or others.

Respondent asserts that she was not a person requiring treatment as defined in MCL 330.1401(1)(a) because a reckless-driving ticket and a speeding ticket did not constitute clear and convincing evidence that she could be expected to physically harm herself or someone else, intentionally or unintentionally. Reckless driving is defined as driving "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). MCL 330.1401(1)(a) does not require the potential harm to be intentional. Respondent's tickets for reckless driving and speeding were evidence of a reasonable expectation of physical harm to respondent or someone else because they were not isolated incidents. Rather, they were part of an ongoing pattern of behavior dating back to 1993 when respondent suffered a TBI in a car accident. Respondent has been in multiple car accidents, which inherently carried a risk of harm to the individuals involved, including

respondent. Respondent's recent tickets for reckless driving and speeding, combined with her history of car accidents, one of which resulted in harm to respondent, gave rise to a reasonable expectation of intentional or unintentional serious physical injury to respondent or another individual in the near future. In addition, Dr. Mariouw's testimony made it plain that respondent's recent reckless-driving and speeding tickets were linked to her ongoing mental health issues.

Respondent next contends that Dr. Mariouw's testimony was inadequate because it was not clear whether he used the word "stalking" in the technical sense or the colloquial sense, and she asserts that stalking includes behavior that does not involve a risk of physical harm. No matter which definition of stalking Dr. Mariouw was using, either definition contemplates actions directed against another person that could unintentionally result in physical harm. The Michigan Penal Code, MCL 750.1 *et seq*., defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). And, colloquially, the most pertinent common definition of "to stalk" is "to pursue obsessively and to the point of harassment." *Merriam-Webster's Collegiate Dictionary* (11th ed). In addition, criminal trespass occurs when a person, without lawful authority, enters or remains on another's land or premises when that person has been forbidden to enter, has been asked to leave, or with regard to posted or fenced farm property, has not received the owner's consent to enter or remain. MCL 750.552(1)(a), (b), and (c). Both stalking and trespass involve unwanted con-

tact directed at another person. Again, MCL 330.1401(1)(a) contemplates the possibility of *unintentional* harm. Although Dr. Mariouw did not elaborate on the circumstances of the arrest for trespassing, that arrest, combined with respondent's delusions related to stalking professors on college campuses, was also consistent with a reasonable expectation of intentional or unintentional serious physical injury to respondent or another individual in the near future.

Respondent argues that there was no testimony that she engaged in acts or made threats to substantially support an expectation of harm. Reckless driving, speeding, and trespassing are "acts" as required by MCL 330.1401(1)(a). Because those acts, in light of respondent's history, substantially support the expectation of intentional or unintentional serious physical injury to respondent or to another within the near future, they meet the definition in Subdivision (a) of a person requiring treatment.

Next, respondent argues that she was not a person requiring treatment as defined in MCL 330.1401(1)(c), because although Dr. Mariouw testified that respondent's judgment was so impaired that she was unable to understand the need for treatment, there was no evidence that respondent's impaired judgment presented a substantial risk of harm to herself or others. Dr. Mariouw testified that respondent's delusions related to stalking professors on college campuses led to her arrest for trespassing, and those delusions impaired her judgment. Dr. Mariouw also testified that respondent had previously been ordered to receive treatment for her mental illness and had left the county or the country to avoid treatment. Accordingly, Dr. Mariouw testified that respondent's judgment was impaired both in relation to her inability to acknowl-

edge the need for treatment and the risk of physical harm to others. For this reason, Dr. Mariouw's testimony established both elements of Subdivision (c). In sum, the trial court did not err by finding that respondent was a person requiring treatment and did not abuse its discretion by ordering that respondent receive treatment for her mental illness.

Affirmed.

SWARTZLE, P.J. and TUKEL, J., concurred with M. J. KELLY, J.

JIM'S BODY SHOP, INC v DEPARTMENT OF TREASURY

Docket No. 343459. Submitted May 8, 2019, at Lansing. Decided May 14, 2019, at 9:15 a.m.

Jim's Body Shop, Inc., brought an action in the Court of Claims against the Department of Treasury (the Department), asserting that it was entitled to cancellation of a tax assessment. In July 2015, the Department informed plaintiff that it would be performing a use-tax audit of plaintiff's returns for the taxable period between August 1, 2011 and December 31, 2014. The Department's auditors determined that plaintiff had not maintained adequate tax records. Plaintiff had not remitted any use tax for the periods at issue, and while plaintiff had remitted some sales tax, it had not reported that sales tax on its annual returns. Consequently, the Department was unable to determine from plaintiff's purchase invoices whether use or sales tax had been remitted on these purchases because they could not be related back to plaintiff's annual return. The Department requested documents, but plaintiff could not provide the necessary information. Ultimately, the Department employed an indirect audit methodology to determine the use tax due on the two types of purchases plaintiff had made during the audit period: capital assets and expenses related to mechanical and body-shop repair work. To determine the goods that plaintiff consumed—and that were thus subject to use tax—the Department, using the information it had available, applied a "one-year block" methodology for the 2014 tax year. To determine the purchases plaintiff itself used, the Department subtracted the total amount of retail sales, adjusted to the cost of goods before markup, from the total purchases. This adjustment to retail sales (hereinafter "retail sales at cost") was necessary to ensure that plaintiff's purchases for self-consumption were calculated correctly. Notably, because plaintiff initially provided only a single invoice from 2014 reflecting a retail sale, for which the markup was 43%, the Department adjusted all of plaintiff's retail sales for each tax year using this 43% markup. Ultimately, the Department issued a final assessment for $111,024, including a negligence penalty and interest. Plaintiff then brought the instant action, asserting that it was not subject to use tax, that the Department ignored "various" tax

exemptions for which plaintiff was eligible, and that the Department erred in calculating a 43% markup to determine plaintiff's purchases for personal use. Plaintiff further claimed that certain expenses and capital assets were improperly included because they were exempt under the industrial-processing exemption and that the remaining capital assets were not subject to taxation for various reasons. In support of its position, plaintiff provided additional documentation that it had not provided during the audit. The Department consequently adjusted the markup downward to 35%, thereby reducing plaintiff's tax liability for expenses. Both parties filed cross-motions for summary disposition, and the Court of Claims, MICHAEL J. TALBOT, J., ruled in the Department's favor. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 205.104a(1) of the Use Tax Act (UTA), MCL 205.91 *et seq*., a taxpayer in the business of selling tangible personal property has a duty to maintain, for a period of four years, an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. In the event the taxpayer fails to comply with this requirement, MCL 205.104a(4) authorizes the Department to determine the taxpayer's tax liability using sources beyond the taxpayer's formal declarations. MCL 205.104a(4) creates a presumption that the resulting assessment is correct and mandates that the audit shall be conducted in accordance with certain standards. In this case, plaintiff failed to remit any use tax, failed to report sales or use taxes on its annual returns, and failed to maintain the required documentation to establish its use-tax liability. Consequently, the Department acted within its authority to apply an indirect audit methodology under MCL 205.104a(4) to determine plaintiff's use-tax liability for the tax years at issue.

2. MCL 205.104a(4) provides that an assessment derived from an indirect method is considered prima facie correct, and MCL 205.104a(4) specifically allocates the burden of proof of refuting the assessment upon the taxpayer. The last sentence of MCL 205.104a(4) requires that an "indirect audit" contain the elements listed in Subdivisions (a) through (d). Contrary to plaintiff's interpretation, Subdivisions (a) through (d) do not inform—or otherwise act as a prerequisite to—the Department's entitlement to the presumption of correctness under MCL 205.104a(4). Subdivisions (a) through (d) are mandatory procedural requirements in the performance of an indirect audit, but the statutory language never indicates that the failure to follow

these procedural requirements renders the assessment invalid or otherwise prohibits application of the presumption. Had the Legislature intended the procedural requirements of Subdivisions (a) through (d) to be requisites to the presumption of correctness, it would have stated so plainly. When the statute is read as a whole, it is plain that the burden rests on taxpayers to show that an assessment derived from an indirect method is actually incorrect. In this case, plaintiff did not assert that the assessment was incorrect; rather, based on its flawed interpretation of the statute, plaintiff claimed that the assessment methodology was unreasonable because the Department did not abide by its manual and because a more reasonable method would have resulted in a more accurate assessment. However, under the plain terms of the statute, assertions that an audit procedure was unreasonable, absent a showing that the assessment is incorrect, do not support a conclusion that the assessment is actually incorrect. On this basis alone, plaintiff failed to meet its burden. Even assuming that an unreasonable audit method by itself could function to rebut the presumption of correctness, plaintiff failed to show that the method the Department employed was unreasonable or to otherwise demonstrate in any way that the assessment was not correct. Accordingly, plaintiff failed to rebut the presumption that the assessment was prima facie correct, so the Court of Claims did not err by granting summary disposition on this basis.

3. MCL 205.94o(1)(a) provides, in pertinent part, that property sold to an "industrial processor" that is used or consumed in "industrial processing" is exempt from taxation under the UTA. MCL 205.94o(7)(b) defines "industrial processor" as a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. MCL 205.94o(7)(a) defines "industrial processing" as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. In this case, plaintiff was not an industrial processor engaged in industrial processing because, by definition, an industrial processor and

industrial processing require an "ultimate sale at retail." MCL 205.51(1)(b) defines "sale at retail" as a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent. It is significant that the Legislature qualified the necessary activity with the phrase "for ultimate sale at retail" because it excludes from the industrial-processing exemption persons involved in the sale of services. Plaintiff's auto-body work involved both the sale of tangible personal property, i.e., new paint on a new or preexisting auto-body part, and the sale of a service, i.e., the repair of auto-body parts. For purposes of the exemption, whether a "sale at retail" has occurred when a mixed transaction is at issue depends on whether the transfer of tangible personal property is merely incidental to the service provided, in which case the transaction is for services and not a "sale at retail." To determine whether a "sale at retail" has occurred, courts applying the General Sales Tax Act have used the "incidental-to-service test" and have objectively examined the totality of the transaction. In this case, the sale of tangible personal property, i.e., new paint on a new or preexisting auto-body part, was incidental to the sale of a service, i.e., the repair of auto-body parts. Because plaintiff made no sales at retail, given that its transactions were for the sale of a service, it was not an "industrial processor" engaged in "industrial processing" and it was not eligible for the industrial-processing exemption.

4. Regarding motions for summary disposition under MCR 2.116(C)(10), once the moving party meets its burden of supporting the motion with documentary evidence, the burden shifts to the nonmoving party to set forth specific facts showing that a genuine issue of disputed fact exists. In this case, plaintiff failed to produce the required documentary evidence necessary to establish a genuine issue of material fact to avoid summary disposition. Plaintiff's owner and president testified regarding purchases but did not present any invoices or documentary proof. Accordingly, the Court of Claims did not err by recognizing that plaintiff had failed to meet its burden of proof.

5. MCL 205.23(3) requires the imposition of a 10% penalty in the event that a tax deficiency is due to the taxpayer's negligence. Mich Admin Code, R 205.1012 defines negligence, for purposes of imposing this penalty, as the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. Whether a taxpayer was negligent is determined on a case-by-case basis, but the standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and

paying the applicable tax in accordance with the statute. MCL 205.23(3) provides, in pertinent part, that if the taxpayer demonstrates to the satisfaction of the Department that the deficiency was due to reasonable cause, the Department shall waive the penalty. In this case, plaintiff did not remit any use taxes during the period and left the portion of its returns relating to sales and use taxes blank. Plaintiff's owner and president testified that he was not aware of plaintiff's tax-reporting procedures and did not know whether plaintiff had filed sales- or use-tax returns for the years in question. Further, plaintiff's claim that it believed it was entitled to the industrial-processing exemption was belied by the fact that it did not raise this exemption until litigation and, in any case, ordinary care would have compelled plaintiff to file returns despite such a belief. These circumstances showed that plaintiff failed to exercise ordinary care. The Court of Claims did not err by upholding the negligence penalty.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Emily C. Zillgitt*, Assistant Attorney General, for the Department of Treasury.

Braun Kendrick Finkbeiner PLC (by *Jamie Hecht Nisidis*) for Jim's Body Shop, Inc.

Before: SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ.

PER CURIAM. In this case involving a use-tax deficiency, plaintiff, Jim's Body Shop, Inc., appeals by right the Court of Claims' order granting summary disposition under MCR 2.116(C)(10) in favor of defendant, the Michigan Department of Treasury. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

Plaintiff is an auto-body repair shop located in Clare, Michigan, that is primarily engaged in the

business of fixing vehicles that have been involved in collisions for insurance companies. This collision work may require both body and mechanical work, including part repair or replacement as well as exterior painting and refinishing. A smaller component of plaintiff's business involves routine noninsurance-related mechanical repairs, for example, replacing batteries, changing oil, or installing tires.

In July 2015, the Department informed plaintiff that it would be performing a use-tax audit of plaintiff's returns for the taxable period between August 1, 2011 and December 31, 2014. Upon initial review of plaintiff's tax records, the Department's auditors determined that plaintiff had not maintained adequate tax records. Plaintiff had not remitted any use tax for the periods at issue, and while plaintiff had remitted some sales tax, it had not reported that sales tax on its annual returns. Rather, plaintiff's annual returns only reported withholding taxes; the portion of the returns relating to sales tax, gross sales, deductions from gross sales, and use tax was left blank. Consequently, while plaintiff had maintained trial-balance sheets,[1] the Department was unable to determine from plaintiff's purchase invoices whether use or sales tax had been remitted on these purchases because they could not be related back to plaintiff's annual return. The Department requested documents to ascertain which purchases plaintiff personally consumed (as opposed to purchases it sold and collected sales tax on), but plaintiff could not provide that information.

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[1] A "trial balance" sheet is "a bookkeeping or accounting report that lists the balances in each of an organization's general ledger accounts." See Harold Averkamp, AccountingCoach, *What Is a Trial Balance?* <https://www.accountingcoach.com/blog/what-is-a-trial-balance> (accessed April 26, 2019) [https://perma.cc/JF7V-NB94].

Ultimately, the Department employed an indirect audit methodology to determine the use tax due on the two types of purchases plaintiff had made during the audit period: capital assets[2] and expenses related to mechanical and body-shop repair work. With regard to capital assets, the Department reviewed plaintiff's federal depreciation schedule for the subject tax years and assessed tax for those purchases on the schedule for which no tax had been paid. With respect to plaintiff's use-tax liability for expenses, or property plaintiff purchased to perform its mechanical and body-shop repair work, the Department reviewed plaintiff's trial-balance sheets and identified 11 accounts as relevant to the use-tax audit. Yet, the trial-balance sheets did not identify whether plaintiff's purchases were for personal consumption or for its retail customers, although they did show that plaintiff's purchases were substantially greater than its retail sales, indicating that certain goods were purchased for plaintiff's consumption.

To determine the goods that plaintiff consumed—and that were thus subject to use tax—the Department, using the information it had available, applied a "one-year block" methodology for the 2014 tax year. Mainly from the 2014 trial-balance sheet and the amount of sales tax remitted in 2014, the Department was able to compare the purchases plaintiff made, i.e., the total cost of goods it paid for, to plaintiff's total retail sales, i.e., the price (cost of the good plus markup) charged to the consumer. To determine the purchases plaintiff itself used, the Department subtracted the total amount of retail sales, adjusted to the

[2] "Capital assets" are "long-term asset[s] used in the operation of a business or used to produce goods or services, such as equipment, land, or an industrial plant." *Black's Law Dictionary* (10th ed), p 140.

cost of goods before markup, from the total purchases. This adjustment to retail sales (hereinafter "retail sales at cost") was necessary to ensure that plaintiff's purchases for self-consumption were calculated correctly. Notably, because plaintiff initially provided only a single invoice from 2014 reflecting a retail sale, for which the markup was 43%, the Department adjusted all of plaintiff's retail sales for each tax year using this 43% markup. Ultimately, the Department issued a final assessment for $111,024, including a negligence penalty and interest.

Shortly after the Department issued its final audit determination, plaintiff filed a complaint in the Court of Claims, asserting that it was entitled to cancellation of the assessment because of the Department's "errors." Plaintiff asserted that it was not subject to use tax and that the Department ignored "various" tax exemptions for which plaintiff is eligible. Plaintiff clarified its position in its discovery responses, alleging that the Department erred in calculating a 43% markup to determine plaintiff's purchases for personal use because the Department relied on a single purchase invoice, the sample size of which was too small and not representative of plaintiff's sales so as to be extrapolated over the four-year period. Plaintiff further claimed that certain expenses and capital assets were improperly included because they were exempt under the industrial-processing exemption, including, as to expenses, paint supplies, sandblaster sand and supplies, and paintless dents equipment and supplies, and as to capital assets, the Cooltech R143A refrigerant recycler, Saylor-Beall air compressor, pressure washer, and carpet extractor. Plaintiff also asserted that the remaining capital assets were not subject to taxation for various reasons, including tools and a foam sprayer that were allegedly part of

the realty, a 2008 Pontiac Grand Prix that plaintiff allegedly never purchased, and a 2003 International 4300 that was purchased for resale.

In support of its position, plaintiff provided additional documentation that it had not provided during the audit and, consequently, the Department reduced plaintiff's tax liability. Plaintiff, for example, provided documents showing that sales tax had been paid on some tire sales and some inventory vehicles and, thus, the Department removed those items from the taxable balance. Plaintiff also produced invoices from 3 of the 11 expense accounts of interest, including 63 tire invoices, 36 parts invoices, and 2 mechanical invoices. Given this additional information, the Department recalculated the markup by averaging the invoices separately in each of the three accounts and then averaging the average. As a result, the Department adjusted the markup downward to 35%, thereby reducing plaintiff's tax liability for expenses.

Eventually the parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The Court of Claims ruled in the Department's favor.

This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. This Court reviews de novo a decision of the Court of Claims granting summary disposition. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The Court must view all the evidence submitted by the

parties in a light most favorable to the nonmoving party. *Id*. If no genuine issue of material fact exists and judgment is proper as a matter of law, then the motion was properly granted. *Id*. Questions of statutory interpretation are questions of law that are also reviewed de novo. *GMAC LLC*, 286 Mich App at 372.

B. ANALYSIS

1. PRESUMPTION OF CORRECTNESS

Under MCL 205.104a(1) of the Use Tax Act (UTA), MCL 205.91 *et seq*., a taxpayer in the business of selling tangible personal property has a duty to maintain, for a period of four years, "an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires." In the event the taxpayer fails to comply with this requirement, MCL 205.104a(4) authorizes the Department to determine the taxpayer's tax liability using sources beyond the taxpayer's formal declarations. MCL 205.104a(4) creates a presumption that the resulting assessment is correct and mandates that the audit shall be conducted in accordance with certain standards.

Here, plaintiff failed to remit any use tax, failed to report sales or use taxes on its annual returns, and failed to maintain the required documentation to establish its use-tax liability. Consequently, the Department acted within its authority to apply an indirect audit methodology under MCL 205.104a(4) to determine plaintiff's use-tax liability for the tax years at issue.

On appeal, plaintiff does not dispute that an indirect methodology was permissible but instead claims that the resultant assessment was not reasonable under the statute and that the Department, therefore, was not entitled to the presumption that the assessment was correct. Plaintiff's contends that under MCL 205.104a(4) the Department is not entitled to the presumption of correctness absent a showing of reasonableness. In support, plaintiff points to Subdivisions (a) through (d), claiming that because these are mandatory requirements, the Department's failure to comply with them either makes the Department ineligible for the presumption or rebuts the presumption. Plaintiff, however, misconstrues the statute.

When construing statutory language, this Court's goal is to ascertain the Legislature's intent. *Cook v Dep't of Treasury*, 229 Mich App 653, 658-659; 583 NW2d 696 (1998). The best indicator of that intent is the plain language used. *Ferguson v City of Lincoln Park*, 264 Mich App 93, 95-96; 694 NW2d 61 (2004). If the language is clear and unambiguous, it must be applied as written. *Id*. "Further, tax statutes are not to be extended by implication and are to be construed against the taxing authority if an ambiguity exists." *Garfield Mart, Inc v Dep't of Treasury*, 320 Mich App 628, 643; 907 NW2d 880 (2017).

MCL 205.104a(4) provides:

> If a taxpayer fails to file a return or to maintain or preserve sufficient records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department. *That assessment is considered prima facie*

> *correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer*. An indirect audit of a taxpayer under this subsection shall be conducted in accordance with 1941 PA 122, MCL 205.1 to 205.31, and the standards published by the department under section 21 of 1941 PA 122, MCL 205.21, and *shall* include all of the following elements:
>
> (a) A review of the taxpayer's books and records. The department may use an indirect method to test the accuracy of the taxpayer's books and records.
>
> (b) Both the credibility of the evidence and the reasonableness of the conclusion shall be evaluated before any determination of tax liability is made.
>
> (c) The department may use any method to reconstruct income, deductions, or expenses that is reasonable under the circumstances. The department may use third-party records in the reconstruction.
>
> (d) The department shall investigate all reasonable evidence presented by the taxpayer refuting the computation. [Emphasis added.]

Subsection (4) requires that an assessment derived from an indirect method "is considered prima facie correct" and specifically allocates the "burden of proof of refuting the assessment . . . upon the taxpayer." MCL 205.104a(4). Because the burden of proof refers back to the presumption of correctness, MCL 205.104a(4), by its plain terms, means that the taxpayer has the burden of rebutting the presumption of correctness by showing that the assessment was incorrect. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 43; 703 NW2d 822 (2005).[3] The last

[3] In *By Lo Oil Co*, 267 Mich App at 43, this Court explained that "[a]lthough plaintiff proffered opinion testimony that the audit method used by the department was not the most reliable and should have been verified with test samples chosen from throughout the period audited, plaintiff failed to offer any evidence that the error rate determined by

sentence of Subsection (4) requires that an "indirect audit" contain the elements listed in Subdivisions (a) through (d). See MCL 205.104a(4)(a) through (d).

Contrary to plaintiff's interpretation, Subdivisions (a) through (d) do not inform—or otherwise act as a prerequisite to—the Department's entitlement to the presumption of correctness under Subsection (4). Subdivisions (a) through (d) are mandatory procedural requirements in the *performance* of an indirect audit, but the statutory language never indicates that the failure to follow these procedural requirements renders the assessment invalid or otherwise prohibits application of the presumption. Had the Legislature intended the procedural requirements of Subdivisions (a) through (d) to be requisites to the presumption of correctness, it would have stated so plainly.[4]

When the statute is read as a whole, it is plain that the burden rests on taxpayers to show that an assessment derived from an indirect method is actually incorrect. Subdivisions (a) through (d) are only relevant to a taxpayer's burden if the taxpayer can show that as a result of the Department's failure to abide by those procedural requirements, the assessment was not correct: for example, by showing that the Department made a mathematical error or failed to include pertinent information. In this case, plaintiff does not assert that the assessment is incorrect; rather, based on its flawed interpretation of the statute, it claims

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the 'block sampling' method was actually inaccurate." In other words, challenging the audit method without also proffering evidence showing that the audit is actually incorrect is insufficient to establish "as a factual matter that any unfairness or injustice occurred." *Id*.

[4] We note that plaintiff's understanding of the statute, which requires a showing of reasonableness before the presumption attaches, effectively eviscerates the presumption of validity by shifting the burden onto the Department to show that the assessment is reasonable.

that the assessment methodology was unreasonable because the Department did not abide by its manual and because a more reasonable method would have resulted in a more accurate assessment. As explained earlier, under the plain terms of the statute, assertions that an audit procedure was unreasonable, absent a showing that the assessment is incorrect, do not support a conclusion that the assessment is actually incorrect. On this basis alone, plaintiff has failed to meet its burden.

Even assuming that an unreasonable audit method by itself could function to rebut the presumption of correctness, plaintiff has failed to show that the method the Department employed was unreasonable or otherwise demonstrate in any way that the assessment was not correct. Regarding the Department's alleged failure to follow the manual's guidance when using a sampling method, plaintiff points out that small sample sizes are disfavored, as are those that are not representative of the entire population. Yet, the Department did not rely on a sampling methodology whereby a "sample" of invoices would be used to determine the markup theoretically applied to all goods sold. Instead, the Department used a block-sampling methodology and used the only information plaintiff had made available to it, which renders the manual's guidance on sampling methodology immaterial. Moreover, even assuming that the sampling methodology had some relevance, plaintiff cites no authority for the proposition that the Department's alleged failure to follow its own guidance renders the assessment incorrect or constitutes error requiring reversal. In any event, the manual is not binding law, but merely guidance. See *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002) (indicating that agency manuals not promulgated through formal

rulemaking are merely guidance). Further, to hold that a taxpayer may rebut the presumption of correctness by merely showing that the Department did not follow its manual would prohibit, or constrain, the Department from making assessments on available information in situations in which taxpayers do not maintain proper records and would greatly erode the state's power to tax. See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 245; 377 NW2d 309 (1985).

Relatedly, plaintiff claims that it was unreasonable for the Department to project the cost of goods plaintiff sold at retail by determining an overall markup based on the average of three separately averaged accounts. When it is necessary for the Department to use an indirect methodology, it has wide discretion in the selection of the method and the taxpayer has no right to choose the method ultimately applied. *By Lo Oil Co*, 267 Mich App at 42. Nevertheless, plaintiff asserts that giving equal weight to the parts-mechanical account (average markup of 66% based on two invoices) disproportionately affects the markup averages of the other two accounts, both of which had much larger sample sizes. According to plaintiff, the Department should have averaged all the invoices together for a total markup of 13%, as opposed to averaging the averages of the accounts. Plaintiff ignores, however, that each of the 11 accounts make up different percentages of plaintiff's business; the significance of this is that by simply averaging all the invoices together, undue weight would be given to the tire account (because plaintiff submitted the most invoices for that account), which only makes up 4% of plaintiff's business. By averaging the averages, defendant gave equal weight to each of the accounts for which invoices were submitted. While defendant's method does not account for the proportion of busi-

ness activity in each account (primarily because plaintiff did not produce invoices for each account), plaintiff's proposed method is not any more reliable than the method applied, given that a taxpayer could manipulate the markup by producing a greater number of invoices favorable to it. In any case, that an audit method other than the one employed may have been more reasonable or reliable than the one actually used is insufficient to rebut the presumption of correctness without a showing that the assessment is actually incorrect. *Id*. at 42-43.

In sum, plaintiff failed to rebut the presumption that the assessment is prima facie correct, so the Court of Claims did not err by granting summary disposition on this basis.

2. INDUSTRIAL-PROCESSING EXEMPTION

Plaintiff argues that the industrial-processing exemption, MCL 205.54t, should be applied in this case. Property sold to an "industrial processor" that is used or consumed in "industrial processing" is exempt from taxation under the UTA. MCL 205.94o(1)(a). The act defines "industrial processor" as

> a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. [MCL 205.94o(7)(b).]

The act further defines "industrial processing" as

> the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a struc-

> tural part of real estate located in another state. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. [MCL 205.94o(7)(a).]

Plaintiff prepares damaged or new auto-body parts by sandblasting and fixing dents as necessary and by preparing and applying a primer. After the primer is baked, plaintiff mixes a combination of powdered tints and other liquid chemicals and applies the resultant paint color to the auto-body part using an air gun. After the paint has baked, plaintiff finishes the process by mixing more chemicals to create a clear coat, which is again applied to the auto part using an air gun. Plainly, plaintiff's auto-body collision-repair work is an activity that alters tangible personal property (the paint tints and other chemicals) by changing its form and character. See MCL 205.94o(7)(a).

Notwithstanding plaintiff's activities, plaintiff is not an industrial processor engaged in industrial processing. This is because, by definition, an industrial processor and industrial processing require an "ultimate sale at retail." The General Sales Tax Act, MCL 205.51 *et seq*., defines "sale at retail" as "a sale, lease, or rental of *tangible personal property* for any purpose other than for resale, sublease, or subrent." MCL 205.51(1)(b) (emphasis added). It is significant that the Legislature qualified the necessary activity with the phrase "for ultimate sale at retail" because it excludes from the industrial-processing exemption persons involved in the sale of services. See *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 364-365; 863 NW2d 387 (2014) (recognizing that under the General Sales Tax Act's analogous industrial-processing exemption, the exemption is not available to persons

selling something other than tangible personal property).[5]

Plaintiff's auto-body work involves both the sale of tangible personal property, i.e., new paint on a new or preexisting auto-body part, and the sale of a service, i.e., the repair of auto-body parts. For purposes of the exemption, whether a "sale at retail" has occurred when a mixed transaction is at issue depends on whether the transfer of tangible personal property is merely incidental to the service provided, in which case the transaction is for services and not a "sale at retail." To determine whether a "sale at retail" has occurred, courts applying the General Sales Tax Act have used the "incidental-to-service test" and have objectively examined the totality of the transaction, considering

> what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. [*Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 26; 678 NW2d 619 (2004).][6]

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[5] Notably, prior to the amendment of the act that added MCL 205.94o in 1999, 1999 PA 117, effective July 14, 1999, the Legislature had recognized that the exemption could apply to those involved in the sale of services, so long as those services changed or altered the character of tangible personal property to place it in a different form, see *Beckman Prod Servs, Inc v Dep't of Treasury*, 202 Mich App 342, 344-345; 508 NW2d 178 (1993). The 1999 amendment, which added the language requiring that industrial processors effect a change in tangible personal property for *ultimate sale at retail*, reflects a conscious decision to narrow the applicability of the exemption.

[6] Although the Michigan Supreme Court articulated this test in a case involving the GSTA, this Court has previously applied the incidental-

Plaintiff is primarily engaged in the business of providing auto-body repairs to vehicles that have been in a collision. With respect to this aspect of plaintiff's business, customers sought the auto-body repairs of their damaged vehicles as the object of the transaction. The paint and supplies that plaintiff used to make these repairs were not made available for sale without the service. And this tangible personal property—the unmixed paint, the other chemicals, and the supplies used to prepare and finish the repair—would have virtually no value to the customer without the service of applying those components to the vehicle so that the auto-body parts look like new. Consequently, the sale of tangible personal property, i.e., new paint on a new or preexisting auto-body part, is incidental to the sale of a service, i.e., the repair of auto-body parts. Because plaintiff makes no sales at retail, given that its transactions are for the sale of a service, it is not an "industrial processor" engaged in "industrial processing" and it is not eligible for the industrial-processing exemption.

Plaintiff disagrees with this conclusion, claiming that the Court of Claims erred by focusing its analysis solely on the fact that the paints were not sold separately at retail, but in doing so, plaintiff takes the Court of Claims' statement in isolation. The court's analysis, however, focused on the totality of the transaction under the incidental-to-service test. Moreover, the evidence provided by plaintiff does not support a finding that plaintiff sold paints alone. Instead, it is clear that the paints were sold in conjunction with the repair service. Plaintiff does not otherwise explain how it is engaged in retail sales, as opposed to the sale of

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to-service test in the context of the UTA. *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 79 n 4; 880 NW2d 337 (2015).

repair service, other than relying on an unpublished case, which is not binding on this Court, and which we do not find persuasive.[7] See MCR 7.215(C)(1).

3. CAPITAL ASSETS

Plaintiff argues that the Court of Claims misapplied the standard for reviewing a summary-disposition motion under MCR 2.116(C)(10) with regard to certain capital assets. Plaintiff claims that the court failed to view the evidence in the light most favorable to plaintiff and wrongly ignored James Paetschow's[8] testimony that the assets were not subject to tax. Once the moving party meets its burden of supporting its motion under MCR 2.116(C)(10) with documentary evidence, the burden shifts to the nonmoving party to set forth specific facts showing that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). In this regard, "the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings [and present documentary evidence] to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Plaintiff's federal depreciation schedule listed the capital assets in dispute; because plaintiff was unable to produce an invoice showing that sales tax had been paid on these items, the Department included those items in the assessment. Contrary to plaintiff's argument on appeal, plaintiff failed to produce the required

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[7] The decision plaintiff relies on is *Central Mich Cementing Servs, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued December 8, 2015 (Docket No. 323405).

[8] Paetschow is plaintiff's owner and president.

documentary evidence necessary to establish a genuine issue of material fact to avoid summary disposition. Paetschow testified that the tools and the foam sprayer were attached to the realty, but plaintiff did not present any invoices or documentary proof. He also testifed that plaintiff purchased a Grand Prix but could not produce an invoice; he later attested contradictorily that plaintiff did not purchase the Grand Prix. And despite claiming the International 4300 on the depreciation schedule, Paetschow testified that it was purchased for resale and kept as inventory, but he did not provide any documentary evidence to support this assertion. Having reviewed the record, it is plain that all of Paetschow's assertions are nothing more than unsubstantiated assertions insufficient to create a question of fact for trial. See *Quinto*, 451 Mich at 362-363. The Court of Claims did not err by recognizing that plaintiff had failed to meet its burden of proof.

4. NEGLIGENCE PENALTY

Finally, plaintiff argues that the negligence penalty should be waived, given that plaintiff was arguably eligible for the industrial-processing exemption. MCL 205.23(3) requires the imposition of a 10% penalty in the event that a tax deficiency is due to the taxpayer's negligence. Negligence, for purposes of imposing such a penalty, "is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances." Mich Admin Code, R 205.1012. Whether a taxpayer was negligent is determined on a case-by-case basis, but the "standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute." *Id*. Thus, if the

taxpayer "demonstrates to the satisfaction of the department that the deficiency . . . was due to reasonable cause, the department shall waive the penalty." MCL 205.23(3).

Plaintiff did not remit any use taxes during the period and left the portion of its returns relating to sales and use taxes blank. Paetschow testified that he was not aware of plaintiff's tax-reporting procedures and did not know whether plaintiff had filed sales- or use-tax returns for the years in question. Further, plaintiff's claim that it believed it was entitled to the industrial-processing exemption is belied by the fact that it did not raise this exemption until litigation and, in any case, ordinary care would have compelled plaintiff to file returns despite such a belief. These circumstances show that plaintiff failed to exercise ordinary care. The Court of Claims did not err by upholding the negligence penalty.

Affirmed.

SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ., concurred.

MAPLES v STATE OF MICHIGAN

Docket No. 343394. Submitted April 3, 2019, at Lansing. Decided May 14, 2019, at 9:20 a.m.

David A. Maples filed an action in the Court of Claims against the state of Michigan, seeking to recover damages under the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*. In August 1993, Maples and Lawrence Roberts met James Murphy at a bar; Murphy sold cocaine to an undercover police officer while they were at the bar. Maples, Roberts, and Murphy were all charged with delivery of cocaine and conspiracy to deliver cocaine, but the charges against Roberts were eventually dismissed. In a letter to the trial court shortly after his arrest, Murphy stated that Maples and Roberts had nothing to do with the sale of the cocaine. Murphy moved to dismiss the charges in February 1994, claiming that he had been entrapped and reiterating that Maples was not involved in the drug transaction; Maples joined in the motion. During that motion hearing, Murphy testified that Maples was neither involved in nor aware of the cocaine sale. In 1995, Maples moved to dismiss the charges on the basis that he had been denied his right to a speedy trial; the trial court denied that motion. Maples intended to call Murphy and Roberts as defense witnesses at his trial. After learning that Murphy had agreed not to testify on Maples's behalf in exchange for a reduced sentence and that Roberts could not be located to testify on Maples's behalf, Maples pleaded guilty of delivering cocaine with an assurance from his trial counsel that he could still appeal the speedy-trial issue. After Maples was sentenced, Murphy executed affidavits in 1997 and 2007, attesting that Maples had not been involved in the alleged crimes. Maples appealed; the Court of Appeals concluded that Maples had waived review of his claims when he pleaded guilty, and the Michigan Supreme Court denied his application for leave to appeal. Maples petitioned the United States District Court for the Eastern District of Michigan for a writ of habeas corpus, claiming ineffective assistance of counsel and denial of his right to a speedy trial; the federal district court denied the petition. Maples appealed, and the United States Court of Appeals for the Sixth Circuit concluded that the

performance of Maples's trial counsel was constitutionally deficient and, on that basis, remanded to the district court to analyze Maples's likelihood of success on his speedy-trial claim to determine whether he was prejudiced such that he could prevail on his ineffective-assistance-of-counsel claim. The federal district court concluded that Maples's speedy-trial claim lacked merit and that he therefore could not prevail on his ineffective-assistance-of-counsel claim. On appeal, the Sixth Circuit directed the federal district court to issue the writ, concluding that Maples had been prejudiced by the delay because both Roberts and Murphy were unavailable to testify by the time of the criminal trial and that as a result, because Maples's speedy-trial violation claim had merit, he had been denied effective assistance when trial counsel had erroneously informed him that the claim would not be waived by pleading guilty. *Maples v Stegall*, 427 F3d 1020 (CA 6, 2005). In 2006, the Macomb Circuit Court dismissed the criminal charges against Maples and vacated his conviction. Maples filed this action in 2017, claiming that new evidence—that is, Roberts's proposed testimony and Murphy's testimony, affidavits, and letter—demonstrated Maples's innocence and had resulted in his conviction being vacated and the charges dismissed. The state moved for summary disposition. The Court of Claims, MICHAEL J. TALBOT, J., granted the motion and dismissed Maples's claim, reasoning that Maples had failed to support his WICA claim with new evidence, a requirement under MCL 691.1755(1)(c) to recover compensation under the act. Maples appealed.

The Court of Appeals *held*:

1. In relevant part, MCL 691.1755(1) provides that to recover on a WICA claim, a plaintiff must prove by clear and convincing evidence that (1) the plaintiff was convicted of one or more crimes under Michigan law, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence; (2) the plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty; and (3) new evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges of a finding of not guilty on all of the charges on retrial. Thus, MCL 691.1755(1)(c) requires that a plaintiff demonstrate that (1) the proffered

evidence meets the MCL 691.1752(b) definition of "new evidence," (2) the new evidence must demonstrate that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis for the conviction, (3) the new evidence must result in the reversal or vacation of the charges in the judgment of conviction, and (4) the new evidence must result in all the charges being dismissed or a finding of not guilty on all the charges on retrial. If a plaintiff cannot establish that the proffered evidence constitutes "new evidence," the plaintiff cannot recover under the WICA. Under MCL 691.1752(b), the phrase "new evidence" is defined as any evidence that was not presented in the proceedings leading to the plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to the plaintiff's conviction. Given the dictionary definitions of "proceeding," "criminal proceeding," and "leading," in order for proposed evidence to be considered "new evidence" under MCL 691.1752(b), the evidence must not have been presented during the regular and orderly progression of the criminal case that brought about the conviction; the phrase "proceeding leading to plaintiff's conviction" is broad in that it is not limited to only those proceedings in which guilt is determined.

2. In this case, Maples's two asserted categories of exculpatory material—(1) Murphy's testimony at the entrapment hearing, his two affidavits, and his letter to the trial court and (2) Roberts's proposed exculpatory testimony—did not qualify as new evidence for purposes of MCL 691.1752(b). Murphy's testimony at the entrapment hearing was not new evidence because Maples was present at that hearing and joined in the motion and the hearing was a proceeding that occurred during the progress of the criminal case that brought about the conviction given that Maples's entrapment defense would have resulted in the charges being dismissed if the trial court had granted the motion. Murphy's testimony, as well as the affidavits and letter reiterating that testimony, thus was not new evidence under the WICA because the evidence had been presented during a proceeding leading to his conviction. Roberts's supposed testimony did not constitute new evidence because Maples provided neither the substance of the purported exculpatory testimony nor established whether Roberts could even be located to provide testimony. Accordingly, because Maples failed to meet the "new evidence" requirement under MCL 691.1752(b), the trial court did not err by granting the state's motion for summary disposition.

Affirmed.

1. WRONGFUL IMPRISONMENT COMPENSATION ACT — RECOVERY UNDER ACT — ELEMENTS.

In order for a plaintiff to recover on a claim brought under the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*., the plaintiff must prove by clear and convincing evidence that (1) the plaintiff was convicted of one or more crimes under Michigan law, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence; (2) the plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty; and (3) new evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges of a finding of not guilty on all of the charges on retrial; that is, under MCL 691.1755(1)(c) a plaintiff demonstrate that (1) the proffered evidence meets the MCL 691.1752(b) definition of "new evidence," (2) the new evidence must demonstrate that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis for the conviction, (3) the new evidence must result in the reversal or vacation of the charges in the judgment of conviction, and (4) the new evidence must result in all the charges being dismissed or a finding of not guilty on all the charges on retrial; if a plaintiff cannot establish that the proffered evidence constitutes "new evidence," the plaintiff cannot recover under the WICA.

2. WRONGFUL IMPRISONMENT COMPENSATION ACT — WORDS AND PHRASES — "NEW EVIDENCE."

For purposes of the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*., the phrase "new evidence" is defined as any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction; in order for proposed evidence to be considered "new evidence" under MCL 691.1752(b), the evidence must not have been presented during the regular and orderly progression of the criminal case that brought about the conviction; the phrase "proceeding leading to plaintiff's conviction" is broad in that it is not limited to only those proceedings in which guilt is determined.

Bendure & Thomas, PLC (by *Mark R. Bendure*) and *We Fight The Law, PLLC* (by *Racine M. Miller*) for David A. Maples.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, for the state of Michigan.

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

CAMERON, J. Plaintiff, David A. Maples, filed this lawsuit for compensation under the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*., after his plea-based conviction of delivery of cocaine was reversed on appeal and the trial court dismissed the criminal charges. Maples now appeals the Court of Claims' order granting summary disposition[1] in favor of defendant, the state of Michigan, because Maples failed to show "new evidence" that satisfied the WICA recovery requirements under MCL 691.1755(1)(c). Finding no error in the Court of Claims' decision, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

In August 1993, Maples, Lawrence Roberts, and James Murphy were arrested and charged with delivery of cocaine and conspiracy to deliver cocaine. The charges arose from a drug transaction that occurred when Maples and Roberts met Murphy at a bar. While at the bar, apparently unbeknownst to Maples and Roberts, Murphy sold cocaine to an undercover police

[1] MCR 2.116(C)(10) (no genuine issue of material fact).

officer. When Maples and Roberts left the bar together, they were pulled over and arrested. The charges against Roberts were eventually dismissed.

Shortly after his arrest, Murphy wrote a letter to the trial court, explaining that Maples and Roberts had nothing to do with the cocaine sale. Murphy reiterated Maples's innocence during a February 1994 hearing on Murphy's entrapment motion; Maples joined the motion. During the hearing, Murphy testified that Maples was neither involved in nor aware of the cocaine sale.

Maples was not scheduled for trial until September 1995. After being unsuccessful in his attempt to have his case dismissed for entrapment and later to have the case dismissed for a speedy-trial violation, Maples expressed his intent to call Murphy as a defense witness in Maples's trial. However, on the eve of trial, Maples learned that Murphy had accepted a plea offer from the prosecution that awarded him a reduced sentence in exchange for agreeing not to testify on Maples's behalf. Further, Maples's only other witness, Roberts, could not be located for trial. Maples then pleaded guilty to delivery of cocaine because he did not have any exculpatory witnesses available and his attorney assured him that he could still appeal the speedy-trial issue. After Maples was sentenced to 10 to 20 years' imprisonment, Murphy executed affidavits in 1997 and 2007 in which he attested that Maples was never involved in the crimes alleged. Murphy's affidavits were consistent with his testimony from the February 1994 entrapment hearing.

Thereafter, Maples appealed the denial of his motion to dismiss for a speedy-trial violation. A panel of this Court concluded that Maples had waived review of that

claim and others when he pleaded guilty.[2] The Michigan Supreme Court denied leave to appeal. *People v Maples*, 459 Mich 867 (1998).

Maples then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, raising issues of ineffective assistance of counsel and the denial of his right to a speedy trial. The district court denied his petition,[3] but it did not explicitly rule on Maples's ineffective-assistance-of-counsel claim. *Maples v Stegall (Maples I)*, 340 F3d 433, 436 (CA 6, 2003) (discussing the federal district court's holding). On appeal, the United States Court of Appeals for the Sixth Circuit held that trial counsel's performance was constitutionally deficient because counsel's advice to Maples—that he could pursue a speedy-trial claim at the appellate level despite the unconditional guilty plea—was "patently erroneous." *Id*. at 439. However, the Sixth Circuit remanded the case back to the federal district court to analyze Maples's likelihood of success on his speedy-trial violation claim in order to determine if there was the requisite prejudice to substantiate an ineffective-assistance-of-counsel claim. *Id*. at 440-441.

On remand, the federal district court concluded that Maples's speedy-trial claim had no merit and, thus, that he could not succeed on his ineffective-assistance-of-counsel claim. See *Maples v Stegall (Maples II)*, 427 F3d 1020, 1023 (CA 6, 2005) (discussing the federal district court's holding). However, the Sixth Circuit concluded, *inter alia*, that although evidence that Roberts would have provided beneficial testimony was weak, evidence to the contrary was weaker, and that

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[2] *People v Maples*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 1997 (Docket No. 196975), p 1.

[3] *Maples v Stegall*, 175 F Supp 2d 918 (ED Mich, 2001).

had Roberts been available for trial, he would have testified on Maples's behalf. *Id*. at 1032-1033. Thus, because Roberts could no longer be located by the time of trial, Maples was prejudiced by the delay. *Id*. at 1033. The Sixth Circuit also determined that Murphy's unavailability to testify because of his plea agreement prejudiced Maples. *Id*. at 1034. The Sixth Circuit noted that Murphy had given testimony that favored Maples at the entrapment hearing in February 1994. *Id*. Because both Roberts and Murphy would have testified favorably for Maples, but both were unavailable by the time of trial, the *Maples II* court concluded that Maples had suffered actual prejudice from the delay. *Id*. Given that conclusion, the Sixth Circuit held that Maples's speedy-trial violation claim had merit, which meant that he had suffered a violation of his right to the effective assistance of counsel. *Id*. Accordingly, the *Maples II* court reversed the federal district court's decision and remanded the case with directions to issue a writ of habeas corpus. *Id*.

After the federal district court issued the writ of habeas corpus, the state criminal court dismissed Maples's criminal charges and vacated his conviction in 2006. Approximately 11 years later, Maples filed his WICA complaint in the Court of Claims.

Maples maintained that he met the WICA requirements for compensation. Specifically, he claimed that new evidence, in the form of Murphy's testimony, affidavits, and letter, as well as Roberts's proposed testimony, demonstrated Maples's innocence and had resulted in the reversal of his conviction and dismissal of the charges against him. The Court of Claims noted that the WICA defined "new evidence" to include evidence that was not presented at "the proceedings leading to plaintiff's conviction," MCL 691.1752(b),

that Maples had joined in Murphy's entrapment motion, and that Murphy had testified at the entrapment hearing that Maples had no knowledge of the cocaine sale and did not participate in it. Concluding that the entrapment hearing was a pretrial hearing that led to Maples's conviction and that Murphy's testimony at the entrapment hearing was the same evidence that Maples was now attempting to use to support his WICA claim, the Court of Claims determined that by definition, it was not "new evidence" under the WICA. Further, the court concluded that counsel's constitutionally deficient performance and Maples's speedy-trial claim resulted in his release, not the evidence of Maples's innocence. This appeal followed.

II. ANALYSIS

Maples argues that the Court of Claims erred by granting the state of Michigan's motion for summary disposition because he met the requirements for compensation under the WICA. We disagree.

"A trial court's decision regarding a motion for summary disposition is reviewed de novo." *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528; 660 NW2d 384 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim and is appropriate when there is no genuine issue concerning any material fact. *Universal Underwriter's Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), we must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

We also review de novo issues of statutory interpretation. *In re Mich Cable Telecom Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000). When interpreting a statute, our goal "is to ascertain and give effect to the intent of the Legislature." *Portelli v I R Constr Prod Co, Inc*, 218 Mich App 591, 606; 554 NW2d 591 (1996). Undefined terms in a statute "must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). This Court must avoid interpreting a statute in a way that would make any part of it meaningless or nugatory. *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003).

To prevail on a WICA claim, the plaintiff must prove by clear and convincing evidence all of the following:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) *New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial*. [MCL 691.1755(1) (emphasis added).]

The WICA defines "new evidence" as "any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction." MCL 691.1752(b).

In sum, there are four requirements under MCL 691.1755(1)(c) that Maples must satisfy before he is entitled to compensation under the WICA: (1) the proffered evidence must meet the definition of "new evidence" as defined under MCL 691.1752(b), (2) the new evidence must demonstrate that Maples did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis for the conviction, (3) the new evidence must result in the reversal or vacation of the charges in the judgment of conviction, and (4) the new evidence must result in dismissal of all the charges or a finding of not guilty on all the charges on retrial. Therefore, we must first determine whether the evidence presented is "new evidence" under MCL 691.1752(b). If Maples satisfies this definition, we must then determine whether he has met the remaining three elements of MCL 691.1755(1)(c).

Maples argues that he has proffered two major categories of exculpatory material that constitute "new evidence": (1) Murphy's testimony at the entrapment hearing, his two affidavits, and his letter to the trial court and (2) Robert's proposed exculpatory testimony. We conclude that this evidence does not meet the definition of "new evidence" under MCL 691.1752(b).

We turn first to Murphy's testimony at the entrapment hearing, his affidavits, and his letter to the trial court. The substance of this evidence was presented to

the trial court at a proceeding before Maples's guilty plea—the entrapment hearing. Under MCL 691.1752(b) "new evidence" cannot have been "presented in the proceedings leading to plaintiff's conviction." Accordingly, if an entrapment hearing is a "proceeding leading to plaintiff's conviction," Maples cannot use the material disclosed at that hearing as "new evidence" of his innocence. The WICA does not define "proceedings." The plain meaning of "proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." *Black's Law Dictionary* (10th ed). In particular, a "criminal proceeding" is further defined as "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial." *Id*. Additionally, "leading" is not defined by the WICA. *Merriam-Webster's Collegiate Dictionary* relevantly defines "leading" as "to bring to some conclusion . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 706 (defining the verb "lead"). Thus, in order for the proposed evidence to be considered "new evidence," it must not have been presented during the regular and orderly progression of the criminal case that brought about the conviction.

The exculpatory material made part of the entrapment hearing cannot now be considered "new evidence." Murphy and Maples were both present at the entrapment hearing, and Murphy testified that Maples was not involved in the drug deal. This is the same testimony that Maples now seeks to admit as "new evidence." There is no serious dispute that the entrapment hearing was a proceeding that occurred during the criminal case against Maples. The question, how-

ever, turns on whether the entrapment hearing was a proceeding that brought about the conviction. We conclude that it was. Maples asserted an entrapment defense that, if granted, would have resulted in the dismissal of all charges. The trial court denied the motion and allowed the case to proceed to trial. Thus, the trial court's denial of Maples's entrapment defense certainly was part of the criminal case that brought about his ultimate conviction, and therefore, the pretrial entrapment hearing was a "proceeding leading to plaintiff's conviction." MCL 691.1752(b). Because Maples seeks to admit the same testimony that was presented during a proceeding leading to his conviction, we hold that Murphy's testimony, including the affidavits and the letter reiterating the substance of the testimony at the entrapment hearing, is not "new evidence" under the WICA.

Maples, however, urges this Court to adopt a much narrower reading of the phrase "proceedings leading to plaintiff's conviction." MCL 691.1752(b). According to Maples, the phrase should be "best understood as looking at whether the evidence was presented in that part of the case in which guilt was determined . . . ." Ultimately, Maples's reading of the statute would constrain "new evidence" to that which was presented at trial or, as in this case, a plea hearing where guilt was determined. We decline to adopt such a narrow interpretation because if the Legislature wanted to narrow the definition of "new evidence" to that which was not presented at a trial or plea hearing, it could have simply used such language. Instead, the Legislature opted for a much broader phrasing—"the proceedings leading to plaintiff's conviction." Therefore, Maples's argument is without merit.

Next, we turn to Roberts's purported exculpatory testimony. Maples has neither provided the substance

of that testimony nor indicated whether Roberts could even be located to provide any testimony. Maples has not submitted a letter or affidavit from Roberts like he did with Murphy. Maples argues that he did in fact supply evidence of Roberts's testimony in the form of the Sixth Circuit's opinion in *Maples II*. But even considering that opinion, the Sixth Circuit similarly did not give any indication of the actual substance of Roberts's testimony. The Sixth Circuit explained that Maples represented that Roberts told him that he would testify on Maples's behalf. *Maples II*, 427 F3d at 1032. It also referred to the letter that Murphy wrote in which Murphy indicated that Roberts was at the scene and had nothing to do with the cocaine sale. *Id*. Roberts himself has provided no documentation expressing what his testimony would entail. The only "evidence" that Maples provided was the Sixth Circuit's conclusion that Roberts *could* have provided beneficial testimony. We conclude that Roberts's supposed testimony was not "new evidence." Because Maples has not met the "new evidence" requirement under MCL 691.1752(b), we need not address the remaining elements. Accordingly, we hold that the Court of Claims did not err by granting the state of Michigan's motion for summary disposition.

Affirmed.

SWARTZLE, P.J., and CAVANAGH, J. concurred with CAMERON, J.

JOHNSON v USA UNDERWRITERS

Docket No. 340323. Submitted October 9, 2018, at Lansing. Decided May 14, 2019, at 9:25 a.m.

Plaintiff, Niles Johnson, filed a complaint in the Washtenaw Circuit Court against several defendants for injuries he sustained in September 2015 when he was struck by an automobile while riding his bicycle. Defendant Courtney Eisemann was driving the vehicle that struck Johnson, and defendant Steven Vandeinse owned the vehicle. Vandeinse had purchased the automobile in June 2015 and had been required to obtain insurance before the dealer would finalize the purchase. Vandeinse bought insurance from L.A. Insurance, an agency that sold insurance issued by defendant/cross-defendant USA Underwriters (USAU). The insurance Vandeinse purchased was not the no-fault insurance mandated by Michigan's no-fault act, MCL 500.3101 *et seq*. Instead, the insurance policy Vandeinse purchased was for comprehensive and collision coverages, two types of optional insurance coverages that could be added to a driver's no-fault policy, but did not alone satisfy the no-fault requirements. Johnson's complaint also named as a defendant the Michigan Automobile Insurance Placement Facility (MAIPF). Johnson filed a claim with the MAIPF, and it ultimately assigned Johnson's claim to Citizens Insurance Company of America. The parties stipulated to the addition of USAU to Johnson's first amended complaint, the substitution of defendant/cross-plaintiff Citizens for the MAIPF, and the dismissal of the MAIPF from the lawsuit. Citizens moved for summary disposition under MCR 2.116(C)(10) on the ground that Vandeinse had a no-fault policy through USAU and that Johnson was therefore ineligible for any benefits from Citizens. USAU moved for summary disposition under MCR 2.116(C)(8) on the ground that the insurance policy it issued to Vandeinse did not include no-fault coverage. Citizens filed a cross-claim against USAU seeking reformation of Vandeinse's insurance contract with USAU to include mandatory no-fault coverages as a matter of law and of public policy. USAU answered, and Johnson filed a second amended complaint seeking the reformation introduced by Citizens. The court held that USAU's practice of selling automobile insurance without manda-

tory no-fault coverages, but with the issuance of certificates of insurance closely resembling the certificates used to register vehicles at the Secretary of State's office, amounted to an intent to defraud. USAU argued that reformation was not an acceptable remedy because there had been no mistake or fraud by either party. Additionally, USAU contended that the no-fault act did not prevent insurers from providing insurance policies containing only collision and comprehensive coverages. The court, Carol A. Kuhnke, J., denied USAU's motion for summary disposition and granted Citizens' motion for summary disposition on its cross-claim against USAU, concluding that USAU's insurance policy was issued with an intent to deceive the consumer and the Secretary of State and that the insurance policy violated the no-fault act. The court also granted Citizens' motions for entry of judgment and for attorney fees. USAU appealed.

The Court of Appeals *held*:

1. Reformation of an insurance contract may be appropriate when a plaintiff proves by clear and convincing evidence a mutual mistake of fact or mistake on one side and fraud on the other. Reformation is not warranted when there is only a mistake in law, that is, when one of the parties is mistaken as to the legal effect of an agreement. A contract may be reformed when one party to the contract makes a mistake and the other party knows about the mistake but remains silent about it. Citizens claimed that USAU's practices were fraudulent in that they were intended to deceive purchasers of USAU's insurance. USAU argued that its practices were not deceptive and that Vandeinse was not mistaken about the insurance coverages he purchased. Vandeinse asserted that he believed that the "full coverage" he requested included the no-fault insurance required under the Michigan no-fault act, even though evidence established that on multiple occasions—verbally and in writing—Vandeinse was alerted to the fact that the USAU insurance policy he purchased through L.A. Insurance did not satisfy Michigan's no-fault insurance requirements. But Vandeinse's purported misunderstanding was merely a mistake in law—a mistake about the legal effect of an agreement; therefore, he was not entitled to reformation of the insurance contract. Citizens also claimed that Vandeinse made a mistake of fact because he believed he had the coverage necessary to finance and register the car. Vandeinse, however, accomplished exactly what he intended to accomplish by purchasing the insurance policy—he financed his car and registered it with the Secretary of State; therefore, there was no mistake of fact at all. Because there was no mistake of fact sufficient to support the

reform of the contract, it was not necessary to determine whether USAU committed fraud. Therefore, the trial court erred when it granted summary disposition to Citizens and reformed the USAU policy to include personal protection insurance (PIP), property protection insurance (PPI), and residual-liability insurance coverages.

2. Reformation may be the appropriate remedy when an insurance contract violates the no-fault law or public policy, or when it contravenes the legislative intent of the no-fault act. A contract is against public policy when its purpose is to create a situation that tends to operate to the detriment of the public interest, without regard to whether the purpose of the agreement is effectuated. MCL 500.3101(1) requires the owner of a motor vehicle to register the vehicle in the state and maintain security for payment of benefits under PIP, PPI, and residual-liability insurance during the period that the motor vehicle is driven or moved on a highway. The insurer of a vehicle not driven or moved on a highway may allow the insured owner or registrant of the vehicle to delete a portion of the coverages on his or her insurance policy and maintain comprehensive coverage without no-fault coverage. Vandeinse's policy from USAU did not provide the mandatory no-fault coverages. In fact, USAU did not offer to customers any insurance policies with the mandatory no-fault coverages. USAU offered only collision and comprehensive insurance policies. However, the no-fault act does not prohibit the practice of selling only optional insurance coverages without the mandatory no-fault coverages. Nowhere does the no-fault act address that circumstance. The no-fault act recognizes that automobile insurance sold in Michigan can provide *any* of the coverages listed in MCL 500.2101(2)(a) through (d), the statute defining automobile insurance for purposes of the no-fault act. The no-fault act does not state that every insurer must provide mandatory no-fault coverages. Instead, MCL 500.3101(1) requires that any insured who intends to drive on a highway must have the mandatory no-fault coverages. Therefore, the trial court erred when it concluded that USAU's insurance policy should have included mandatory no-fault coverages and that the policy was issued with an intent to deceive Vandeinse. Reformation of the contract to include the no-fault coverages mandated by law was not appropriate.

3. An insurer does not violate the no-fault act or public policy when it sells optional coverages without the mandatory no-fault coverages—PIP, PPI, and residual-liability insurance. The financial responsibility act, MCL 257.501 *et seq*., like the no-fault act,

does not specifically address whether an insurer may offer optional coverages only, but the financial responsibility act does expressly provide in MCL 257.520(j) that the requirements of liability-insurance coverage may be fulfilled by the policies of one or more insurance carriers, those policies together meeting the requirements of the no-fault act. The financial responsibility act cannot justify an insurance policy that is repugnant to the clear directive of the no-fault act, but in this case, the financial responsibility act simply addresses a gap that the no-fault act left open—the question whether insurers can sell policies that include only optional coverages, and it answers the question in the affirmative. MCL 257.520(j) allows insureds to meet the requirements for motor vehicle liability coverage through more than one insurance carrier. Bobtail policies, which insure tractors being operated without trailers, are an example of policies that do not provide full coverage and may be sold separately from policies having all the mandatory no-fault coverages. USAU was not precluded from selling optional coverages in order to satisfy customers who chose to purchase insurance policies from multiple carriers as allowed under MCL 257.520(j). Therefore, the trial court erred by ruling that USAU's practice of selling optional insurance coverages violated Michigan's no-fault law.

4. An insurance contract violates public policy if its purpose is to create a situation that tends to operate to the detriment of the public interest. Citizens argued that if USAU was permitted to continue providing optional coverages as standalone policies, more cases would arise in which the MAIPF and the assigned insurers would become financially liable for costs related to insureds who, like Vandeinse, did not have mandatory no-fault coverages on their vehicles. But the Legislature has not expressly barred insurance companies from offering optional coverages as standalone policies. The insured, not the insurer, is obligated to obtain the coverages necessary to meet the requirements of the no-fault act. The insurance contract documents in this case explicitly stated in multiple places that the policy covered physical damage only and did not meet the requirements of the no-fault act. Vandeinse initialed contract provisions indicating that he understood the scope of the coverage he was purchasing. The insurance agent testified that she explained to Vandeinse what each type of coverage entailed. There was no misrepresentation. Therefore, the trial court erred when it concluded that the optional coverages USAU sold Vandeinse violated public policy and subsequently reformed USAU's insurance policy to include mandatory no-fault coverages.

5. The American rule governs the award of attorney fees in Michigan. It states that attorney fees are generally not allowed, as either costs or damages, unless recovery of attorney fees is expressly authorized by statute, court rule, or a recognized exception to the general rule. One of the exceptions permits a plaintiff to recover as damages from a third party the attorney fees the plaintiff expended in a prior lawsuit the plaintiff was forced to defend or prosecute because of the wrongful acts of the third party. Because USAU did not engage in any wrongdoing, attorney fees were not permissible. Moreover, it is a fundamental principle that attorney fees and costs are only awarded to the prevailing party, and after reversal of the trial court's rulings, Citizens was no longer a prevailing party.

Reversed and remanded.

BECKERING, P.J., dissenting, would have affirmed the ruling of the trial court because the policies of USAU did not comply with the no-fault act. The no-fault act does not allow an insurance company providing automobile insurance in Michigan to circumvent the no-fault act by selling nonmandatory insurance but not providing any of the coverages that are mandatory under the no-fault law. The no-fault law permits an insured or an insurer to forgo mandatory no-fault coverage on an automobile on one condition; that is, only when an automobile is not going to be driven or moved on a highway may an insurance company issue an insurance policy that has deleted the mandatory minimum coverages under the no-fault law. To delete a mandatory coverage from an insurance policy, the mandatory coverage must initially have been included in the policy. Thus, the starting point in Michigan is an automobile insurance policy that contains the statutorily required minimum coverages unless the vehicle will not be driven or moved on a highway. MCL 500.3101 and MCL 500.3009(3) implicitly require every automobile insurance policy in Michigan to contain the requisite minimum no-fault coverage at the outset, after which optional coverage may be added. Because USAU sold an insurance policy to Vandeinse in violation of Michigan's no-fault law and its clearly stated public policy, the trial court did not err by reforming the contract between USAU and Vandeinse to include the required minimum coverages—PPI, PIP, and residual liability. To the extent that the majority cites the financial responsibility act, MCL 257.501 *et seq*., in support of its contention that insurance companies may limit themselves to selling optional coverages only, the financial responsibility act should not be construed to contradict the no-fault act. The no-fault act is the most recent expression of Michigan's public

policy concerning motor vehicle liability insurance. That an insured may satisfy the insurance obligations created by the no-fault act by obtaining various policies from more than one insurance company, MCL 257.520(i) and (j), is not the equivalent of authorizing insurance companies in Michigan to sell automobile insurance policies that do not include the mandatory minimum liability-insurance coverages outlined in the no-fault act.

1. INSURANCE — NO-FAULT — CONTRACTS — REFORMATION — MISTAKES OF LAW — REFORMATION NOT PERMISSIBLE.

Reformation of a contract is permissible on evidence of a mistake of fact, but not on evidence of a mistake of law; a mistake of law occurs when a party is mistaken regarding the legal effect of an agreement; a party's mistaken belief that the "full coverage" insurance policy on his or her new automobile included the mandatory no-fault insurance coverages is a mistake of law, not a mistake of fact; a party in this situation is not entitled to reformation of the insurance contract.

2. MOTOR VEHICLES — NO-FAULT INSURANCE — MANDATORY AND OPTIONAL INSURANCE COVERAGES — COMPANY MAY OFFER OPTIONAL COVERAGES WITHOUT OFFERING MANDATORY NO-FAULT COVERAGES.

In Michigan, the owner or registrant of a motor vehicle driven or moved on a highway must maintain personal protection injury insurance, property protection insurance, and residual-liability insurance; an insurer is permitted to sell motor vehicle insurance policies that do not include the no-fault coverages required by Michigan no-fault law, because nothing in the no-fault law requires an insurer that offers optional insurance coverage—comprehensive and collision insurance coverage, for example—to also offer the no-fault insurance coverages mandated by the no-fault law (MCL 500.3101).

3. MOTOR VEHICLES — FINANCIAL RESPONSIBILITY ACT — REQUIREMENTS OF NO-FAULT COVERAGES MAY BE SATISFIED BY POLICIES FROM MULTIPLE INSURERS.

An owner or registrant of a motor vehicle driven or moved on a highway may satisfy the statutory requirements of the minimum no-fault insurance coverages with policies from one or more insurance carriers if the combined policies provide the required no-fault insurance coverage (MCL 257.520(j)).

Varnum LLP (by *Bradley S. Defoe*) for USA Underwriters.

Conlin, McKenney & Philbrick, PC (by *Erik Duenas* and *Joy M. Glovick*) for Citizens Insurance Company of America.

Before: BECKERING, P.J., and RIORDAN and CAMERON, JJ.

CAMERON, J. Defendant/cross-defendant, USA Underwriters, appeals the trial court's orders (1) denying USA's motion for summary disposition, (2) granting the motion for summary disposition filed by defendant/cross-plaintiff, Citizens Insurance Company of America, on its cross-claim against USA, (3) granting Citizens' motion for entry of judgment, and (4) granting Citizens' motion for attorney fees. We reverse the trial court's orders and remand this case for proceedings consistent with this opinion.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2015, defendant Steven Vandeinse purchased a 2011 Chevy Impala from a used-car dealership in Ypsilanti. Before the dealership would finalize the sale, Vandeinse was required to obtain automobile insurance. Vandeinse went to a nearby L.A. Insurance agency and asked the insurance agent, Jennifer Essak, for a policy to cover the Impala. According to Vandeinse, he asked her for a "full coverage policy." Vandeinse left the agency with a USA insurance policy that provided collision and comprehensive insurance coverages only. The insurance agent, however, stated in an affidavit she provided during dis-

[1] Some of the no-fault statutes have been amended since the events in this case took place. The versions of the statutes quoted or cited in this case are identified by their effective dates and the public act numbers when appropriate.

covery that she had "explained to [Vandeinse] the difference between no-fault coverage and collision and comprehensive coverage and offered to assist him with obtaining both." Sometimes, "it was less expensive for the customer to obtain no-fault coverage from one carrier and then collision and comprehensive coverage through [USA]." She further asserted that Vandeinse "declined my offer to assist him with obtaining no-fault coverage, and asked only for collision and comprehensive coverage through [USA]."

The application for automobile insurance that Vandeinse completed was entitled "Application for Physical Damage Insurance Economy Program" through USA. The declarations section of the application stated: "This application is for Auto Physical Damage Insurance only. It does not provide bodily injury, property damage or any other Michigan statutory No-Fault coverages." Additionally, Vandeinse initialed a provision in the application that stated: "**PHYSICAL DAMAGE ONLY.** This insurance is physical damage only coverage and does not meet the requirements of the Michigan No-fault Act, Chapter 31 of the Michigan Insurance Code." After obtaining the collision and comprehensive insurance policy, Vandeinse purchased the Impala from the dealership using a certificate of insurance that USA provided. Like the insurance application, the certificate of insurance[2] stated, "This insurance is physical damage only, coverage does not meet the requirements of the Michigan No-fault Act, Chapter 31 of the Michigan

[2] "Certificate of insurance" is defined as "a document, regardless of how [it is] titled or described, that is prepared by an insurer or insurance producer that is a statement or summary of an insured's property or casualty insurance coverage. Certificate of insurance does not include a policy of insurance, insurance binder, or policy endorsement." MCL 500.2270(a).

Insurance Code." At the hearing on Citizens' motion for summary disposition, an attorney for plaintiff Niles Johnson asserted that the certificate "looks like a regular no-fault certificate . . . that you would take to the Secretary of State to get your tabs renewed." The Michigan Secretary of State apparently accepted this certificate and registered the Impala with the state of Michigan.

On September 8, 2015, defendant Courtney Eisemann drove the Impala. As Eisemann exited a parking lot, she struck Johnson, who was riding his bicycle on the sidewalk. Johnson sustained injuries and was transported to the hospital. On February 29, 2016, Johnson filed a complaint against Eisemann, Vandeinse, and the Michigan Automobile Insurance Placement Facility (the Facility). The parties eventually stipulated to adding USA as a defendant to the first amended complaint, to substitute Citizens for the Facility as a defendant, and to dismiss the Facility. Citizens moved for summary disposition under MCR 2.116(C)(10), seeking dismissal from the lawsuit because Vandeinse had a no-fault policy through USA, and therefore, Johnson was ineligible for any benefits through the Facility. USA moved for summary disposition under MCR 2.116(C)(8), claiming that USA's insurance policy did not include mandatory no-fault coverage. The trial court ultimately held that USA's practice of selling automobile insurance with certificates of insurance but without mandatory no-fault coverages amounted to "an intent to defraud," and it denied USA's motion for summary disposition. The trial court signaled to the parties that it would wait to rule on any claims to reform the policy until the issue "ripen[ed]."

Citizens filed a cross-claim against USA seeking reformation of Vandeinse's insurance contract with USA to include mandatory no-fault coverages as a matter of law and public policy. USA answered. Citizens then moved for summary disposition against USA under MCR 2.116(C)(10). According to Citizens, issuing an insurance policy with only optional coverages was a violation of MCL 500.3101(1) and against the public policy of the state to ensure that all drivers have mandatory no-fault coverage. Moreover, Citizens argued that USA and the insurance agent misrepresented the type of insurance Vandeinse obtained, therefore, necessitating reformation. In response, USA argued that Citizens had not shown that reformation was an acceptable remedy because there was no mistake or fraud by either party to the insurance contract, especially in light of the insurance agent's affidavit. Additionally, USA argued that the no-fault act did not prevent insurers from providing insurance policies containing only collision and comprehensive coverages. The trial court granted Citizens' motion for summary disposition, concluding that USA's policy was issued "with an intent to deceive the consumer and the Secretary of State, [and] that the policy violates the Michigan No-Fault Act." Therefore, the trial court reformed USA's insurance policy "to include no fault/PIP coverage, liability coverage, and property damage."

On appeal, USA argues that the trial court erred when it reformed the insurance policy to include mandatory no-fault coverages because (1) there was no mistake or fraud by either party, (2) issuing insurance policies limited to collision and comprehensive coverages did not contravene the no-fault act, and (3) public policy did not allow for reformation under these circumstances. We agree.

II. REFORMATION OF USA'S POLICY

A. STANDARD OF REVIEW

This Court reviews de novo motions for summary disposition under MCR 2.116(C)(10). *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). MCR 2.116(C)(10) provides that a trial court may grant judgment on all or part of a claim where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The moving party must support its motion with affidavits, depositions, admissions, or other documentary evidence. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012). If the moving party properly supports its motion, the opposing party then has the burden of demonstrating with "evidentiary materials that a genuine issue of disputed material fact exists." *Id*. at 440-441. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court, reviewing the record in the same manner as the trial court, "must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Insofar as the motion for summary disposition involves questions regarding the proper interpretation of a contract, this Court's review is de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Additionally, "[t]his Court reviews de novo the

trial court's decision to grant or deny equitable relief." *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). When considering whether a trial court properly ordered reformation, this Court must be "mindful that courts are required to proceed with the utmost caution in exercising jurisdiction to reform written instruments." *Id*. To reform a contract, "the facts necessary for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance." *Woolner v Layne*, 384 Mich 316, 319; 181 NW2d 907 (1970) (quotation marks and citation omitted). "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 . . . ." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted; alteration in original).

B. REFORMATION BASED ON MISTAKE AND FRAUD

USA first argues that there was insufficient evidence to support reformation of USA's insurance policy on the basis of fraud. Therefore, USA asserts that the trial court erred when it granted summary disposition in favor of Citizens and reformed the policy to include no-fault, liability, and property-damage coverages on the basis of USA's fraudulent conduct. We agree.

Courts of equity have the power to reform an insurance contract so that it conforms to the agreement actually made. See *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). Reformation may be appropriate when a plaintiff proves "a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence." *Id*. Importantly, reformation is not warranted when there is only a mistake in law, i.e., a mistake by one of the parties

about the legal effect of an agreement. *Id.*; see also *Olsen*, 213 Mich App at 29 ("[R]eformation will generally not be granted for a mistake of law.").

There are two types of fraud: actionable fraud and silent fraud. Actionable fraud has the following requirements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (quotation marks and citation omitted).]

On the other hand, "[s]ilent fraud, also known as fraudulent concealment, acknowledges that 'suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud.' " *Maurer v Fremont Ins Co*, 325 Mich App 685, 695; 926 NW2d 848 (2018), quoting *M&D, Inc*, 231 Mich App at 28-29 (quotation marks and citation omitted). Furthermore, "the party having a legal or equitable duty to disclose must have concealed the material fact with an intent to defraud." *Maurer*, 325 Mich App at 695.

"However, fraud is not a necessary element of every action to reform an agreement on the basis of a unilateral mistake." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 380; 761 NW2d 353 (2008). Our Supreme Court has also held:

> [I]f one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to

> the terms to be embodied therein, but knows what that intention is, the latter can have the writing reformed so that it will express that intention. [*Woolner*, 384 Mich at 318-319 (quotation marks and citation omitted).]

Stated differently, a contract may be reformed when one party to a contract made a mistake and the other party knows about the mistake but remains silent about it, i.e., there was inequitable conduct. *Johnson Family*, 281 Mich App at 380-381.

Citizens has never claimed mutual mistake. Instead, Citizens claims that USA's practices were intended to deceive purchasers of its insurance, which constituted fraud. The trial court accepted this argument, concluding that USA's practice reflected an "intent to defraud." Conversely, USA argues on appeal that its policy and practices were not deceptive and that Vandeinse was not mistaken about what coverages he was purchasing. Moreover, even if he was mistaken about the insurance coverages he purchased, a mistake of law is not a basis to reform a contract. Under these circumstances, we agree that the trial court erred when it reformed the insurance policy on grounds of fraud.

As a preliminary matter, we first differentiate between a mistake of fact and a mistake of law. Reformation is permissible on evidence of a mistake of fact, not a mistake of law. A mistake of law is "a mistake by one side or the other regarding the legal effect of an agreement . . . ." *Casey*, 273 Mich App at 398. In this case, USA correctly asserts that the only mistake alleged by Vandeinse was his belief concerning his insurance coverage. Vandeinse stated after the accident that he believed he had "full coverage," because that is what he requested from his insurance agent. However, Vandeinse's mistaken belief that he had "full coverage" was simply a mistake about the legal effect

of his insurance policy, which is a mistake of law—not fact. Therefore, Vandeinse is not entitled to reformation of the insurance policy.

Additionally, Citizens claims that Vandeinse made a mistake of fact because he mistakenly believed that his policy provided full coverage that could then be used to finance his car and register it with the Michigan Secretary of State. Even if, as Citizens argues, Vandeinse should not have been able to legally finance and register his car using the USA insurance policy, the fact remains that he did indeed finance his new car and register it with the Secretary of State. Vandeinse accomplished exactly what he intended to do when he purchased his insurance policy; thus, there was no mistake of fact at all. Because there was no mistake of fact sufficient to support the reform of the contract, this Court need not determine whether USA committed fraud. Therefore, reformation on this basis was error.

Even if fraud was attributable to Vandeinse's insurance agent, there was insufficient evidence to find USA liable for purposes of reformation. "An insurance policy constitutes a contractual agreement between the insurer and the insured," and "[w]hen such an agreement is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). "[A]n agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered." *Harts v Farmers Ins Exch*, 461 Mich 1, 8; 597 NW2d 47 (1999). In this case, the insurance agent's actions are not attributable to USA because she was

independent and considered an agent of Vandeinse. She did not represent USA; rather, she presented USA's product to Vandeinse, who then purchased it knowing that it did not meet the requirements of the no-fault act. Therefore, reformation is not a cognizable remedy.

C. REFORMATION FOR A VIOLATION OF LAW AND PUBLIC POLICY

USA also argues that the trial court erred when it reformed the insurance contract on the basis of a violation of the no-fault act and public policy. We agree.

"It is a 'bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent . . . a contract in violation of law or public policy.' " *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 256; 819 NW2d 68 (2012) (citation omitted). "[W]hen reasonably possible, this Court is obligated to construe insurance contracts that conflict with the no-fault act and, thus, violate public policy, in a manner that renders them 'compatible with the existing public policy as reflected in the no-fault act.' " *Id*. at 257 (citation omitted). Therefore, reformation is the appropriate remedy when such a contract violates law or public policy. *Id*. Whether a contract is against public policy

> depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present. [*Mahoney v*

> *Lincoln Brick Co*, 304 Mich 694, 705; 8 NW2d 883 (1943) (quotation marks and citation omitted).]

The question here is whether an insurer violates the Michigan no-fault act or public policy when it sells optional coverages without mandatory no-fault coverages, such as personal protection insurance, property protection insurance, and residual-liability insurance. We conclude that it does not.

1. MICHIGAN NO-FAULT LAW

MCL 500.3101(1) provides:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved on a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.[3]

"A policy of insurance represented or sold as providing security is considered to provide insurance for the payment of the benefits." MCL 500.3101(3).

The no-fault act is clear that an owner must register his or her vehicle in the state and "maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance" "during the period the motor vehicle is driven or moved on a highway." MCL 500.3101(1). With

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[3] As amended by 2014 PA 492, effective January 13, 2015.

this in mind, "an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved on a highway *may* allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy . . . ." *Id*. (emphasis added).

Section 3101(1) is clear that an insurer providing mandatory no-fault coverages has the discretion to "allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion" so long as the "motor vehicle . . . is not driven or moved on a highway . . . ." MCL 500.3101(1). The no-fault act, however, does not address, let alone bar, an insurer's ability to sell optional insurance coverages only. In this case, the USA policy did not provide the mandatory no-fault coverages to Vandeinse. Indeed, USA does not offer mandatory coverages to any customers; it only sells collision and comprehensive policies, which, according to Vandeinse's insurance agent, are sometimes bundled with other insurance policies for a reduced cost. Because the no-fault act does not bar this practice, it does not violate Michigan law, and we cannot read into the statute something that is not there.

The no-fault act's definition of "automobile insurance policy" supports our conclusion that insurers may sell insurance policies that do not include mandatory no-fault coverages. The Legislature broadly defines automobile insurance:

> "Automobile insurance" means insurance for private passenger nonfleet automobiles which provides *any* of the following:
>
> (a) Security required pursuant to section 3101.

(b) Personal protection, property protection, and residual liability insurance for amounts in excess of the amounts required under chapter 31.

(c) Insurance coverages customarily known as comprehensive and collision.

(d) Other insurance coverages for a private passenger nonfleet automobile as prescribed by rule promulgated by the commissioner pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws. A rule proposed for promulgation by the commissioner pursuant to this section shall be transmitted in advance to each member of the standing committee in the house and in the senate which has jurisdiction over insurance. [MCL 500.2102(2) (emphasis added)].

The no-fault act does not limit the definition of automobile insurance to only those policies that include the mandatory coverages. Instead, the no-fault act recognizes that automobile insurance sold in the state of Michigan can provide "any" of the listed coverages, including "[i]nsurance coverages customarily known as comprehensive and collision." MCL 500.2102(2)(c). This is precisely the policy USA sold to Vandeinse in this case. Without any provision under the no-fault act preventing insurers from issuing collision and comprehensive policies separately, we cannot conclude that USA's practice is against Michigan law.[4]

The dissent concludes that the no-fault act "implicitly" requires that every insurer provide policies that include the mandatory coverages, and then—and only then—can an insurer "delete" coverages after verifica-

[4] In the same vein, Citizens has not shown that USA "represented or sold" its policy as mandatory no-fault coverage. See MCL 500.3101(3), as amended by 2014 PA 492, effective January 13, 2015. Instead, USA notified Vandeinse in each of its insurance documents that the policy did not include mandatory no-fault coverages.

tion that the insured will not operate the vehicle on a roadway. However, the no-fault act does not state that every insurer must provide mandatory coverages. Instead, MCL 500.3101(1) requires that any insured who intends to drive on a highway must have the mandatory coverages. The no-fault act also allows insurers to delete coverages from policies that have already been issued. The dissent has not identified any statutory provision that requires insurers to provide mandatory coverages when issuing policies to insureds. If that was the Legislature's intent, it would have included such a provision in the no-fault act.

2. FINANCIAL RESPONSIBILITY ACT

The financial responsibility act, MCL 257.501 *et seq*., lends further support to our analysis. The financial responsibility act determines the "scope of coverage regarding an automobile accident" and addresses optional insurance coverage. *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325, 330; 520 NW2d 656 (1994). Under the financial responsibility act, "[a]ny policy which grants the coverage required for a motor vehicle liability policy may also grant [optional coverage]." MCL 257.520(g). " 'Optional' coverage, for purposes of the financial responsibility act, . . . consists of 'any lawful coverage in excess of or in addition to the [mandatory minimum] coverage specified for a motor vehicle liability policy.' " *Lake States Ins Co v Wilson*, 231 Mich App 327, 332 n 2; 586 NW2d 113 (1998), quoting MCL 257.520(g) (alteration in original). The Legislature has made it clear that when an insurer provides mandatory no-fault coverages, it may also offer optional coverages. MCL 257.520(g). Like the no-fault act, the financial responsibility act does not address whether an insurer may

offer optional coverages only. With that said, MCL 257.520(j) states that "[t]he requirements for a motor vehicle liability policy may be fulfilled by the policies of 1 or more insurance carriers which policies together meet such requirements." Thus, MCL 257.520(j) expressly permits insureds to fulfill their insurance needs by way of multiple policies through more than one carrier. In this case, USA was permitted to sell an insurance policy that included only collision and comprehensive coverages with the understanding that the insured had to procure the mandatory no-fault coverages elsewhere before the vehicle could be driven or moved on a highway.

The dissent is unpersuaded that the financial responsibility act provides any guidance to this issue. Instead, the dissent concludes that because USA's policy violates the no-fault act's "implicit" requirement that all insurers provide mandatory coverages, the no-fault act—not the financial responsibility act—controls. The dissent's argument, however, relies on the faulty premise that the no-fault act requires insurers to always provide mandatory coverages in their policies. This is simply not the case. The no-fault act is silent regarding the practice of selling policies that only provide optional coverages, and the financial responsibility act permits it. The dissent has construed a legislative requirement not supported by the text of the no-fault act.

Nevertheless, after finding an irreconcilable conflict between USA's coverages and the requirements of the no-fault act, the dissent relies on *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995), to underscore its point that the authorizing language found in the financial responsibility act cannot validate a policy that violates the

no-fault act. We agree with the dissent that an insurance policy contravening the no-fault act cannot be justified by the financial responsibility act. See *id*. at 232 ("An insurance policy that is repugnant to the clear directive of the no-fault act otherwise cannot be justified by the financial responsibility act."). However, in this case, the financial responsibility act simply addresses a gap that the no-fault act left open—whether insurers can sell policies that include only optional coverages. The financial responsibility act clearly allows insurers to combine multiple automobile policies in order to fulfill the requirements of the no-fault act. See MCL 257.520(j). Therefore, unlike in *Citizens*, in which a residual-liability policy clearly violated the express terms of the no-fault act,[5] there was no such violation here, and the financial responsibility act provided proper guidance for our analysis. See *Citizens*, 448 Mich at 232 (stating that "the financial responsibility act continues to present legitimate methods by which vehicle owners may satisfy the insurance obligations created by the no-fault act" and that MCL 257.520(j) provides "a method by which an owner may allocate insurance costs among various policies that he may have purchased for a particular vehicle").

A similar question related to bobtail insurance was previously addressed by this Court in *Integral*, 206 Mich

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[5] The *Citizens* Court made clear that when an owner or registrant obtains residual-liability insurance, the policy "must afford coverage for enumerated types of loss caused by or arising from the '*use* of a motor vehicle.' " *Citizens*, 448 Mich at 229, citing MCL 500.3131; MCL 500.3135. The Court concluded that the policy at issue in that case, which denied residual-liability coverage for all persons—except those who were uninsured or underinsured—was a clear violation of the residual-liability requirements under MCL 500.3009. *Id*. at 231. Therefore, the policy contravened the no-fault act, and no provision in the financial responsibility act could save the policy.

App at 331: Bobtail insurance policies, which do not provide "full coverage," may nonetheless be sold separately from mandatory no-fault policies. In *Integral*, this Court stated that "[a]dmittedly, the [bobtail] policy itself does not provide full coverage." *Id*. However, because MCL 257.520(j) allows insureds to meet the requirements for motor vehicle liability coverage through more than one insurance carrier, and because the truck driver was covered by both a bobtail policy and a policy providing no-fault benefits through another carrier, the practice of selling only bobtail insurance was not against the law. *Integral*, 206 Mich App at 331-332. We reach the same conclusion in this case.[6] While Vandeinse did not procure a no-fault policy with the mandatory coverages, USA was not precluded from selling optional insurance coverages in order to satisfy customers who chose to purchase insurance policies from multiple carriers as allowed under MCL 257.520(j). Thus, USA's practice of selling optional insurance coverages does not violate Michigan law.

3. PUBLIC POLICY

An insurance contract violates public policy when its purpose "is to create a situation which tends to operate to the detriment of the public interest." *Mahoney*, 304 Mich at 705 (quotation marks and citation omitted). Citizens argues that if USA is permitted to continue providing optional coverages only, more cases like this will arise—cases in which the Facility and the as-

[6] The dissent highlights the fact that in *Integral* the bobtail policy and the no-fault policy both provided mandatory coverages—applicable at different times depending on how the truck was being used. While this is certainly true, it nonetheless supports our conclusion that the financial responsibility act allows more than one insurance policy to fulfill the requirements of the no-fault act, when separately, the insurance policies would not meet the requirements of the no-fault act.

signed insurers are left footing the bill. Citizens claims that insureds will continue to mistakenly believe that they purchased full-coverage insurance and are lawfully driving on Michigan roads.

While we agree that Citizens raises real concerns, the fact remains that the Michigan Legislature has not expressly barred insurance companies from offering optional coverages as standalone policies. The parties readily acknowledge that there are circumstances when a person may want to purchase limited coverages that do not meet the requirements of the no-fault act. For instance, limited coverage is entirely appropriate when the vehicle will not be operated on public roads or if, as asserted by Vandeinse's insurance agent, the insured can obtain less expensive mandatory and optional coverages from multiple carriers. MCL 500.3101(1) puts the onus on the insured to obtain the coverages necessary to meet the requirements of the no-fault act. The Legislature has not imposed the same duty on insurers. To do so would require insurers to verify that every insured who has purchased policies from more than one carrier has procured all the insurance needed to satisfy the no-fault act. It is the role of the Legislature to balance these types of policy considerations, not the role of this Court. USA's policy is crystal clear that it included coverage for physical damage only and did not meet the requirements of the no-fault act. Vandeinse initialed these contract provisions, indicating that he understood the scope of the coverage he purchased. Vandeinse's insurance agent even testified that she explained to Vandeinse what each type of coverage entailed. There was no misrepresentation. While it is true Vandeinse was able to purchase and register his vehicle using USA's policy, this was not because USA failed to alert Vandeinse or anybody else that the policy did not conform to the

no-fault act. The insurance application, the insurance policy itself, and the certificate of insurance all provided notice that the USA policy did not satisfy the requirements of the no-fault act. The obligation is on the owner or registrant to procure the proper no-fault coverages. MCL 500.3101(1). Therefore, the trial court erred when it reformed USA's policy after concluding that it violated public policy.

III. ATTORNEY FEES

USA also appeals the trial court's award of attorney fees to Citizens. Because we conclude that the trial court erred when it reformed the insurance policy, Citizens is no longer a prevailing party, and attorney fees are not warranted.

"A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689; 828 NW2d 400 (2012). The trial court's findings of fact are reviewed for clear error, and questions of law are reviewed de novo. *Id*. at 690. With that said, we review a trial court's ultimate decision to award attorney fees for an abuse of discretion. *Id*. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

The trial court did not cite a statute or court rule that would permit the award of attorney fees, and no such authority is advanced on appeal. Instead, the trial court concluded that courts have long permitted the award of attorney fees when there is fraud or unlawful conduct. "In Michigan, it is well-settled that the recovery of attorney fees is governed by the 'American rule.' " *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 426; 528 NW2d 749 (1995). "Under the American rule, attor-

ney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Id*. at 426-427. "An exception to this rule permits a plaintiff to recover as damages from a third party the attorney fees the plaintiff expended in a prior lawsuit the plaintiff was forced to defend or prosecute because of the wrongful acts of the third party." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 468; 487 NW2d 807 (1992), citing *Warren v McLouth Steel Corp*, 111 Mich App 496, 508; 314 NW2d 666 (1981). However, "[w]here there is no evidence to support a claim that a third party's wrongdoing caused the prior litigation, recovery of attorney fees under this exception is improper." *Bonner*, 194 Mich App at 469. Because we have concluded that USA engaged in no wrongdoing, attorney fees are not permissible. Moreover, it is a fundamental principle that attorney fees and costs may only be awarded to the prevailing party. See, e.g., MCL 600.2591(1); MCR 2.625(A)(1). Therefore, the trial court erred when it awarded attorney fees and costs to Citizens. We reverse the trial court's orders granting Citizens' motion for summary disposition and its motion for attorney fees, and we remand the matter to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

RIORDAN, J., concurred with CAMERON, J.

BECKERING, P.J. (*dissenting*). When it comes to car insurance, Michigan is a no-fault state.[1] Every owner of a car required to be registered in Michigan must have

[1] Michigan's no-fault insurance act, MCL 500.3101 *et seq*., became law on October 1, 1973. While it has been a target of certain legislators for

certain basic coverages in order to drive that car on a highway. MCL 500.3101(1). Those coverages are personal protection insurance (PIP), property protection insurance (PPI), and residual-liability insurance. *Id*. Under Michigan law, only if a car is *not* going to be driven or moved on a highway may an insurance company issue an insurance policy that *deletes* the above-identified mandatory minimum coverages and maintains the nonmandatory comprehensive portion of the policy in effect. MCL 500.3101(2). Our Supreme Court has expressly stated, with clarity, this mandate on owners and insurers: "[U]nder the no-fault automobile insurance act, MCL 500.3101 *et seq*., insurance companies are *required* to provide first-party insurance benefits, referred to as personal protection insurance (PIP) benefits, for certain expenses and losses. MCL 500.3107; MCL 500.3108." *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012) (emphasis added); see also *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 230; 531 NW2d 138 (1995) ("[W]hile subject to certain exceptions not at issue here, the no-fault act *unambiguously requires* that a policy of automobile insurance, sold to a vehicle owner pursuant to the act, *must* provide coverage for residual liability arising from use of the vehicle so insured.") (emphasis added); and *Continental Cas Co v Mich Catastrophic Claims Ass'n*, 874 F Supp 2d 678, 680 (ED Mich, 2012) ("The Michigan No-Fault Insurance Act is unique among no-fault regimes; it provides for unlimited lifetime PIP benefits to accident victims. § 500.3101, *et seq*. The unlimited PIP coverage is mandatory for all registered owners of motor vehicles in the state. *Id*. Therefore, insurance companies writ-

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years and is currently the subject of much debate and legislative wrangling, our no-fault auto insurance system remains in place.

ing automobile insurance in Michigan *must* provide unlimited PIP coverage to policyholders.") (emphasis added).[2] At its core, this case is about whether an insurance company can sell the nonmandatory portions of a car insurance policy in Michigan and yet not provide any of the mandatory coverages required by Michigan's no-fault law.[3] Defendant USA Underwriters (USAU) claims that it can, and the majority agrees. I respectfully dissent.

I. BASIC FACTS AND PROCEDURAL HISTORY

According to his testimony and the documents produced at defendant Steven Vandeinse's deposition,[4] Vandeinse purchased a 2011 Chevrolet Impala from Ypsilanti Import Auto Sales for about $11,000 on June 19, 2015. Before he could take possession of the car, Vandeinse had to get insurance, so he went to L.A. Insurance. Vandeinse testified that he told the person working there he wanted "full coverage on the vehicle."[5] He was charged $445.03 up front and agreed to

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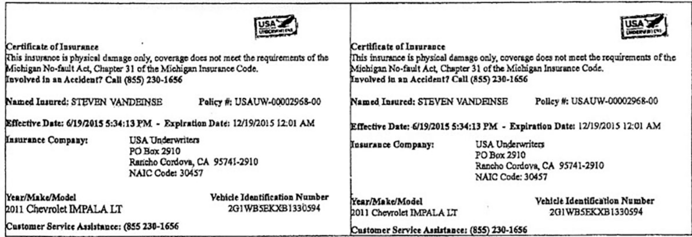
[2] Although the decisions of the lower federal courts are not binding, we may find their analyses and conclusions to be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[3] Defendant USA Underwriters admitted at oral argument that none of the car insurance policies it sells in Michigan provides any of the basic coverages required by Michigan law pursuant to MCL 500.3101(1). Consequently, if you buy car insurance from USA Underwriters alone, you still can't legally drive your car on Michigan roads.

[4] Although not yet a party at the time, USAU was notified of Vandeinse's deposition but did not attend.

[5] As noted by the majority, the person who worked with Vandeinse at L.A. Insurance wrote an affidavit for purposes of this litigation indicating that the insurance policy Vandeinse actually bought is exactly what he asked for and that he chose to forgo buying insurance compliant with the no-fault law. USAU also produced a typewritten application, purportedly initialed by Vandeinse, identifying what he was actually

ongoing monthly payments to USAU of approximately $145. Vandeinse was given a "Certificate of Insurance" issued by USAU, which looked like the verification document drivers are required to present to the Secretary of State's office in order to prove they have no-fault coverage so they can register their car:



Certificate of Insurance
This insurance is physical damage only, coverage does not meet the requirements of the Michigan No-fault Act, Chapter 31 of the Michigan Insurance Code.
Involved in an Accident? Call (855) 230-1656

Named Insured: STEVEN VANDEINSE **Policy #:** USAUW-00002968-00

Effective Date: 6/19/2015 5:34:13 PM - **Expiration Date:** 12/19/2015 12:01 AM

Insurance Company: USA Underwriters
PO Box 2910
Rancho Cordova, CA 95741-2910
NAIC Code: 30457

Year/Make/Model **Vehicle Identification Number**
2011 Chevrolet IMPALA LT 2G1WB5EKXB1330594

Customer Service Assistance: (855 230-1656

Certificate of Insurance
This insurance is physical damage only, coverage does not meet the requirements of the Michigan No-fault Act, Chapter 31 of the Michigan Insurance Code.
Involved in an Accident? Call (855) 230-1656

Named Insured: STEVEN VANDEINSE **Policy #:** USAUW-00002968-00

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NAIC Code: 30457

Year/Make/Model **Vehicle Identification Number**
2011 Chevrolet IMPALA LT 2G1WB5EKXB1330594

Customer Service Assistance: (855) 230-1656

While the certificate states in small print that the insurance "is physical damage only, coverage does not meet the requirements of the Michigan No-fault Act, Chapter 31 of the Michigan Insurance Code," it also immediately thereafter states in bold type: "**Involved in an Accident? Call (855) 230-1656**." Vandeinse was also handed a one-page document titled "Loss Payable Endorsement" issued by USAU. The document indicated that he was being charged for "Comprehensive" and "Collision" insurance; it does not mention that the coverage failed to meet the requirements of Michigan's no-fault law. Vandeinse's policy was effective for six months at a premium rate of $792; that equals $1,584

getting in terms of coverage. Whether Vandeinse or the agent is telling the truth about how the transaction was actually handled remains a matter of dispute. But it is not material to the legal issue of whether USAU can sell a car insurance policy for a car that is going to be driven or moved on a highway in Michigan that does not comply with MCL 500.3101(1), but instead provides only comprehensive and collision coverages. Importantly, USAU was made well aware of the fact that the car would be driven or moved on the highway because it sold Vandeinse collision insurance.

per year for only collision and comprehensive insurance on a 2011 Chevy Impala.

On the basis of other documents produced in this litigation, it appears that L.A. Insurance[6] sold Vandeinse a comprehensive-and-collision-only policy issued by USAU, as described above, and an Automobile Service Contract, issued by NSD (Nation Safe Drivers), covering roadside assistance for $300. In other words, Vandeinse walked away with just about everything but mandatory no-fault coverage. None of what he was sold allowed him to operate or move his car on a Michigan highway.

Vandeinse returned to Ypsilanti Import Auto Sales with his documents, where Vandeinse and a dealership representative completed, and Vandeinse signed, an "Application for Michigan Title & Registration, Statement of Vehicle Sale," which documented that Vandeinse had obtained insurance through USAU, Policy No. USAUW-00002968-00. Vandeinse received a temporary registration number.

On July 7, 2015, the state of Michigan issued a Certificate of Title recognizing Vandeinse as the lawfully registered owner of the Impala. Vandeinse testified that he dutifully paid USAU $145 per month for the insurance.

On September 8, 2015, Vandeinse's girlfriend, Courtney Eisemann, was driving the Impala with

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[6] According to testimony provided by Hani Kassab, Jr., president and part-owner of USAU and a franchisee of L.A. Insurance, Anthony Yousif owns and is the president and CEO of L.A. Insurance. According to documents submitted by USAU to the Department of Insurance and Financial Services, Yousif was also the primary shareholder in USAU. At the time of Kassab's 2017 deposition, USAU had been operating for approximately four years, having purchased Southern Michigan Insurance Company.

permission when she accidentally struck and injured a bicyclist, plaintiff Niles Johnson. After the accident, the responding police officer documented that the Impala was insured through USAU.

Johnson initially filed a claim with, and later a lawsuit against, the Michigan Automobile Insurance Placement Facility. Defendant/cross-plaintiff-appellee Citizens Insurance Company of America received the claim by assignment. But after the depositions of Vandeinse and Eisemann, Johnson added USAU to the instant lawsuit. Ultimately, the trial court concluded that USAU had issued a policy in violation of Michigan law because it failed to provide the requisite no-fault insurance coverage required by MCL 500.3101. And apparently on the basis of USAU's issuance of a "Certificate of Insurance," which looked just like that commonly used to register a vehicle with the Secretary of State's office (and which did, in fact, fool both the Secretary of State's office and a police officer), the court concluded that USAU acted with an intent to deceive the consumer and the Secretary of State. Therefore, the court ordered reformation of the contract to provide PIP, PPI, and residual-liability insurance, as required by the no-fault act. USAU appeals by right.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition, *MEEMIC Ins Co v Mich Millers Mut Ins*, 313 Mich App 94, 99; 880 NW2d 327 (2015), the proper interpretation of a statute, *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010), and a trial court's decision to grant equitable relief, *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 253; 819 NW2d 68 (2012).

III. MANDATORY MICHIGAN NO-FAULT INSURANCE

On appeal, USAU contends that the trial court erred by reforming Vandeinse's automobile insurance policy because the plain language of the insurance application and disclosures purportedly signed by Vandeinse indicated that the policy did not include no-fault coverage. I would hold that the trial court properly concluded that USAU issued an automobile insurance policy in violation of the mandatory coverage requirements of the no-fault act. An automobile insurance policy in Michigan must be interpreted to include the statutorily required minimum coverage in order to comply with Michigan law.

"An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 530; 740 NW2d 503 (2007), citing MCL 500.3105(1). "When construing the no-fault act, this Court must be careful to interpret the words used in the statute in light of their ordinary meaning and their context within the statute and must read the various provisions harmoniously to give effect to the statute as a whole." *MEEMIC Ins Co*, 313 Mich App at 102 (quotation marks and citation omitted). It has long been held that the no-fault insurance act is remedial in nature and must be liberally construed in favor of persons it is intended to benefit. *In re Geror*, 286 Mich App 132, 134-135; 779 NW2d 316 (2009) (quotation marks and citation omitted).

MCL 500.3101(1)[7] of the no-fault act addresses motor vehicle security agreements and provides:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for

[7] As amended by 2014 PA 492, effective January 13, 2015.

> payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway. Notwithstanding any other provision in this act, *an insurer* that has issued *an automobile insurance policy* on a motor vehicle *that is not driven or moved on a highway* may allow the insured owner or registrant of the motor vehicle to *delete a portion* of the coverages under the policy *and maintain the comprehensive coverage portion* of the policy in effect. [Emphasis added.]

MCL 500.3101(2)(a) defines "automobile insurance" as meaning "that term as defined in [MCL 500.]2102." MCL 500.2102 broadly defines "automobile insurance" to include "[i]nsurance coverages customarily known as comprehensive and collision." MCL 500.2102(2)(c). Thus, a comprehensive and collision insurance policy is an "automobile insurance policy" as described in MCL 500.3101(1).[8] Under the plain language in the third sentence of MCL 500.3101(1), an insurer may only allow an insured to *delete* the statutorily mandated coverage from an automobile insurance policy and *maintain* the comprehensive coverage *portion* under one condition. In other words, an automobile insurance policy *starts* with the mandatory coverages, because the word "delete" necessarily means initial inclusion. An insurer may allow the insured to *delete* those mandatory coverages *if* the motor vehicle is not driven or moved on a highway. I interpret MCL 500.3101(1) of the no-fault act to mean that an insurer may not sell an automobile insurance

[8] Similarly, MCL 500.3206, which pertains to cancellation of automobile liability policies, defines "policy of automobile insurance" as used in that chapter to mean "a policy insuring private passenger automobiles . . . or that portion of a combination policy which insures private passenger automobiles." Put simply, an "automobile liability policy" and a policy insuring private passenger automobiles are one and the same.

policy in Michigan—including the policy in question—without the statutorily required minimum coverages, absent circumstances not present here (i.e., for a car that is not going to be driven or moved on a highway).[9]

My interpretation of MCL 500.3101(1) is further bolstered by MCL 500.3009,[10] regarding casualty insurance contracts for automobiles:

> An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and subject to that limit for 1 person, to a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and to a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.
>
> * * *
>
> (3) If an insurer *deletes* coverages from an *automobile insurance policy* pursuant to [MCL 500.]3101, the insurer shall send documentary evidence of the deletion to the insured. [Emphasis added.]

MCL 500.3101(1) and MCL 500.3009(3)[11] both broadly address "automobile insurance policies" and under

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[9] As noted earlier, it cannot be disputed that USAU knew the Impala Vandeinse was seeking to insure would be operated on the highway because USAU sold him collision insurance.

[10] As amended by 1988 PA 43, effective March 30, 1989.

[11] MCL 500.3009(3) had since been renumbered as MCL 500.3009(4). See 2016 PA 346, effective March 21, 2017.

what circumstances an insurer may *delete* the requisite statutory minimum coverages from an automobile insurance policy. MCL 500.3101 and MCL 500.3009(3) implicitly require every automobile insurance policy in Michigan to contain the requisite minimum no-fault coverage at the outset, whereafter optional, or nonmandatory, coverage may be added to that policy, "the rights and limitations of [which] are purely contractual and are construed without reference to the no-fault act." *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005).[12] See also *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155 n 17; 802 NW2d 281 (2011) ("[A]ll owners or registrants of automobiles in Michigan are free to purchase insurance contracts that provide *greater* coverage than the *minimum* required under the no-fault act.") (emphasis added).

More explicitly, MCL 500.3131, pertaining to residual-liability insurance, provides that "[t]his section shall apply to *all* insurance contracts in force as of October 1, 1973, or entered into after that date." MCL 500.3131(2) (emphasis added). Thus, the no-fault laws make clear that automobile insurance policies in Michigan must include at least the minimum no-fault coverages identified in MCL 500.3101(1), with those coverages being deletable only if the "motor vehicle is not driven or moved on a highway," and that additional nonmandatory coverages can be added to the policy as agreed upon by the parties. Further exemplifying this

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[12] Optional coverages the parties may agree to add to the automobile insurance policy include collision insurance, comprehensive insurance, residual-liability coverage in excess of the statutory minimum, uninsured and underinsured coverage, and mini-tort coverage. However, the fundamental and unavoidable starting point for insurers offering automobile insurance policies to owners and registrants of automobiles in the Michigan marketplace is a policy that provides the statutorily required minimum coverages under our no-fault law.

statutory scheme, optional collision coverage is addressed in MCL 500.3037,[13] which provides, in pertinent part:

> (1) At the time a new applicant for the insurance required by [MCL 500.3101] for a private passenger nonfleet automobile makes an initial written application to the insurer, an insurer shall offer both of the following collision coverages to the applicant:
>
> (a) Limited collision coverage which shall pay for collision damage to the insured vehicle without a deductible amount when the operator of the vehicle is not substantially at fault in the accident from which the damage arose.
>
> (b) Broad form collision coverage which shall pay for collision damage to the insured vehicle regardless of fault, with deductibles in such amounts as may be approved by the commissioner, which deductibles shall be waived if the operator of the vehicle is not substantially at fault in the accident from which the damage arose.
>
> (2) In addition to the coverages offered pursuant to subsection (1), standard and limited collision coverage may be offered with deductibles as approved by the commissioner.
>
> * * *
>
> (6)[14] At least annually in conjunction with the renewal of a private passenger nonfleet *automobile insurance policy*, or at the time of an addition, deletion, or substitution of a vehicle under an existing policy, other than a group policy, an insurer shall inform the policyholder, on a form approved by the commissioner, of all of the following:
>
> (a) The current status of collision coverage, if any, for the vehicle or vehicles affected by the renewal or change

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[13] As amended by 1980 PA 461, effective January 15, 1981.

[14] MCL 500.3037(6) was renumbered as MCL 500.3037(7) by 2016 PA 346, effective March 21, 2017.

> and the rights of the insured in the event of damages to the insured vehicle under the current coverage.
>
> (b) The collision coverages available under the policy and the rights of the insured in the event of damage to the insured vehicle under each collision option.
>
> (c) Procedures for the policyholder to follow if he or she wishes to change the current collision coverage. [Emphasis added.]

As manifested by MCL 500.3037, the starting point in Michigan is an automobile insurance policy that includes the mandatory minimum insurance required by MCL 500.3101. The new applicant can then decide whether to *add* collision coverage to the policy at that time or a later time in the life of the policy. Nowhere in the no-fault act does it say that insurance companies can sell to Michigan automobile owners automobile insurance policies that do not provide the mandatory minimum no-fault coverage. To do so would be a violation of the clear purpose of the no-fault act and a consequent violation of public policy. USAU—which bills itself as carrying "Affordable Car Insurance" and offering "terrific rates on quality coverage from top-rated insurance carriers" to "drivers" allowing them "affordable ways to stay on the road and within the law," according to usaunderwriters.com[15]—sold an automobile policy to Vandeinse that would not even allow him to legally drive his car off the lot.

USAU has conceded that none of the automobile insurance policies it sells in Michigan provides the statutorily mandated minimum coverages for PIP, PPI, and residual liability. Therefore, instead of starting with an automobile policy that meets the requirements of Michigan's no-fault act and deleting or adding cov-

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[15] USA Underwriters, *Home Page* <http://www.usaunderwriters.com> (accessed March 13, 2019) [https://www.perma.cc/62XV-SF6D].

erages as permitted by law, USAU bypasses the no-fault act by underwriting optional insurance only. An insurer who sells automobile insurance in the Michigan marketplace must abide by the no-fault act. See *Citizens*, 448 Mich at 232. On the basis of the foregoing interpretation of the applicable statutes and caselaw, I would hold that USAU sold an automobile insurance policy to Vandeinse in violation of Michigan's no-fault law and its clearly stated public policy. Accordingly, the trial court did not err by reforming the contract to include the statutorily required minimum no-fault coverage required by MCL 500.3101. See *Citizens*, 448 Mich at 234.

My colleagues in the majority note that the financial responsibility act, MCL 257.501 *et seq.*, "permits insureds to fulfill their insurance needs by way of multiple policies through more than one carrier." However, as our Supreme Court indicated in *Citizens*, the financial responsibility act should not be construed to contradict the no-fault act. *Citizens*, 448 Mich at 232.

At issue in *Citizens* was "the validity of a vehicle owner's policy of liability insurance that denies coverage to any permissive user who is otherwise insured for an amount equal to that specified by the no-fault act." *Id.* at 227. In *Citizens*, Federated Insurance Company's policy provided the mandated residual-liability coverages to permissive drivers of the insured car only if the drivers were uninsured or underinsured, while denying such coverages under all other circumstances. *Id.* at 231. The Supreme Court held that an insurer may not lawfully deny residual-liability coverages for losses arising from use of a covered vehicle "because the no-fault act clearly directs that a policy sold pursuant to the act must provide residual liability coverage for *use* of the vehicle insured." *Id.* Of significance to the

case at bar, the Supreme Court addressed and dismissed an argument similar to that made in the instant case by USAU:

> Notwithstanding the no-fault act, Federated urges us to focus on the financial responsibility act and contends that the exclusion of coverage contained in its policy is "authorized and contemplated by the financial responsibility act." In particular, Federated relies on subsections (i) and (j) of the financial responsibility act, MCL 257.520, which provide:
>
> > (i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.
> >
> > (j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of 1 or more insurance carriers which policies together meet such requirements.
>
> According to Federated, because in each of these cases the driver's insurance policy, when taken together with Federated's insurance policy, will afford benefits of an amount specified by law, its insurance policy complies with public policy evidenced by the financial responsibility act. We question the premise of Federated's argument because it suggests that the financial responsibility act manifests the controlling public policy of this state concerning automobile insurance.
>
> *The no-fault act, as opposed to the financial responsibility act, is the most recent expression of this state's public policy concerning motor vehicle liability insurance*. Therefore, while Federated's insurance policy might well be reconciled with the financial responsibility act, *its failure to comply with the no-fault act nevertheless renders it violative of public policy*. *An insurance policy that is repugnant to the clear directive of the no-fault act otherwise cannot be justified by the financial responsibility act*. [*Id*. at 231-232 (emphasis added; citation omitted).]

The financial responsibility act, particularly MCL 257.520(i) and (j), does "provide a method by which an

owner may allocate insurance costs among various policies" or by which "vehicle owners may satisfy the insurance obligations created by the no-fault act." *Id*. at 232.

> *However, neither subsection (i) nor subsection (j) of the financial responsibility act permits an insurer . . . to circumscribe the coverage directed by the no-fault act*; to reach that conclusion would not accord proper deference to the policy judgment implicit in the Legislature's decision to require *owners* and registrants of motor vehicles to obtain insurance for the residual liability arising from the *use* of their vehicles. See MCL 500.3101[.] [*Id*. at 232-233 (emphasis added).]

Thus, while it is incumbent upon owners and registrants to obtain the statutorily mandated insurance, insurers cannot "circumscribe the coverage required by the no-fault act . . . ." *Id*. at 233. The Supreme Court held that the vehicle owner's policy was invalid because it denied coverage for liability arising from the use of an insured vehicle, in contravention of the no-fault act, and it deemed the policy to provide primary coverage in an amount equal to that required by the no-fault act. *Id*. at 227. *Citizens* stands for the proposition that the financial responsibility act neither articulates Michigan's public policy with regard to motor vehicle insurance nor absolves insurers of the mandate to conform to the requirements of the no-fault act.

As further support for their conclusion that selling automobile insurance policies in Michigan that do not provide the mandatory minimum coverages set forth in MCL 500.3101 does not violate the no-fault act, my colleagues in the majority rely on this Court's decision in *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325; 520 NW2d 656 (1994). *Integral*, however, does not support the majority's position.

Integral involved a priority dispute between insurers to determine which insurer was liable to pay PIP benefits for injuries suffered by Ralph Scott when the Michigan-registered tractor truck Scott was driving, and the semitrailer the tractor was pulling, overturned in Pennsylvania. Scott owned the tractor, but he had leased it to Maersk for 90 days. *Id*. at 328. Maersk had agreed to obtain and maintain liability insurance covering bodily injury and property damage for the tractor. And Scott, who drove the tractor for Maersk, had agreed to obtain "bobtail" insurance[16] and workers' compensation insurance. Accordingly, Maersk obtained from Insurance Company of North America (INA) a policy "covering personal injury protection for automobiles subject to no-fault" that also covered the tractor, and Scott obtained a bobtail policy from Integral Insurance Company. The bobtail policy "expressly excluded coverage (1) while the tractor was being used to carry property for business and (2) while the tractor was being used for the business of anyone who leased the tractor." *Id*. at 328.

Scott was hauling a trailer loaded with cargo for Maersk at the time of the accident. Consequently, one of the issues in the trial court was whether INA under the policy sold to Maersk or Integral under the bobtail policy sold to Scott was first in priority for payment of PIP benefits. Scott also filed a workers' compensation claim, and the hearing referee ruled that Scott was an employee of Maersk. *Id*. at 330. On the basis of this ruling, the trial court concluded that Maersk's insurer, INA, was first in priority for PIP benefits under MCL 500.3114(3) and entered a corresponding order. *Id*. Sub-

[16] "Generally, a 'bobtail' policy is a policy that insures the tractor and driver of a rig when it is operated without cargo or a trailer." *Integral*, 206 Mich App at 331.

sequently, however, the Worker's Compensation Appellate Commission reversed the hearing referee's determination. *Id*. Thus, by the time the appeals and cross-appeals from the trial court's order had reached this Court, the basis of the court's decision no longer existed. Nevertheless, this Court affirmed the trial court's order, but on different grounds. *Id*. at 332. The Court affirmed that INA was first in priority on the grounds that Scott had been hauling a trailer with cargo for Maersk at the time of the accident and the bobtail policy validly excluded coverage under such circumstances. *Id*.

The majority finds *Integral*'s relevance to the instant case in the Court's discussion of the validity of the bobtail policy's exclusions. The trial court ruled that the exclusions were void as against public policy, but this Court disagreed, observing that

> Integral's policy provided coverage only when Scott was not hauling cargo for a business or when Scott was not hauling cargo for a business to whom the tractor was rented. Admittedly, the policy itself does not provide full coverage. However, the tractor was fully covered under no-fault by the addition of INA's policy that provided coverage when Scott was hauling cargo on behalf of Maersk. [*Id*. at 331.]

The Court supported its reasoning by noting that MCL 257.520(j) of the financial responsibility act provides that "[t]he requirements for a motor vehicle liability policy may be fulfilled by the policies of 1 or more insurance carriers which policies together meet such requirements." *Integral*, 206 Mich App at 331. The Court then determined that "[t]aken together, the policy issued by INA and the bobtail policy issued by Integral provided continuous insurance coverage to the tractor as required by the motor vehicle financial responsibility act." *Id*. at 331-332.

The majority interprets the Court's observation that the bobtail policy did not provide "full coverage" but that the tractor was "fully covered under no-fault by the addition of INA's policy," *id*. at 331, as indicating that the bobtail policy did not provide for the PIP benefits mandated under MCL 500.3101(1). This interpretation is incorrect. That the bobtail policy provided PIP benefits is evident from this Court's characterization of *Integral* as "a dispute between no-fault insurers" and from the fact that "Integral and INA each agreed to contribute fifty percent of Scott's personal protection insurance (PIP) benefits during their dispute regarding priority." *Integral*, 206 Mich App at 328. Note that the dispute between the insurers was about priority, not liability. Accordingly, the Court's observation that the bobtail policy plus Maersk's policy from INA provided "full coverage" was not an observation about *what* each policy covered, but about *when* the policies were in force. Both policies provided PIP benefits, but at different times. The bobtail policy excluded coverage when the tractor was hauling a load or was rented for business, and INA's policy provided coverage during the period of Maersk's rental; together, the two policies provided "*continuous* insurance coverage to the tractor . . . ." *Id*. at 331 (emphasis added). Thus, *Integral* is not about obtaining "full coverage" by combining policies that do not cover PIP benefits with those that do; rather, *Integral* is about combining policies—each of which provides the statutorily mandated PIP coverages—to achieve temporally "continuous insurance coverage" as required by the financial responsibility act.

In sum, the caselaw relied on by the majority does not support its conclusion that the no-fault act allows an insurance company providing automobile insurance in Michigan to circumvent the no-fault act and sell only

optional insurance coverages. The statutory scheme is clear: the starting point for achieving the goals of the no-fault act is an automobile insurance policy that provides the statutorily mandated coverages under MCL 500.3101(1), to which parties may add elective coverages as agreed on and delete the mandatory coverages and maintain comprehensive coverage only if the car is not going to be driven or moved on a highway. Automobile policies underwritten by USAU do not comply with the no-fault act. Accordingly, I would affirm the ruling of the trial court.

In re GUARDIANSHIP OF LISA BROSAMER

Docket No. 346394. Submitted May 8, 2019, at Detroit. Decided May 16, 2019, at 9:00 a.m.

As guardian of a protected individual, Lisa Brosamer, Patricia Brosamer petitioned the Lenawee County Probate Court for an ex parte order, seeking to enjoin the Lenawee Community Mental Health Authority under MCL 330.1536(1) from moving Lisa from one community residential placement to another on the basis that the transfer would be detrimental to her. Lisa was cared for at home by her mother from 1961 through 2006, after which Lisa was transitioned to a residential treatment facility; Lisa lived in two other facilities before being transferred to College Avenue in 2009. In 2018, petitioner objected under MCL 330.1536(2) when respondent sought to transfer Lisa to Westhaven, a different community placement. At the hearing on the petition after the court, Gregg P. Iddings, J., had issued the petition ex parte, respondent provided three affidavits from its employees indicating that the transfer would not be detrimental to Lisa, and petitioner presented four witnesses directly familiar with Lisa, all of whom testified that the planned move would be detrimental to her. Relying on the testimony of petitioner's witnesses, who were most familiar with Lisa's needs, the probate court continued the injunction, concluding that under MCL 330.1536(1), the transfer could not occur because it would be detrimental to Lisa. Respondent appealed.

The Court of Appeals *held*:

Under MCL 330.1536(1), a resident in a facility may be transferred to any other facility, or to a hospital operated by the Department of Community Health, if the transfer would not be detrimental to the resident and the responsible community mental health services program approves the transfer. MCL 330.1536(2) in turn provides that the resident and his or her nearest relative or guardian must be notified at least 7 days before any transfer, except that a transfer may be effected earlier if necessitated by an emergency; the department must provide an opportunity to appeal the transfer if the resident, his or her nearest relative, or guardian objects to the transfer. MCL 330.1536 balances the needs of

consumers with the limited resources of the department, but the statute clearly does not allow a consumer to be transferred if it would be detrimental to that consumer. MCL 330.1536 does not grant guardians the right to veto the decisions of mental health authorities; instead, the focus is on whether, under the presented facts, the transfer would be detrimental to the resident's well-being. In that regard, although third parties and the public have an interest in the department's ability to transfer consumers and balance its resources for the benefit of the community, the interests of those third parties are not relevant to whether a transfer is permissible for a particular consumer. In this case, all four witnesses, who had longstanding histories with Lisa, testified that the transfer would be detrimental to her. In contrast, respondent's affiants did not have a history with Lisa comparable to petitioner's witnesses. Under the facts of the case, the probate court did not clearly err when it found that the proposed transfer would be detrimental to Lisa under MCL 330.1536(1). The probate court also did not abuse its discretion by permanently enjoining respondent from moving Lisa from her current residential placement without court approval because (1) the interest to be protected was Lisa's well-being, (2) there was substantial testimony that the transfer would be detrimental to Lisa's well-being because she was well-adjusted and thriving at College Avenue, (3) in light of the fact that respondent continued to argue, contrary to the evidence, that the transfer would not be detrimental, a permanent injunction was the most adequate means of ensuring that respondent did not transfer Lisa, and (4) the injunction would not be impractical to enforce and respondent could seek to have the injunction lifted if a transfer arose that would not be detrimental to Lisa's well-being.

Affirmed.

MENTAL HEALTH — TRANSFERS OF RESIDENTS — APPEAL OF TRANSFERS — TRANSFER DETRIMENTAL TO RESIDENT.

MCL 330.1536 provides that (1) a resident in a facility may be transferred to any other facility, or to a hospital operated by the Department of Community Health, if the transfer would not be detrimental to the resident and the responsible community mental health services program approves the transfer, (2) the resident and his or her nearest relative or guardian must be notified at least 7 days before any transfer, except that a transfer may be effected earlier if necessitated by an emergency, and (3) the department must provide an opportunity to appeal the transfer if the resident, his or her nearest relative, or guardian objects to the transfer; MCL 330.1536 balances the needs of consumers with the limited resources of the department; the statute does not grant

guardians the right to veto the decisions of mental health authorities; instead, the focus is on whether, under the presented facts, the transfer would be detrimental to the resident's well-being; although third parties and the public have an interest in the department's ability to transfer consumers and balance its resources for the benefit of the community, the interests of those third parties are not relevant to whether a transfer is permissible for a particular consumer.

Thomas L. Stringer for petitioner.

Abbott Nicholson, PC (by *John R. McGlinchey* and *Kristen L. Baiardi*) for respondent.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. In this guardianship case, respondent, the Lenawee Community Mental Health Authority, appeals as of right the probate court's order enjoining respondent from transferring a protected individual, Lisa Brosamer (Lisa), from one community residential placement (College Avenue, where Lisa has resided since 2009) to another residential placement (Westhaven). Respondent contends on appeal that (1) the probate court erroneously applied MCL 330.1536 and effectively rewrote the statute and (2) the probate court abused its discretion by granting permanent injunctive relief. We disagree and affirm.

I. BASIC FACTS

Lisa is severely intellectually disabled and unable to care for herself or manage her estate. Her mother was Lisa's predecessor guardian and cared for Lisa in her home from Lisa's birth on February 22, 1961, through October 3, 2006, when, because of her mother's declining health, Lisa transitioned to a residential treatment facility at 3376 Marvin Drive in Adrian. On March 7,

2008, Lisa was transferred to a different facility at 451 South Main Street in Adrian. Finally, on March 1, 2009, Lisa was transferred to her current residence at College Avenue. Petitioner, Patricia Brosamer, was appointed successor plenary guardian of Lisa on December 2, 2009.

On September 26, 2018, petitioner filed the petition that led to this appeal. Petitioner contended that respondent was planning to transfer Lisa from College Avenue to another community placement at Westhaven and sought an ex parte order denying the transfer on the ground that it would be detrimental to Lisa pursuant to MCL 330.1536. The probate court granted ex parte relief and later held a full hearing. In lieu of testimony, respondent presented three affidavits from its employees indicating that the transfer would not be detrimental to Lisa and that respondent was, therefore, statutorily entitled to move forward with the transfer. Petitioner presented four witnesses familiar with Lisa's situation who all testified that the planned move would be detrimental to Lisa. Lisa's lawyer-guardian ad litem indicated that, in his opinion, the probate court should favor the testimony of petitioner because of petitioner's heavy involvement in the welfare of Lisa and because petitioner's history with Lisa made petitioner the most capable of predicting the outcome of a transfer. The probate court summarized the affidavits provided by respondent and the testimony from the evidentiary hearing and concluded that the "move certainly does appear to be something that would be detrimental to Lisa."

II. APPLICATION OF MCL 330.1536

On appeal, respondent argues that the probate court clearly erred by determining that transferring Lisa

from College Avenue would be detrimental to her well-being. It argues that the probate court judicially revised MCL 330.1536 and created a right for plenary guardians to veto the decisions of mental health authorities when the Legislature did not intend for such a veto to exist. We disagree. Although respondent frames its argument on appeal as one regarding statutory interpretation, respondent's argument actually concerns the probate court's factual findings.

The probate court's factual findings are reviewed for clear error and its dispositional rulings for an abuse of discretion. *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). A finding is clearly erroneous when, even though there is evidence to support it, "a reviewing court is left with a definite and firm conviction that a mistake has been made[.]" *In re Vansach Estate*, 324 Mich App 371, 385; 922 NW2d 136 (2018) (quotation marks and citation omitted). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes" or when the court fails "to operate within the correct legal framework." *Id*. at 385 (quotation marks and citation omitted). Further, "[t]he reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

MCL 330.1536 provides:

> (1) A resident in a center may be transferred to any other center, or to a hospital operated by the department, if the transfer would not be detrimental to the resident

> and the responsible community mental health services program approves the transfer.
>
> (2) The resident and his or her nearest relative or guardian shall be notified at least 7 days prior to any transfer, except that a transfer may be effected earlier if necessitated by an emergency. In addition, the resident may designate 2 other persons to receive the notice. If the resident, his or her nearest relative, or guardian objects to the transfer, the department shall provide an opportunity to appeal the transfer.
>
> (3) If a transfer is effected due to an emergency, the required notices shall be given as soon as possible, but not later than 24 hours after the transfer.[1]

The evidence in this case primarily came from seven people: three affiants and four testifying witnesses. Of those seven people, only four of them provided evidence that they had either a history with Lisa or daily interaction with Lisa such that they might reasonably be capable of opining as to how the proposed transfer might affect Lisa's well-being. All four of the witnesses demonstrated a personal history with Lisa, and all of them concluded that transferring Lisa to Westhaven would be detrimental.

Petitioner testified that Lisa had thrived at College Avenue largely because of the relationships she had formed with residents and staff, including forming a close bond with a resident who had resided at College Avenue even longer than Lisa. Petitioner was able to testify that in light of her history with and personal knowledge of Lisa, starting anew at Westhaven would be detrimental to Lisa and would cause her to regress.

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[1] MCL 330.1536 has been amended and, effective March 28, 2019, the word "center" in Subsection (1) changed to "facility," and the phrase "prior to" in Subsection (2) changed to "before." MCL 330.1536, as amended by 2018 PA 596. All references in this opinion to the statute are to the version in effect when the trial court issued its order.

Notably, Lisa's lawyer-guardian ad litem, who has been involved in the case since at least 2011, reported that because of petitioner's "extensive involvement with [Lisa] over the years," petitioner was in a superior position to any of the other witnesses or affiants "to know what [would] be detrimental to Lisa."

Lisa's doctor of 14 years testified that Lisa relies on familiarity with those around her to comfort and calm her and that given Lisa's age and disability, Lisa would "not be able to adjust" and did not have the "coping mechanism" to handle a transfer from College Avenue. A direct-care staff member at College Avenue, who had known Lisa for 16 years and worked directly with Lisa on a regular basis for one year, testified that Lisa relied on familiarity with staff and peers, that Lisa would not respond well to significant changes, and that transferring Lisa would be to Lisa's detriment. Finally, a former manager at Westhaven testified that she had known Lisa for 20 years, that Westhaven was not as well suited for Lisa as College Avenue, and that there was a particularly high risk of Lisa having altercations with an aggressive individual at Westhaven if Lisa were to be transferred.

None of the affidavits provided by respondent suggested that the affiants had a history with Lisa comparable to petitioner's witnesses. Respondent's executive director reported that she was responsible for over 1,850 consumers of mental health services and that the determination that Lisa was prepared to transfer to Westhaven was not personally made by the executive director, but by unnamed "expert" staff. In another affidavit, respondent's supervisor of developmentally disabled consumers did not speak to her level of personal knowledge of Lisa and instead spoke primarily to the fact that the supervisor had communicated

with petitioner on several occasions about the proposed transfer. Finally, Lisa's case manager testified that she had only been assigned to Lisa's case since June 18, 2018, which, coincidentally, was the same month that respondent determined that another consumer needed a bed at College Avenue and the same month that respondent determined Lisa could be transferred. Petitioner testified that the case manager was assigned to the case after Lisa's former case manager of 10 years retired. Petitioner also testified that she asked respondent's executive director to replace the new case manager because petitioner could not understand how the case manager could conclude that a transfer was appropriate while being so new and unfamiliar with Lisa.

That the case manager was not as familiar with Lisa as petitioner's witnesses is evidenced by comparing the case manager's affidavit with the testimony of petitioner, the former Westhaven manager, and the direct-care staff member at College Avenue. As the only evidence that one of Lisa's visits to Westhaven had gone well, Lisa's case manager stated that "Lisa came into the home and gave everyone hugs." However, the former Westhaven manager described Lisa as a "hugger," and the College Avenue direct-care staff member indicated that Lisa giving "a couple of the staff members that worked for Westhaven a hug" was not indicative of Lisa being interactive or otherwise having a productive visit at Westhaven. Additionally, petitioner characterized the case manager's statement as an exaggeration, noting that Lisa hugged the manager at Westhaven—the same manager who testified at trial—because Lisa recognized her.

Overall, witnesses deeply familiar with Lisa testified that transferring Lisa from College Avenue would

be detrimental to her well-being. Far from judicially revising MCL 330.1536 or creating a "veto right," the probate court narrowly tailored its role in the case to the only issue it was statutorily authorized to determine: whether respondent's proposed transfer of Lisa would be detrimental to Lisa's well-being. We are not left with a definite and firm conviction that a mistake was made. To the contrary, the probate court's finding with respect to detriment was well supported by the evidence.

III. PERMANENT INJUNCTION

Respondent argues that the probate court abused its discretion by granting a permanent injunction and that the injunction went too far because it enjoined respondent not just from transferring Lisa to Westhaven, but from transferring Lisa anywhere else in the future. We disagree.

As a preliminary matter, we note that the parties disagree about whether the probate court's order serves as a permanent injunction. For purposes of this appeal, we assume that the order serves as a permanent injunction from transferring Lisa to any facility at any time without court approval.

"A trial court's decision to grant or deny injunctive relief is reviewed for an abuse of discretion." *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274; 856 NW2d 206 (2014). The court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *Vansach*, 324 Mich App at 385. "The Court of Appeals has succinctly stated that injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury."

Pontiac Fire Fighters Union Local 376 v Pontiac, 482 Mich 1, 8; 753 NW2d 595 (2008) (quotation marks and citations omitted). In determining whether a permanent injunction was properly issued, this Court considers:

> "(a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order of judgment." [*Janet Travis*, 306 Mich App at 274, quoting *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 28; 836 NW2d 279 (2013), aff'd in part and vacated in part 497 Mich 36 (2014).]

"Additionally, '[c]ourts balance the benefit of an injunction to a requesting plaintiff against the damage and inconvenience to the defendant, and will grant an injunction if doing so is most consistent with justice and equality.' " *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 34-35; 896 NW2d 39 (2016) (alteration in original), quoting *Janet Travis*, 306 Mich App at 274-275.

The probate court did not abuse its discretion by granting permanent injunctive relief. With respect to the nature of the interest the injunction serves to protect, it was Lisa's overall well-being. There was a substantial amount of testimony that Lisa's transfer to Westhaven would be detrimental to her well-being, not simply because Westhaven was less suited to Lisa's needs than College Avenue, but because Lisa was well-adjusted, familiar, and thriving at College Avenue, and for that reason, Lisa's transfer to any other facility would be detrimental. With respect to the

relative adequacy of the permanent injunction versus other potential remedies, respondent continues to argue, in contradiction to the evidence, that Lisa's transfer from College Avenue would not be detrimental, and thus, the injunctive relief would seem the most adequate means of ensuring that respondent does not transfer Lisa to the detriment of her well-being. There is no evidence that petitioner made any unreasonable delays in filing her petition for an injunction, nor is there evidence that petitioner engaged in any form of misconduct.

Being sensitive to the fact that respondent must walk the tightrope of balancing the needs of consumers—sometimes against one another—with the limited resources that it has, MCL 330.1536 is clear that respondent cannot transfer a consumer if the transfer would be detrimental to that consumer. Thus, the relative hardship on respondent that the injunction imposes is no greater than the hardship imposed by MCL 330.1536 itself. Contrarily, the hardship Lisa may endure if she were to be transferred to the detriment of her well-being is significant. Additionally, although third parties and the public have an interest in respondent's ability to transfer consumers and balance its resources for the benefit of the community, Lisa has the right to be free of detrimental transfers, and with respect to MCL 330.1536, the interests of third parties in transfers that might be detrimental to Lisa are not relevant to whether the transfer is permissible. We note that nothing bars respondent from seeking to have the injunction lifted if a transfer that would not be detrimental to Lisa's well-being arises. Finally, the injunction will not be impractical to enforce.

In light of these factors, and considering there was no adequate remedy at law to ensure that respondent

would not be transferred, the probate court's injunction was not outside the range of reasonable and principled outcomes.

Affirmed.

REDFORD, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

SMITH v SMITH

Docket No. 342200. Submitted May 8, 2019, at Detroit. Decided May 16, 2019, at 9:05 a.m.

Plaintiff, Allen Smith, and defendant, Robin Smith, entered into a consent judgment of divorce in the Oakland Circuit Court, Family Division, in April 2016. In November 2017, plaintiff moved to modify the amount of spousal support, asserting that he had retired from his job and that the decrease in his wages constituted a change of circumstances that warranted a modification of spousal support. The divorce judgment provided that a change in plaintiff's "base wages . . . may represent a change in circumstance warranting modification of Spousal Support." The divorce judgment further provided that it incorporated a Uniform Spousal Support Order (USSO); the language of the USSO provided that the order would continue until the death of plaintiff or his remarriage, but it did not provide any other language or allude to a change in circumstances as a basis to revisit or discontinue the spousal-support award. The USSO was subsequently amended to reflect a revised effective date, but like the first USSO, the amended USSO failed to include any language indicating that a change in circumstances could serve as a basis to modify or discontinue spousal support. The trial court, Victoria A. Valentine, J., denied plaintiff's motion to modify spousal support, citing two reasons. First, the court determined that the spousal support provisions in the divorce judgment and the USSO conflicted with each other with respect to whether a change in circumstances could support a modification of spousal support; therefore, according to the court, the USSO controlled under MCR 3.211 and support could not be modified or terminated until defendant's death or remarriage. Second, the trial court concluded that there had been no change in circumstances because plaintiff's retirement had been contemplated when he settled the case, yet the divorce judgment did not mention that "retirement" constituted a change in circumstances. Plaintiff sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. MCL 552.28 generally authorizes a court to modify an award of spousal support, and it provides a statutory right to litigants to seek modification of spousal support. The parties are free, however, to forgo their statutory rights by clearly expressing in a settlement their intent to render a spousal-support award final, binding, and nonmodifiable. In this case, the record contained no affirmative expression of an intent by the parties to prohibit a modification of spousal support based on a change in circumstances.

2. MCR 3.211(D)(1) provides that a USSO shall govern if the terms of the divorce judgment or order conflict with the USSO. However, in this case, the USSO did not conflict with the divorce judgment; rather, the USSO was a partial or incomplete expression of the parties' intent and agreement, which was plainly and unambiguously set forth in the divorce judgment: the judgment expressly allowed either party to seek modification of spousal support on a showing of a change in circumstances. Moreover, the divorce judgment provided that it "incorporates" the USSO, which effectively made the USSO part of the divorce judgment. The divorce judgment evinced the parties' intent to allow consideration of a change in spousal support when there is a change in circumstances; accordingly, the terms of the divorce judgment had to be enforced. The trial court erred by determining that a change in circumstances could not be considered for purposes of modifying spousal support.

3. Generally speaking, retirement may constitute a change in circumstances for purposes of modifying an order of spousal support. In this case, the divorce judgment provided that a change in plaintiff's "base wages . . . may represent a change in circumstances warranting modification of Spousal Support." Contrary to the trial court's view, this provision plainly and unambiguously could encompass plaintiff's retirement depending on how his retirement affected his base wages. Even though the parties did not include the term "retirement" in their consent judgment, the concept that retirement would terminate one's "base wages" would be generally understood. Moreover, even absent the base-wages provision, an ex-spouse's ensuing retirement may qualify as a change in circumstances. Parties who reach an agreement on spousal support and allow for future modification of support based on a change in circumstances cannot reasonably be expected to list in the agreement all the possible events that could constitute a change in circumstances. Because the divorce judgment provided that a change in plaintiff's base wages "may" represent a change in circumstances warranting modification of spousal support, how-

ever, that change in base wages does not necessarily amount to a change in circumstances justifying a modification of spousal support. Accordingly, while the trial court clearly erred by denying plaintiff's motion on the basis that the divorce judgment did not specifically refer to "retirement" as constituting a change in circumstances, a remand was appropriate to allow the trial court to consider the issue anew.

Reversed and remanded for further proceedings.

Brooke L. Archie for Allen Smith.

Robin Smith *in propria persona*.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

MARKEY, J. In this postjudgment litigation, plaintiff appeals by leave granted the trial court's order denying his motion to modify spousal support that had been awarded to defendant pursuant to a consent judgment of divorce. We reverse and remand for further proceedings.

In April 2016, a consent judgment of divorce was entered, and the judgment provided, in relevant part, as follows:

> The Plaintiff is not awarded spousal support and his claim for spousal support is forever barred. The Defendant is awarded spousal support for $2,500.00 per month. This amount shall terminate upon death, remarriage *or a showing of a change in circumstances*. . . .
>
> This Judgment incorporates the Uniform Spousal Support Order [USSO] which was entered at trial, by consent of the parties, on March 31, 2016 and is as described in this Judgment.
>
> * * *
>
> It is agreed, that Defendant may not use an increase in Plaintiff's overtime wages as a basis for modification. It is

> further agreed, that should Plaintiff have a change in his base wages it *may represent a change in circumstance* warranting modification of Spousal Support. [Emphasis added.]

The parties and the parties' attorneys signed the consent divorce judgment.

The USSO described in the judgment of divorce, which was also executed by the parties and their attorneys, indicated that it would "continue[] until the death of the payee or until the earliest of the following events: . . . Remarriage of the payee."[1] No other language is set forth, and no other boxes are checked in the USSO; it does not allude to a "change in circumstances" as a basis to revisit or discontinue the spousal-support award. The USSO had an effective date of April 1, 2016. Subsequently, on plaintiff's motion, the trial court entered an order stating that the effective date of the spousal-support award must be changed to June 1, 2016, and it directed plaintiff's counsel to prepare an amended USSO. An amended USSO with the revised effective date was entered, but like the first USSO, it failed to include any language indicating that a change in circumstances could serve as a basis to discontinue or modify spousal support.

In November 2017, plaintiff moved to modify the spousal support, asserting that he was now 65 years old and had retired from his job, which resulted in a "substantial decrease in wages . . . ." Plaintiff argued that the decrease in wages constituted a change of circumstances warranting a modification of spousal support. Plaintiff noted that the divorce judgment specifically contemplated "a change in his base wages"

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[1] The "remarriage" provision is reflected in a checked box on a standard State Court Administrative Office form. Boxes for "Death of the payer" and "Other" are not checked or marked.

as being a potential basis to modify the amount of spousal support. The trial court denied the motion for two reasons. First, the court determined that the spousal support provisions in the consent divorce judgment and the USSO conflicted with each other with respect to whether a change in circumstances could support a modification of spousal support. Therefore, according to the court, the USSO controlled under MCR 3.211 and support could not be modified or terminated until defendant's death or remarriage. Second, the trial court concluded that there had been no change in circumstances because plaintiff's retirement had been contemplated when he settled the case, yet there was no provision in the judgment indicating that "retirement" could constitute a change in circumstances. An order was subsequently entered denying plaintiff's motion for the reasons stated on the record at the hearing. Plaintiff appeals by leave granted. *Smith v Smith*, unpublished order of the Court of Appeals, entered June 8, 2018 (Docket No. 342200).

We review de novo the interpretation of the court rules, *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002), as well as the construction and application of contractual clauses, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

Plaintiff first contends that the trial court erred by effectively concluding that the spousal-support award was nonmodifiable. MCL 552.28 generally authorizes a court to modify an award of spousal support, and it provides a statutory right to litigants to seek modification of spousal support. *Allard v Allard (On Remand)*, 318 Mich App 583, 599; 899 NW2d 420 (2017); *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000). The parties are free, however, to forgo their statutory rights by clearly expressing in a settlement

their intent to render a spousal-support award final, binding, and nonmodifiable. *Allard*, 318 Mich App at 599; *Staple*, 241 Mich App at 568. In this case, the consent judgment reflects just the contrary, and even the USSO does not contain such express language. The record contains no affirmative expression of an intent by the parties to prohibit a modification of spousal support based on a change in circumstances.

MCR 3.211(D)(1) does provide that a "Uniform Support Order shall govern if the terms of the judgment or order *conflict* with the Uniform Support Order." (Emphasis added.) If the USSO in this case specifically provided that spousal support were nonmodifiable or that a change in circumstances would not justify modification of spousal support, we would certainly agree that a "conflict" would exist with the judgment of divorce. But the USSO is more accurately characterized as simply being a partial or incomplete expression of the parties' intent and agreement, which was plainly and unambiguously set forth in the divorce judgment: the judgment expressly allows *either party* to seek modification of spousal support on a showing of a change in circumstances. Moreover, we take note of the fact that the judgment of divorce provides that it "incorporates" the USSO, thereby effectively making it part of the divorce judgment. Under these circumstances, it is difficult to logically conclude that the judgment of divorce conflicts with the USSO. Moreover, the divorce judgment's language that the amount of spousal support terminates upon defendant's death or remarriage is consistent with the USSO's language that the support order continues until defendant's death or remarriage.

In sum, the consent divorce judgment so clearly evinces the parties' intent to allow consideration of a

change in spousal support when there is a change in circumstances that we are compelled to hold that the terms of the judgment of divorce must be enforced. See *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008) ("A consent judgment is in the nature of a contract, and . . . [i]f no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written . . . ."). Accordingly, the trial court erred by determining that a change in circumstances could not be considered for purposes of modifying spousal support.[2]

We next address the trial court's ruling that, regardless of MCR 3.211, there was no change in circumstances because plaintiff had contemplated retirement when the settlement was negotiated. Yet, the judgment makes no reference to retirement in connection with a change in circumstances. We first note that plaintiff's appellate brief provides little analysis of this issue; plaintiff only mentions it in passing in a two-sentence footnote.[3] Plaintiff states:

> Although it was not the primary basis of the trial court's holding, the court did state that it believed that anticipating or contemplating retirement during the parties' judgment negotiations necessarily meant that retirement could not constitute a change of circumstance. To the contrary, the *Staple* [C]ourt underscores the importance of anticipating circumstances that may change for either party.

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[2] Given our ruling, we find it unnecessary to reach plaintiff's additional argument that the trial court's application of MCR 3.211(D)(1) violated and undermined public policy.

[3] "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." *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015).

In reviewing plaintiff's brief, it appears that it is almost entirely devoted to challenging the trial court's ruling under MCR 3.211. Although some of plaintiff's arguments may have been intended to address both components of the court's ruling, plaintiff's brief is unclear in parts. We will, however, give plaintiff the benefit of the doubt and address the trial court's ruling that there was no change in circumstances.

This Court reviews "the trial court's factual findings relating to the award or modification of [spousal support] for clear error." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. at 654-655. When a trial court's findings are not clearly erroneous, we must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id*. at 655. The *Moore* panel observed:

> The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case. An alimony award can be modified upon a showing of changed circumstances. The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce. [*Id*. at 654 (citations omitted).]

Although it is somewhat unclear, the trial court apparently found that the circumstances had not changed because plaintiff had contemplated retirement at the time of the settlement negotiations. Yet the divorce judgment contains no language expressly indicating that retirement could or would constitute a change in circumstances. Generally speaking, we note that retirement may constitute a change in circumstances for purposes of modifying an order of spousal

support. See *McCallister v McCallister*, 205 Mich App 84, 86; 517 NW2d 268 (1994) ("We agree with plaintiff that his retirement constitutes changed circumstances.").

In the instant case, the judgment of divorce provided that a change in plaintiff's "base wages . . . *may* represent a change in circumstances . . . ." (Emphasis added.) This provision, contrary to the trial court's view, plainly and unambiguously could encompass plaintiff's retirement depending on how his retirement affected his base wages. Retirement from employment essentially means—and is understood to mean—an end to one's employment wages. Even though the parties did not include the term "retirement" in their consent judgment, we have to conclude that this concept most certainly would be generally understood, i.e., that retirement would terminate one's "base wages." Moreover, even absent the base-wages provision, an ex-spouse's ensuing retirement may qualify as a change in circumstances. *McCallister*, 205 Mich App at 86. Parties who reach an agreement on spousal support and allow for future modification of support based on a change in circumstances cannot reasonably be expected to list in the agreement all the possible events that could constitute a change in circumstances.

The parties' agreement also clearly provided that a change in plaintiff's base wages "may" represent a change in circumstances warranting modification of spousal support. Use of the term "may" reflected an agreement by the parties that a change in plaintiff's base wages would not necessarily amount to a change in circumstances justifying a modification of spousal support. Accordingly, while the trial court clearly erred by denying plaintiff's motion on the basis that the divorce judgment did not specifically refer to "retire-

ment" as constituting a change in circumstances, we conclude that a remand is appropriate to allow the trial court to consider the issue anew. In examining whether plaintiff's retirement and the concomitant decrease in his income qualify as a change in circumstances warranting a modification in spousal support, the trial court should consider the principles recited earlier regarding spousal support, i.e., support must be just and reasonable under the circumstances and should balance the incomes and needs of the parties in a way that will not impoverish either party. *Moore*, 242 Mich App at 654.

We reverse and 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.

REDFORD, P.J., and K. F. KELLY, J., concurred with MARKEY, J.

PEOPLE v PARKMALLORY

Docket No. 342546. Submitted May 8, 2019, at Lansing. Decided May 16, 2019, at 9:10 a.m. Court of Appeals judgment vacated and case remanded to the Saginaw Circuit Court for an evidentiary hearing 505 Mich 866 (2019).

Michael R. Parkmallory was convicted following a jury trial in the Saginaw Circuit Court, Darnell Jackson, J., of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f(1), and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b(1), following an incident on New Year's Eve, December 31, 2016, in which defendant and his girlfriend took turns firing a gun into the air. Before the trial began, defendant's lawyer stipulated that defendant was ineligible to possess the firearm because defendant had a prior conviction of receiving and concealing a stolen motor vehicle in June 2009. At trial, defendant's lawyer argued that defendant never possessed the gun because he only touched it briefly when his girlfriend tossed it to him in a panic. The jury convicted defendant as charged. Defendant appealed, arguing that his convictions should be reversed because his lawyer provided constitutionally ineffective assistance by stipulating that he was ineligible to possess the gun.

The Court of Appeals *held*:

1. MCR 7.216(A)(4) provides that the Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on terms it deems just, permit amendments, corrections, or additions to the transcript or record. In this case, defendant failed to support his claims with documentary evidence that was in the record. However, the documents defendant provided were copies of court orders signed by the judge presiding over the 2009 case, which are the type of documents that a court may take judicial notice of under MRE 201(b). Accordingly, under the present circumstances, the record was expanded to include the copies of court orders.

2. To establish that a lawyer provided ineffective assistance, a defendant must establish (1) that the lawyer's performance fell below an objective standard of reasonableness and (2) that

the defendant was prejudiced by the lawyer's deficient performance, i.e., that there is a reasonable probability that but for the lawyer's unprofessional errors, the result of the proceeding would have been different. Under MCL 750.224f(1), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of three years after all of the following circumstances exist: (a) the person has paid all fines imposed for the violation, (b) the person has served all terms of imprisonment imposed for the violation, and (c) the person has successfully completed all conditions of probation or parole imposed for the violation. Under MCL 750.224f(1), the right to possess a firearm is automatically restored when the statutory conditions are satisfied. The defendant bears the burden of producing evidence that his right to possess a firearm has been restored. In this case, rather than attempting to satisfy that burden, defendant's lawyer stipulated that defendant was, essentially, ineligible to possess a gun because he committed a felony. As a result, the prosecution was not required to prove the lack of restoration of firearm rights beyond a reasonable doubt, as it would have been obligated to do had the defense satisfied its burden of production. Accordingly, defendant's lawyer provided constitutionally ineffective assistance when he failed to present existing evidence supporting a finding that defendant's right to possess a firearm had been automatically restored under MCL 750.224f(1). The order of conviction and sentence entered on September 21, 2011, made three things apparent: (1) no attorney fees, court costs, restitution, crime-victim fees, supervision fees, or state minimum costs were imposed, (2) defendant was sentenced to 110 days in jail with credit for 110 days served, and (3) defendant's probation was "closed w/o Improvement." Therefore, because all three requirements under MCL 750.224f(1) were satisfied by the September 21, 2011 order, and because more than three years elapsed between September 21, 2011 and December 31, 2016, the order was sufficient to establish that when defendant committed the instant offense he was, in fact, eligible to possess a firearm because his right to do so was automatically restored under MCL 750.224f(1). Defendant was unconditionally discharged, free from supervision, and had no lingering probation requirements to complete. Although the court order provided that defendant's probation was "closed w/o Improvement," that notation had no bearing on whether he successfully completed all conditions of probation. Even to the extent that defendant did not perfectly complete all conditions of his probation—as evidenced by multiple probation-violation

hearings—that failure had no bearing on whether he was nevertheless successful in completing all conditions of probation by virtue of the fact that after the discharge was entered by the trial court, no conditions of probation remained for him to complete. Justice KELLY's reasoning on this point in a dissenting statement in *People v Sessions*, 747 Mich 1120 (2006), was persuasive and was adopted in this case: a felon successfully completes all conditions of probation for purposes of MCL 750.224f(1)(c) when the court discharges the felon from probation. In this case, defendant successfully completed all conditions of probation and was unconditionally discharged. Accordingly, he was eligible to possess a firearm. Defendant therefore established that his lawyer's performance was deficient when his lawyer stipulated that defendant was ineligible to possess a firearm. Moreover, but for his lawyer's deficient performance, there was a reasonable probability that the outcome of the trial would have been different. Had his lawyer presented the September 21, 2011 order and conviction, the prosecution would have had to prove beyond a reasonable doubt that defendant's right to possess a firearm had not been automatically restored under MCL 750.224f(1), and there was no evidence in the record showing that the prosecution would have been capable of satisfying that burden, which would negate a necessary element for felon-in-possession and a necessary element for felony-firearm. Defendant satisfied his burden of establishing that his lawyer provided ineffective assistance during the trial court proceedings.

Reversed.

CRIMINAL LAW — FIREARMS — ELIGIBILITY TO POSSESS A FIREARM AFTER COMPLETION OF PROBATION.

Under MCL 750.224f(1), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of three years after all of the following circumstances exist: (a) the person has paid all fines imposed for the violation, (b) the person has served all terms of imprisonment imposed for the violation, and (c) the person has successfully completed all conditions of probation or parole imposed for the violation; a felon successfully completes all condition of probation for purposes of MCL 750.224f(1)(c) when the court discharges the felon from probation and there exists no lingering probation requirement for the felon to complete.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*,

Prosecuting Attorney, and *Joseph M. Albosta*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Michael R. Waldo* and *Christine A. Pagac*) for defendant.

Before: SWARTZLE, P.J., and M. J. KELLY and TUKEL, JJ.

M. J. KELLY, J. Defendant, Michael Parkmallory, appeals as of right his jury-trial convictions of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f(1), and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b(1). For the reasons stated in this opinion, we reverse.

I. BASIC FACTS

Parkmallory was charged with felon-in-possession and second-offense felony-firearm following an incident on New Year's Eve, December 31, 2016, in which Parkmallory and his girlfriend took turns firing a gun into the air. Before the trial began, Parkmallory's lawyer stipulated that Parkmallory had a prior conviction of receiving and concealing a stolen motor vehicle, which rendered Parkmallory "ineligible to possess the firearm." At trial, Parkmallory's lawyer argued that Parkmallory never possessed the gun because he only touched it briefly when his girlfriend tossed it to him "in a panic." The jury convicted Parkmallory as charged.

II. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Parkmallory argues that his convictions should be reversed because his lawyer provided constitutionally

ineffective assistance by stipulating that he was ineligible to possess a gun given his June 2009 conviction of receiving and concealing a stolen motor vehicle. He did not, however, preserve the issue by filing a motion for a new trial or for an evidentiary hearing. See *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). Because no evidentiary hearing was conducted, "our review of [his] claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Although our review is limited to mistakes apparent on the record, Parkmallory has only supported his claim with documentary evidence that is *not* in the record. Therefore, the first question we must answer is whether the documents appended to Parkmallory's appeal may be considered by this Court. As a general rule, "[a]ppeals to the Court of Appeals are heard on the original record," MCR 7.210(A), and the parties may not expand the record on appeal, *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). However, MCR 7.216(A)(4) provides a mechanism for this Court to permit additions to the record. That court rule explains:

> (A) Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:
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> * * *
>
> (4) permit amendments, corrections, or additions to the transcript or record[.] [MCR 7.216(A)(4).]

Here, we discern no reason to deny the expansion of the record. The records provided by Parkmallory are copies of court orders signed by the judge presiding over the 2009 case. On appeal, the prosecution argues

that the records were not included in the proceedings before the trial court in this case but does not otherwise challenge their accuracy or completeness. Moreover, we note that the documents appended to Parkmallory's appeal contain the type of facts that a court may, generally speaking, take judicial notice of. See MRE 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Accordingly, under the present circumstances we deem it just to allow the expansion of the record to include the following records: (1) the May 20, 2011 motion and bench warrant, (2) the August 2, 2011 order of conviction and sentence, (3) the September 7, 2011 motion and bench warrant, and (4) the September 21, 2011 order of conviction and sentence.

B. ANALYSIS

In order to establish that his lawyer provided ineffective assistance, Parkmallory must establish (1) that his lawyer provided deficient assistance, i.e., that his performance "fell below an objective standard of reasonableness," and (2) that he was prejudiced by his lawyer's deficient performance, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part and remanded for resentencing 493 Mich 864 (2012) (quotation marks and citation omitted). "Because there are countless ways to provide effective assistance in any given case, in reviewing a claim that counsel was ineffective courts must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance." *Gioglio*, 296 Mich App at 22 (quotation marks and citation omitted).

Parkmallory argues that his lawyer's performance was deficient because instead of presenting evidence showing that Parkmallory's right to possess a firearm had been restored, his lawyer stipulated that he was ineligible to possess a firearm. He argues that without his lawyer's stipulation, the prosecution would not have been able to convict him of either felon-in-possession or felony-firearm because necessary elements of both charges would have been unsupported by the evidence.

A person can be convicted of felon-in-possession under Subsection (1) or Subsection (2) of MCL 750.224f. In both cases, the prosecution must prove beyond a reasonable doubt that the defendant possessed a firearm. See MCL 750.224f(1) and (2). Under Subsection (2), the defendant must have been convicted of a "specified felony," and in order to have his or her right to possess a firearm restored, the defendant must petition the circuit court for a restoration of his or her right to possess a firearm. See MCL 750.224f(2)(b); MCL 28.424(1). However, under MCL 750.224f(1)—the subsection under which Parkmallory was convicted—the right to possess a firearm is *automatically* restored when the statutory conditions are satisfied. In full, MCL 750.224f(1) provides:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.

> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation.

As explained by our Supreme Court in *People v Perkins*, 473 Mich 626, 640; 703 NW2d 448 (2005), the defendant bears the burden of producing evidence that his or her right to possess a firearm has been restored. See also MCL 776.20; *People v Henderson*, 391 Mich 612, 616; 218 NW2d 2 (1974). In this case, rather than attempting to satisfy that burden, Parkmallory's lawyer stipulated that Parkmallory was, essentially, ineligible to possess a gun because he committed a "felony." As a result, the prosecution was not required to prove "the lack of restoration of firearm rights beyond a reasonable doubt," as it would have been obligated to do had the defense satisfied its burden of production. *Perkins*, 473 Mich at 640.

Parkmallory's lawyer provided constitutionally ineffective assistance when he failed to present existing evidence supporting a finding that Parkmallory's right to possess a firearm had been automatically restored under MCL 750.224f(1). An order of conviction and sentence was entered on September 21, 2011. Based on our review of the order, three things are apparent: (1) no attorney fees, court costs, restitution, crime-victim fees, supervision fees, or state minimum costs were imposed, (2) Parkmallory was sentenced to 110 days in jail with credit for 110 days served, and (3) Parkmallory's probation was "closed [without] Improvement." In other words, the order constitutes proof that as of September 21, 2011, Parkmallory did not have any outstanding fines as a result of his June 2009 conviction of receiving and concealing a stolen motor vehicle, thereby satisfying the requirement in MCL 750.224f(1)(a) (all fines imposed paid). It also estab-

lishes that all terms of imprisonment imposed for the June 2009 conviction were served, which satisfies the requirement in MCL 750.224f(1)(b) (all terms of imprisonment imposed served). Finally, the order also suggests that the requirement in MCL 750.224f(1)(c) was satisfied, i.e., that Parkmallory "has successfully completed all conditions of probation or parole imposed for the violation" because after September 21, 2011, no conditions of probation or parole remained for him to complete. Furthermore, because all three conditions appear to have been satisfied by the September 21, 2011 order, and because more than three years elapsed between September 21, 2011 and December 31, 2016, the order is sufficient to establish that when Parkmallory committed the instant offense he was, in fact, eligible to possess a firearm because his right to do so was automatically restored under MCL 750.224f(1).

Yet, the prosecution argues that the September 21, 2011 order is insufficient to establish the requirement in MCL 750.224f(1)(c) because Parkmallory was essentially discharged from probation without improvement. The prosecution argues that, as a result, Parkmallory did not "successfully complete[] all conditions of probation or parole imposed for the violation." See MCL 750.224f(1)(c). We disagree.

Although this issue has not been addressed by this Court or by our Supreme Court in binding precedent, we find persuasive Justice KELLY's dissent from our Supreme Court's order in *People v Sessions*, 474 Mich 1120 (2006). Justice KELLY reasoned:

> The parties dispute the meaning of "successfully" in this statute. A Webster's dictionary defines the root word "success" as "the favorable or prosperous termination of attempts or endeavors." *Random House Webster's College Dictionary* (2001). Applying that definition, in order to be

"successful," a defendant must achieve a favorable termination of all conditions of probation. This is the only means of satisfying MCL 750.224f(1)(c).

In this case, defendant did achieve a favorable termination. His probation conditions favorably terminated when the court unconditionally discharged him from probation. The judge left no lingering probation requirement for defendant to complete. He was free from court supervision without the obligation to report to a probation officer. Therefore, he successfully completed all conditions of probation.

* * *

"All" conditions means "the whole number of" or "every one" of the conditions. *Random House Webster's College Dictionary* (2001). Hence, a probationer must complete every one of the conditions of probation before the three-year waiting period for the restoration of the right to possess a firearm can begin to run. MCL 750.224f(1).

By using this phrasing, the Legislature indicated that substantial completion of probation is insufficient to start the clock running toward restoration. For instance, if the court released a probationer from all the conditions of probation except one, that probationer would not have satisfied the requirements of MCL 750.224f(1)(c). The probationer would satisfy that subsection only by fulfilling the final condition of probation. Then, as required by the Legislature, the probationer would have completed "all conditions of probation."

* * *

A felon successfully completes all conditions of probation for purposes of MCL 750.224f(1)(c) when the court discharges the felon from probation. . . . As a consequence, there exists no judicial determination that a judge is authorized to include in an order discharging a

> probationer that the probation was unsuccessfully completed. It is a concept beyond the ken of MCL 750.224f(1)(c). [*Sessions*, 474 Mich at 1121-1123 (KELLY, J., dissenting).]

Although not binding, we find Justice KELLY's reasoning in *Sessions* to be persuasive and we adopt it as our own.[1]

Here, like the defendant in *Sessions*, Parkmallory achieved a favorable termination of his probation; he was unconditionally discharged, free from supervision, and had no lingering probation requirements to complete. Accordingly, although the court order provides that Parkmallory's probation was "closed w/o Improvement," that notation has no bearing on whether he successfully completed all conditions of probation.

Furthermore, as recognized by Justice KELLY, "the Legislature chose to use 'successfully,' not 'perfectly.' " *Sessions*, 474 Mich at 1122 (KELLY, J., dissenting).

> The root word of perfectly, "perfect," can be defined as "conforming absolutely to the description or definition of an ideal type . . . ." *Random House Webster's College Dictionary* (2001). The Court of Appeals would require a person on probation, in order to again be entitled to possess a firearm, to conform in absolute terms to the conditions of probation.

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[1] In *Sessions*, the majority reversed and vacated the opinion of the Court of Appeals on alternate grounds not raised by the parties. *Sessions*, 474 Mich at 1120; *Sessions*, 474 Mich at 1120 (MARKMAN, J., concurring) (noting that the resolution was on alternate grounds than those raised by the parties). Further, in his concurring statement, Justice MARKMAN aptly noted:

> I do not necessarily disagree with Justice KELLY's substantive analysis and this Court doubtlessly will have the opportunity to consider it in a future case. In the meantime, the Court of Appeals opinion to which Justice KELLY takes such objection has been *vacated*. As such, it has no precedential value and thus will serve as no barrier to the adoption of Justice KELLY's analysis in the proper case. [*Sessions*, 474 Mich at 1120 (MARKMAN, J., concurring).]

> But the Legislature chose to use “successfully,” not “perfectly.” Without good cause to conclude otherwise, we must assume that it chose the word purposely and intentionally. *Detroit v Redford Twp*, 253 Mich 453, 456[; 235 NW 217] (1931). There is no reason to believe that the Legislature inadvertently used “successfully,” intending another word. Therefore, “successfully” should not be read as “perfectly.” [*Sessions*, 474 Mich at 1122 (KELLY, J., dissenting).]

Therefore, even to the extent that Parkmallory did not *perfectly* complete all conditions of his probation—as evidenced by multiple probation-violation hearings—that failure has no bearing on whether he was nevertheless successful in completing all conditions of probation by virtue of the fact that after the discharge was entered by the trial court, no conditions of probation remained for him to complete.

For the foregoing reasons, we conclude that Parkmallory has established that his lawyer’s performance was deficient when he stipulated that Parkmallory was ineligible to possess a firearm because of his 2009 conviction for receiving and concealing a stolen motor vehicle.[2] Moreover, we conclude that but for his lawyer’s deficient performance, there is a reasonable probability that the outcome of the trial would have been different. See *Gioglio*, 296 Mich App at 22. If his lawyer had presented the September 21, 2011 order and conviction, the prosecution would have had to prove beyond a reasonable doubt that Parkmallory’s right to possess a firearm had not been automatically restored under MCL 750.224f(1). See *Perkins*, 473 Mich at 640.

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[2] To the extent that Parkmallory’s lawyer was unaware that Parkmallory’s right to possess a firearm was automatically restored, we note that the failure to adequately investigate can constitute ineffective assistance “if it undermines confidence in the trial’s outcome.” *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

On the record presently before us, there is no evidence that the prosecution would have been capable of satisfying that burden, which negates a necessary element for felon-in-possession. See *id*. (requiring the prosecution to prove that the defendant's right to possess a firearm has not been restored if the defendant produces evidence showing that his or her right has, in fact, been restored). And it also negates a necessary element for felony-firearm, which is reliant on the conviction for felon-in-possession as a predicate felony before a defendant can be convicted of felony-firearm. See MCL 750.227b(1) (requiring a defendant to carry or possess a firearm when he commits or attempts to commit a *felony*).[3] Stated differently, but for Parkmallory's lawyer's deficient performance, there is a reasonable probability that Parkmallory would have been acquitted of both charges. Accordingly, he has satisfied his burden of establishing that his lawyer provided ineffective assistance during the trial court proceedings.

Reversed.

SWARTZLE, P.J., and TUKEL, J., concurred with M. J. KELLY, J.

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[3] Nothing in our opinion should be construed as prohibiting the prosecution from coming forward with evidence during a new trial showing that, for reasons not apparent on this record, Parkmallory was ineligible to possess a firearm on January 1, 2016. Our holding is limited to finding that the September 21, 2011 order of conviction and sentence is sufficient to establish—on a prima facie basis—that the statutory requirements for restoration of Parkmallory's right to possess a firearm under MCL 750.224f(1) were met.

LIANG v LIANG

Docket No. 341010. Submitted April 10, 2019, at Detroit. Decided May 16, 2019, at 9:15 a.m.

McCarty Ji Liang, by his next friend, Mei Shaw, brought an action in the Wayne Circuit Court against Guang Hui Liang, who is plaintiff's father, and G. Liang, Inc., doing business as Chan's Chinese Restaurant, Inc. (Chan's), following an injury plaintiff suffered at Chan's. Plaintiff was five years old when he arrived at Chan's after business hours with his mother to surprise Liang for Father's Day. While Liang was preparing for closing and plaintiff's mother was at the take-out window to inform a customer that Chan's had closed for the night, plaintiff wandered out of the dining area and into a room that housed the restaurant's meat grinder. Plaintiff attempted to operate the meat grinder, but he caught and injured his hand in the machine. Plaintiff brought the instant suit against defendants, alleging common-law negligence, negligent infliction of emotional distress, and premises liability. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), asserting parental immunity. Plaintiff responded by arguing that parental immunity could not shield Chan's, a corporate entity, from liability and that his complaint did not allege negligent supervision because Liang was acting in a business capacity at the time of the injuries. Further, plaintiff asserted that parental immunity did not apply to his premises-liability claim because property owners owe a heightened duty of care to licensees. The court, Edward Ewell, Jr., J., denied defendants' motion, holding that parental immunity could not shield defendants from liability because Liang was acting as a business owner when plaintiff's injuries occurred and had a duty to plaintiff as an invitee on the property. Defendants appealed.

The Court of Appeals *held*:

1. A child can maintain a lawsuit against his or her parent for injuries suffered as a result of the alleged ordinary negligence of the parent, except (1) when the alleged negligent act involves an exercise of reasonable parental authority over the child and (2) when the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing,

housing, medical and dental services, and other care. A claim for negligent parental supervision of a child falls within the first exception, meaning that a parent is granted immunity and a child may not sue a parent for negligent supervision. In this case, despite plaintiff's efforts to plead in avoidance of parental immunity, the gravamen of his complaint consisted of claims grounded in negligent supervision. Specifically, plaintiff alleged in his complaint that Liang failed to secure the meat grinder, protect him from the foreseeable risk of harm posed by the dangerous meat grinder, and warn him of the danger. These allegations focus exclusively on Liang's alleged failure to properly supervise plaintiff by preventing him from roaming, unsupervised, into a separate room that led to his injuries or to instruct plaintiff regarding apparent dangers on the premises. These actions (or inactions) fell squarely within the first exception. That the injury occurred at Chan's did not alter the conclusion because a business exception to the applicability of parental immunity does not exist. Because plaintiff's allegations against Liang were grounded in negligent supervision, they fell under the first exception no matter where the alleged negligent supervision occurred. Accordingly, Liang was entitled to parental immunity, and the trial court erred when it denied summary disposition of plaintiff's claims against Liang.

2. Although plaintiff alleged both ordinary negligence and premises liability against Chan's, the allegations were analyzed under the premises-liability framework only, given that plaintiff's injuries arose from an allegedly dangerous condition on the land, i.e., the meat grinder, and Chan's liability arose solely from its duty as owner, possessor, or occupier of the land. Property owners generally owe no duty to supervise minor children of guests on their property. However, this rule applies only to claims of ordinary negligence. In the context of premises liability, the law imposes on landowners the duty to take reasonable or ordinary care to prevent injury to child licensees from dangerous conditions on the land. Because defendants did not dispute that plaintiff was a licensee of Chan's on the night of his injuries, and because the rule that property owners owe no duty to supervise minor children applies only to claims of ordinary negligence, the denial of summary disposition of plaintiff's premises-liability claim under MCR 2.116(C)(8) was appropriate.

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

Ross Law Office, PLLC (by *Sherrie C. Ross*) for plaintiff.

Harvey Kruse, PC (by *James E. Sukkar* and *Gregory P. LaVoy*) for defendants.

Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

MURRAY, C.J. We granted the application for leave to appeal filed by defendants, Guang Hui Liang (Liang) and G. Liang, Inc., doing business as Chan's Chinese Restaurant, Inc. (Chan's),[1] to consider whether Liang is entitled to parental immunity from the claims brought against him by his son, plaintiff McCarty Ji Liang, for an injury plaintiff suffered at Liang's business. For the reasons that follow, we hold that parental immunity bars the negligence-based claims against Liang but that the immunity doctrine has no bearing on the premises-liability claim against the corporate entity. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises from the injuries suffered by plaintiff at Chan's, his father Liang's restaurant.[2] Plaintiff, who was five years old at the time, arrived at Chan's between 9:30 p.m. and 10:00 p.m. with his mother, Guo Ying Cao, to surprise Liang for Father's Day. Although Chan's operated only as a take-out restaurant, it had a full dining room in the front where plaintiff and Cao

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[1] *Liang v Liang*, unpublished order of the Court of Appeals, entered April 17, 2018 (Docket No. 341010).

[2] Liang was the sole owner, operator, and employee of Chan's, a take-out restaurant generally open between 11:00 a.m. and 11:00 p.m.

waited while Liang prepared for closing by cleaning and prepping food for the next day. When Cao walked away to inform a customer at the take-out window that Chan's had closed for the night, plaintiff wandered out of the dining area and into a room that housed the restaurant's industrial meat grinder. The room, separated from the kitchen, was near the bathroom, and the meat grinder was plugged in on the floor. Plaintiff attempted to operate the meat grinder, but caught and injured his hand in the machine, ultimately requiring amputation of his hand.

In his suit against defendants, plaintiff alleged common-law negligence, negligent infliction of emotional distress (NIED), and premises liability. In lieu of an answer, defendants moved for summary disposition of the complaint pursuant to MCR 2.116(C)(7) and (8), asserting entitlement to parental immunity from plaintiff's claims. Plaintiff responded by arguing that parental immunity could not shield Chan's, a corporate entity, from liability and that his complaint did not allege negligent supervision as Liang was acting in a business capacity at the time of the injuries. Further, plaintiff asserted that parental immunity did not apply to his premises-liability claim because property owners owe a heightened duty of care to licensees. Ultimately, the trial court denied defendants' motion, holding that parental immunity could not shield defendants from liability because Liang was acting as a business owner when plaintiff's injuries occurred and had a duty to plaintiff as an invitee on the property.

II. ANALYSIS

We first address defendants' argument that the trial court erred when it concluded that parental immunity did not bar plaintiff's claims against Liang. We agree

and hold that, notwithstanding the fact that plaintiff's injuries occurred at Chan's, Liang's business, Liang was entitled to parental immunity.

"This Court reviews de novo a trial court's decision to deny a motion for summary disposition." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). When deciding the motion, "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party." *Fields v Suburban Mobility Auth for Regional Transp*, 311 Mich App 231, 234; 874 NW2d 715 (2015). "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*. (quotation marks and citation omitted).

A. PARENTAL IMMUNITY

Michigan courts had for many decades recognized the doctrine of parental immunity, which prohibited a minor from suing her parent in tort. See *Elias v Collins*, 237 Mich 175, 177; 211 NW 88 (1926), overruled by *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972). The *Elias* Court stated that the doctrine was created at common law to serve "the interest of the peace of the family and of society, and is supported by sound public policy." *Elias*, 237 Mich at 177. In 1972, however, the doctrine was redefined and limited; it was expressed as permitting "[a] child [to] maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent," except "(1) where the alleged negligent act involves an exercise of reasonable

parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Plumley*, 388 Mich at 8.

In *Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 143-144; 923 NW2d 894 (2018), our Court recently set out the current standards governing the application of the parental-immunity doctrine:

> Although parents undoubtedly have a duty to supervise their children, the law generally does not allow children to recover damages from their parents for a breach of this duty. In particular, "[a]t common law, a minor could not sue his or her parents in tort." The Michigan Supreme Court generally abolished intra-family tort immunity in *Plumley*, holding that a child could maintain a lawsuit against his or her parents for an injury resulting from a parent's negligence. However, the *Plumley* Court retained two exceptions to this rule, concluding that parental immunity remained:
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>> (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.
>
> A claim for negligent parental supervision of a child falls within the first *Plumley* exception, meaning that a parent is granted immunity and a child may not sue a parent for negligent supervision. [Citations omitted.]

See also *Vandonkelaar v Kid's Kourt, LLC*, 290 Mich App 187, 211; 800 NW2d 760 (2010) (MURRAY, J., dissenting) ("Although parents traditionally enjoyed immunity from suit by their minor child should they breach the duties owed to the child, the modern rule is that a child may sue his parents for negligence.

Plumley, 388 Mich at 8. An exception to this rule in Michigan, however, extends immunity to parents 'where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.' " *Id.*). The pivotal question for resolution here is whether the allegations against Liang fall within the first *Plumley* exception.

"In determining whether a defendant was exercising reasonable parental authority, the question is not whether the defendant acted negligently, but whether the alleged act reasonably fell within one of the *Plumley* exceptions," *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995), and this Court has repeatedly held that a claim for negligent parental supervision falls under the first exception, *Paige v Bing Constr Co*, 61 Mich App 480, 484; 233 NW2d 46 (1975) ("A parent's exercise of authority over his or her child involves more than discipline. It includes the providing of instruction and education so that a child may be aware of dangers to his or her well being."); *McCallister v Sun Valley Pools, Inc*, 100 Mich App 131, 139; 298 NW2d 687 (1980); *Goodwin*, 325 Mich App at 144.

Consequently, this Court has applied the parental-immunity doctrine where a child died from injuries sustained after falling into a man-made hole on a construction site, *Paige*, 61 Mich App at 481, a 15-year-old boy injured himself diving into his family's swimming pool, *McCallister*, 100 Mich App at 133, a seven-year-old girl shot herself with a loaded gun while on a fishing trip with her father, *Wright v Wright*, 134 Mich App 800, 803; 351 NW2d 868 (1984), and a child injured himself on a dirt bike given to him by his

father, *Haddrill v Damon*, 149 Mich App 702, 703-704; 386 NW2d 643 (1986).

We see no meaningful distinction between the cases cited above and the circumstances and claims at issue here. Despite plaintiff's efforts to plead in avoidance of parental immunity, the gravamen of his complaint consists of claims grounded in negligent supervision. See *McCallister*, 100 Mich App at 139 ("The gravamen of plaintiff's pleadings can only be construed as an action for negligent parental supervision."). Specifically, plaintiff alleged in his complaint that Liang failed to secure the meat grinder, protect him from the foreseeable risk of harm posed by the dangerous meat grinder, and warn him of the danger. These allegations focus exclusively on Liang's alleged failure to properly supervise plaintiff by preventing him from roaming, unsupervised, into a separate room that led to his injuries or to instruct plaintiff regarding apparent dangers on the premises. These actions (or inactions) fall squarely within the first *Plumley* exception.

That the injury occurred at Liang's business does not alter our conclusion. Neither this Court nor the Supreme Court has recognized a business exception to the applicability of parental immunity. What is dispositive under *Plumley* and its progeny is that plaintiff is suing his father for injuries that occurred as a result of his alleged failure to supervise. Since plaintiff's allegations against Liang are grounded in negligent supervision, they fall under the first *Plumley* exception no matter where the alleged negligent supervision occurred. Accordingly, Liang was entitled to parental immunity,[3]

[3] Chan's, of course, is not entitled to parental immunity. See *Wayne-Oakland Bank v Adam's Rib*, 48 Mich App 144, 146-147; 210 NW2d 121 (1973), where this Court held that parental immunity could not shield a partnership from liability for the negligence of a partner.

and the trial court erred when it denied summary disposition of plaintiff's claims against Liang.[4]

B. PREMISES LIABILITY

On the other hand, the trial court properly denied summary disposition of plaintiff's premises-liability claim against Chan's. Although plaintiff alleged both ordinary negligence and premises liability against Chan's, we analyze the allegations under the premises-liability framework only, because "plaintiff's injur[ies] arose from an allegedly dangerous condition on the land," *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012), i.e., the meat grinder, and Chan's liability arose solely from its "duty as owner, possessor, or occupier of [the] land," *id*.

Defendants argue that plaintiff's claims against Chan's are barred as a matter of law because Chan's did not have a duty to supervise plaintiff while he was under Cao's supervision. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5); *Maiden*, 461 Mich at 119-120. The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly

[4] The existence of liability insurance does not alter our conclusion. As stated in *McCallister*, 100 Mich App at 142, "it must be concluded that the presence of liability insurance alone is insufficient to justify the abrogation of parental immunity where the exercise of reasonable parental authority over the child is involved."

justify recovery.' " *Maiden*, 461 Mich at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

As defendants assert, "property owners generally owe no duty to supervise minor children of guests on their property." *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 305; 807 NW2d 909 (2011); see also *Stopczynski v Woodcox*, 258 Mich App 226, 236-237; 671 NW2d 119 (2003); *Bradford v Feeback*, 149 Mich App 67, 71-72; 385 NW2d 729 (1986). However, this rule applies only to claims of ordinary negligence. *Wheeler*, 292 Mich App at 304-305. *Bradford*, like this case, involved both failure-to-supervise ordinary-negligence and premises-liability claims, and the Court applied the rule to the ordinary-negligence claim only. *Bradford*, 149 Mich App at 70-72.

In the context of premises liability, the law imposes on landowners the duty to take "reasonable or ordinary care to prevent injury" to child licensees from dangerous conditions on the land. *Bragan v Symanzik*, 263 Mich App 324, 329; 687 NW2d 881 (2004) (quotation marks and citation omitted). Because defendants do not dispute that plaintiff was a licensee[5] of Chan's on

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[5] "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent," and the category generally includes social guests. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "An 'invitee' is a person who enters upon the land of another upon an invitation which carried with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception," and the term generally applies to those entering a property for business purposes. *Id*. at 596-597 (quotation marks and citation omitted; alterations in original). Because plaintiff entered Chan's as a social guest of Liang's, he would be considered a licensee for premises-liability purposes, something defendants do not argue against. Regardless, premises owners owe a heightened duty of care to child invitees as well. *Bragan*, 263 Mich App at 333.

the night of his injuries, thus imposing on them a duty to take reasonable care to prevent his injury, and because the rule that property owners owe no duty to supervise minor children applies only to claims of ordinary negligence, we hold that the denial of summary disposition of plaintiff's premises-liability claim under MCR 2.116(C)(8) was appropriate. The claim is not "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119 (quotation marks and citation omitted).[6]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER and REDFORD, JJ., concurred with MURRAY, C.J.

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[6] Defendants do not raise any argument with regard to plaintiff's NIED claim against Chan's.

In re CLAIM FOR SURPLUS FUNDS

Docket No. 344016. Submitted May 1, 2019, at Grand Rapids. Decided May 21, 2019, at 9:00 a.m.

BAERE, Co., filed a petition in the Kent Circuit Court seeking to recover funds from the mortgage foreclosure sale of petitioner's property. Petitioner purchased the property at issue by quitclaim deed subject to a mortgage that had been assigned to respondent, Specialized Loan Servicing LLC. Petitioner defaulted on the mortgage, and respondent foreclosed by advertisement for the amount owed under the mortgage—$51,915.75. At the foreclosure sale, respondent bid $20,300 on the property, but a third party ultimately bid on and purchased the property for $50,000. Respondent received $20,300 after the sheriff's sale, and both parties requested the remaining funds from the court officer who conducted the sale. After petitioner filed this action, both parties moved to recover the remaining $29,700. The court, Mark A. Trusock, J., awarded the remaining funds to respondent, concluding that under MCL 600.3252, petitioner was not entitled to the funds because the sale amount was less than the amount petitioner owed on the mortgage held by respondent. Petitioner appealed.

The Court of Appeals *held*:

The purpose of a mortgage foreclosure is to ensure that the mortgagor's debt, secured by a mortgage to a mortgagee, is satisfied. MCL 600.3252 provides that when any real estate is sold, if there remains in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which the real estate was sold and payment of the costs and expenses of the foreclosure and sale, the surplus must be paid to the mortgagor unless at the time of the sale or before the surplus is paid over, a subsequent mortgagee or lienholder files a written claim with the person who made the sale, who in turn must notify the circuit court of the claim. Given the dictionary definitions of "satisfy" and "surplus" as read in context with caselaw, the phrase "satisfying the mortgage on which the real estate was sold" in MCL 600.3252 refers to paying off the entirety of the debt secured by the mortgage; thus, satisfying a mortgage and extinguishing

the mortgage are not synonymous. In other words, for purposes of a foreclosure sale, while extinguishment of the debt extinguishes the mortgage, extinguishment of the mortgage does not extinguish the debt unless the total amount due under the mortgage is paid at the sale. Moreover, a mortgagee is not legally required to bid the full amount of the outstanding debt at a foreclosure sale. Accordingly, a mortgagee is entitled to any remaining funds after a foreclosure sale—up to the full amount of the outstanding debt under the mortgage—if the amount paid for the property was less than the total amount due under the mortgage. In this case, respondent's mortgage was not "satisfied" for purposes of MCL 600.3252 because the purchase price at the foreclosure sale was less than the amount owed under the mortgage; for that reason, there were no surplus funds for petitioner to seek. Respondent was not required to bid the full amount owed at the foreclosure sale, and respondent's original bid sheet did not constitute a contract or admission that the mortgage would be satisfied or discharged for $20,300. Accordingly, the trial court correctly denied the petition and granted respondent's motion for the remaining funds.

Affirmed.

1. MORTGAGES — FORECLOSURE OF MORTGAGE BY ADVERTISEMENT — WORDS AND PHRASES – "SATISFYING THE MORTGAGE ON WHICH THE REAL ESTATE WAS SOLD."

MCL 600.3252 provides that when any real estate is sold, if there remains in the hands of the officer or other person making the sale any surplus money after satisfying the mortgage on which the real estate was sold and payment of the costs and expenses of the foreclosure and sale, the surplus must be paid to the mortgagor unless, at the time of the sale or before the surplus is paid over, a subsequent mortgagee or lienholder files a written claim with the person who made the sale, who in turn must notify the circuit court of the claim; the phrase "satisfying the mortgage on which the real estate was sold" in MCL 600.3252 refers to paying off the entirety of the debt secured by the mortgage; satisfying a mortgage and extinguishing the mortgage are not synonymous; for purposes of a foreclosure sale, while extinguishment of the debt extinguishes the mortgage, extinguishment of the mortgage does not extinguish the debt unless the total amount due under the mortgage is paid at the sale; a mortgagee is entitled to any remaining funds after a foreclosure sale—up to the full amount of the outstanding debt under the mortgage—if the amount paid for the property was less than the total amount due under the mortgage.

2. MORTGAGES — FORECLOSURE OF MORTGAGE BY ADVERTISEMENT — BIDS BY MORTGAGEE.

A mortgagee is not legally required to bid the full amount of the outstanding debt at a foreclosure sale.

Bernard Schaefer for petitioner.

Randall S. Miller & Associates, PC (by *Raymond H. K. Scodeller*) for respondent.

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

PER CURIAM. Petitioner, BAERE, Co., appeals as of right the trial court's order granting summary disposition in favor of respondent, Specialized Loan Servicing LLC. We affirm.

I. BACKGROUND

This case arises out of the foreclosure sale of property located in Grand Rapids, Michigan (the property). The original property owner took out a mortgage on the property, and he died approximately eleven years later. The mortgage was assigned to respondent, and in the meantime, petitioner purchased the property via quitclaim deed from the original property owner's son. The mortgage eventually fell into default, whereupon respondent initiated a foreclosure by advertisement. As of the day of the foreclosure sale, the amount of the indebtedness on the mortgage was $51,915.75. Respondent made an initial bid of $20,300. The successful bidder, nonparty RDG New Homes, LLC, bid $50,000. Respondent received $20,300 after the sale, and the sheriff held the remaining proceeds. The parties both sought the remaining $29,700 of "surplus" funds. After holding a hearing and considering the parties' arguments, the trial court determined that petitioner was

not entitled to any funds from the foreclosure sale because the mortgage held by respondent was not satisfied by the proceeds of the sale. Accordingly, the trial court granted respondent's motion seeking the remaining $29,700 from the sale. Petitioner appeals, arguing that the trial court misinterpreted MCL 600.3252.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002). "A summary disposition motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Weingartz Supply Co v Salsco Inc*, 310 Mich App 226, 232; 871 NW2d 375 (2015) (quotation marks and citation omitted). A genuine issue of material fact exists when the record, "giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (quotation marks and citation omitted). We also review de novo questions of statutory interpretation, with the goal of ascertaining and applying the intent of the Legislature as expressed by the language of the statute. *In re $55,336.17 Surplus Funds*, 319 Mich App 501, 506-507; 902 NW2d 422 (2017).

III. ANALYSIS

As noted, petitioner argues that the trial court misinterpreted MCL 600.3252 and erroneously re-

jected petitioner's claim that it was the only party entitled to the remaining $29,700. We disagree.

MCL 600.3252 provides, in its entirety:

> If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, *any surplus money after satisfying the mortgage on which the real estate was sold*, and payment of the costs and expenses of the foreclosure and sale, the surplus shall be paid over by the officer or other person on demand, to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus shall be so paid over, some claimant or claimants, shall file with the person so making the sale, a claim or claims, in writing, duly verified by the oath of the claimant, his agent, or attorney, that the claimant has a subsequent mortgage or lien encumbering the real estate, or some part thereof, and stating the amount thereof unpaid, setting forth the facts and nature of the same, in which case the person so making the sale, shall forthwith upon receiving the claim, pay the surplus to, and file the written claim with the clerk of the circuit court of the county in which the sale is so made; and thereupon any person or persons interested in the surplus, may apply to the court for an order to take proofs of the facts and circumstances contained in the claim or claims so filed. Thereafter, the court shall summon the claimant or claimants, party, or parties interested in the surplus, to appear before him at a time and place to be by him named, and attend the taking of the proof, and the claimant or claimants or party interested who shall appear may examine witnesses and produce such proof as they or either of them may see fit, and the court shall thereupon make an order in the premises directing the disposition of the surplus moneys or payment thereof in accordance with the rights of the claimant or claimants or persons interested. [Emphasis added.]

A mortgage is "[a] conveyance of an interest in real estate to secure the performance of an obligation, typi-

cally a debt. The very purpose of mortgage foreclosure is to ensure that the mortgagor's debt, secured by a mortgage to a mortgagee, is satisfied." *In re $55,336.17 Surplus Funds*, 319 Mich App at 508 (quotation marks and citation omitted; alteration in original).

Petitioner argues that respondent's mortgage was satisfied once it received the $20,300 payment from the foreclosure sale. Petitioner asserts, correctly, that a foreclosure sale extinguishes the mortgage. *Mtg & Contract Co v First Mortgage Bond Co*, 256 Mich 451, 452; 240 NW 39 (1932). Petitioner argues that respondent's bid of $20,300 represented the amount necessary to satisfy the mortgage. Quoting MCL 600.3252, petitioner argues that, therefore, any amount exceeding this bid constituted "surplus funds" under the statute because the funds remained "in the hands of the officer or other person making the sale[.]" Petitioner asserts that in this case, MCL 600.3252 only permits the mortgagor, or in this case petitioner as the mortgagor's assignee, to obtain the remaining $29,700.

Petitioner's argument depends on the meaning of the statutory phrase "satisfying the mortgage on which the real estate was sold[.]" *Id*. We must first decide whether the mortgage was satisfied before we can determine if a surplus existed. The terms "satisfy" and "surplus" are not defined in the statute. As a result, we will consult the dictionary to determine the common and ordinary meanings of the words. See *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). The word "satisfy" is defined, in relevant part, as "to carry out the terms of (as a contract): DISCHARGE," and "to meet a financial obligation to[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "surplus," in pertinent part, as "the amount that remains when use or need is satisfied[.]"

We further observe that a mortgage is fundamentally a security for a debt or liability and that extinguishment of the debt therefore extinguishes the mortgage. *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942). However, the inverse is not true: extinguishment of the mortgage does not necessarily extinguish the debt unless the total amount due under the terms of the mortgage is paid at the foreclosure sale. *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1929); *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551, 555; 444 NW2d 217 (1989). Because the amount due on the mortgage was $51,915.75 at the time of the sale and the successful bid was $50,000, the debt was not extinguished. Furthermore, respondent was paid only $20,300, leaving $31,615.75 remaining due under the mortgage. Consequently, respondent could pursue a deficiency judgment against the debtor, the original property owner's estate. See *Bank of America NA v First American Title Ins Co*, 499 Mich 74, 88; 878 NW2d 816 (2016). Finally, we note that the purpose of MCL 600.3252 is to protect the rights of others after the mortgagee has recovered its debt. *In re $55,336.17 Surplus Funds*, 319 Mich App at 510-511.

We conclude that when the definitions of "satisfy" and "surplus" are read in context with the caselaw, it is unambiguous that "satisfying the mortgage on which the real estate was sold" refers to paying off the entirety of the debt secured by the mortgage. In other words, *satisfying* a mortgage and *extinguishing* the mortgage are not synonymous. It is therefore beyond dispute that respondent's mortgage was not "satisfied" and that there were no "surplus funds" for petitioner to seek.

In the alternative, petitioner argues that that the mortgage was satisfied once respondent received the

$20,300 payment from the foreclosure sale because respondent expressly agreed to that amount in its "bid sheet." In other words, petitioner argues that respondent agreed that the lesser amount would satisfy the mortgage. Petitioner concludes that respondent therefore agreed that its mortgage would be satisfied and discharged in exchange for the $20,300 and that any further amount of money must necessarily constitute a surplus. Respondent contends that "[t]he bid sheet is not [a] signed document, it is not a contract, it is not an agreement and it is not a waiver of any deficiency." We agree with respondent that the "bid sheet" does not appear to be a contract or a binding admission establishing the amount of the debt. We are aware of no law requiring mortgagees to bid the full amount owed during a foreclosure sale, and we decline to create any such law.

IV. CONCLUSION

We conclude that the phrase "satisfying the mortgage on which the real estate was sold" in MCL 600.3252 refers to paying the entirety of the debt secured by the mortgage. We are aware of no legal requirement for mortgagees to bid the full amount of any outstanding debt at a foreclosure sale, and the "bid sheet" in this matter did not constitute a contract or admission. The trial court therefore correctly denied the petition and granted respondent's motion for the funds.

Affirmed. Respondent, being the prevailing party, may tax costs. MCR 7.219(A).

GLEICHER, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ., concurred.

REAUME v TOWNSHIP OF SPRING LAKE

Docket No. 341654. Submitted May 1, 2019, at Grand Rapids. Decided May 21, 2019, at 9:05 a.m. Leave to appeal sought.

Susan Reaume filed an action in Ottawa Circuit Court against Spring Lake Township, seeking to compel the township's zoning board of appeals (the ZBA) to grant her application for a short-term rental license. In 2003, plaintiff purchased a home in the township that was located in the "R-1 Low Density Residential" zoning district; she lived at the property full-time until 2014. In 2015, plaintiff retained a property-management company to determine whether she could rent the property as a short-term rental. According to the management company's manager, Barbara Hass, Connie Meiste from the township's office informed her that the township had no restrictions on short-term or long-term rentals. According to plaintiff, the township's zoning administrator, Lukas Hill, not only approved plaintiff's rental listing agreement, stating that it complied with the specific prohibition against multifamily dwellings in the R-1 zoning district, but also expressly stated that plaintiff had the lawful right to use the property as a short-term rental. On the basis of that information, plaintiff made improvements to the property, and in 2015 and 2016, she rented it out seasonally as a short-term vacation rental; plaintiff's neighbors filed complaints with the township about the rentals. In December 2016, the township amended the Spring Lake Township Code of Ordinances by adding Article 5 to Chapter 6 of the code. In that regard, Ordinance No. 255 prohibited short-term rentals in districts zoned R-1, allowed long-term rentals of more than 28 days in those districts, and required all short-term rentals to be registered and licensed with the township's community development director before a property could be rented. In 2017, the township adopted Ordinance No. 257; the ordinance allowed limited short-term rentals—that is, the rental of any dwelling for any one or two rental periods of up to 14 days, not to exceed 14 days total in a calendar year—in districts zoned R-1. The township rejected plaintiff's application for a short-term rental license, and the ZBA denied her appeal of that decision.

The trial court, Jon A. Van Allsburg, J., affirmed the ZBA's decision to deny the short-term rental license request. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. A municipality can be equitably estopped from enforcing a zoning ordinance if a party reasonably relies to its prejudice on a representation made by the municipality. Standing alone, a municipality's historical failure to enforce a particular zoning ordinance is insufficient to preclude enforcement of that ordinance in the present. However, a municipality may, in some cases, be estopped from enforcing a zoning ordinance when the positive acts of municipal officials induce a plaintiff to act in a certain manner and the plaintiff incurs a change of position or makes expenditures in reliance on the officials' action. A municipality will generally not be estopped from enforcing zoning ordinances absent exceptional circumstances; the circumstances must be viewed as a whole with no single factor being decisive, and a township official's casual private advice does not constitute exceptional circumstances. In this case, without additional evidence, Meiste's purported statement to Hass regarding short-term rentals did not constitute a statement that any kind of rental was explicitly authorized in the township. Moreover, there was no evidence that Meiste had the authority to bind the township. Hill's approval of plaintiff's revised rental listing—specifically, that it complied with the specific prohibition against multifamily dwellings in the R-1 zoning district—was not proof that the rental did not violate other restrictions. The documents plaintiff relied on to support her action did not constitute a formal determination that plaintiff's use of the property was lawful. And as with Meiste, there was no record evidence that Hill had individual authority to bind the township to a zoning determination. Accordingly, the township was not equitably estopped from enforcing its zoning and regulatory ordinances to preclude plaintiff from using the property for short-term rentals.

2. MCL 125.3208(1) provides that if the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment. A prior nonconforming use is a vested right in the use of a particular property that does not conform to zoning restrictions; such a use is protected because it lawfully existed before the zoning regulation's effective date. Before Ordinance No. 255 expressly prohibited short-term rentals in the R-1 zoning district, the definition of

"Dwelling, Single Family" in the Spring Lake Township Zoning Ordinance unambiguously excluded transient or temporary rental occupation. Therefore, plaintiff's short-term rental of the property was never lawful, and she was not entitled to continue renting the property as a nonconforming use after the township adopted Ordinance No. 255. Moreover, the township's prior failure to enforce its ordinances did not grant plaintiff the right to continue violating the zoning ordinance. Accordingly, the trial court correctly affirmed the ZBA's denial of plaintiff's request for a short-term rental license.

Affirmed.

1. ZONING — ENFORCEMENT — DEFENSES — EQUITABLE ESTOPPEL.

A municipality can be equitably estopped from enforcing a zoning ordinance if a party reasonably relies to its prejudice on a representation made by the municipality; standing alone, a municipality's historical failure to enforce a particular zoning ordinance is insufficient to preclude enforcement of that ordinance in the present; a municipality may, in some cases, be estopped from enforcing a zoning ordinance when the positive acts of municipal officials induce a plaintiff to act in a certain manner and the plaintiff incurs a change of position or makes expenditures in reliance on the officials' action; a municipality will generally not be estopped from enforcing zoning ordinances absent exceptional circumstances; the circumstances must be viewed as a whole with no single factor being decisive, and a township official's casual private advice does not constitute exceptional circumstances.

2. ZONING — ENFORCEMENT — NONCONFORMING USES.

MCL 125.3208(1) provides that if the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment; a prior nonconforming use is a vested right in the use of a particular property that does not conform to zoning restrictions; such a use is protected because it lawfully existed before the zoning regulation's effective date.

Mill Point Legal Services (by *Edward A. Grafton* and *Jennifer L. Lynn*) for plaintiff.

McGraw Morris PC (by *Craig R. Noland* and *Amanda M. Zdarsky*) for defendant.

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

RONAYNE KRAUSE, J. Plaintiff, Susan Reaume, appeals by leave granted[1] the trial court's order affirming the denial by defendant, the township of Spring Lake (the Township), of plaintiff's application for a short-term rental license. We affirm.

I. BACKGROUND

In 2003, plaintiff purchased a home (the property) located in the Township. The property has at all relevant times been located within the "R-1 Low Density Residential" zoning district. Plaintiff used the property as her full-time residence until 2014. In 2015, plaintiff retained a property-management company, and an agent of that company made a telephone inquiry to the Township regarding restrictions on short-term rentals for the property. According to the agent (manager Barbara Hass), Township employee Connie Meiste "said that Spring Lake Township had no restrictions on short term or long term rentals." Plaintiff made substantial improvements to the property, and in 2015 and 2016, she rented it out seasonally as a short-term vacation rental. As will be discussed further, Hass averred and plaintiff contends that Lukas Hill, the Township's zoning administrator,[2] "expressly affirmed [plaintiff's] right to lawfully use [the property] as a short-term rental." Plaintiff's neighbors, however, objected to the use of the property for short-term rentals and lodged complaints with the Township.

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[1] *Reaume v Spring Lake Twp*, unpublished order of the Court of Appeals, entered June 4, 2018 (Docket No. 341654).

[2] Apparently, the Township uses the terms "zoning administrator" and "community development director" interchangeably.

In December 2016, the Township amended the Spring Lake Township Code of Ordinances by adopting Ordinance No. 255; the amendment prohibited short-term rentals in the R-1 zoning district. However, the ordinance allowed long-term rentals of more than 28 days. The ordinance provided that all short-term rentals had to be registered and licensed with the community development director before rental activity could occur. In 2017, the Township also adopted Ordinance No. 257, amending the Spring Lake Township Zoning Ordinance to allow "short-term rentals" and "limited short-term rentals," which had independent definitions, in certain zoning districts. Ordinance No. 257 permitted "limited short-term rentals," but not "short-term rentals," in R-1 zones. The amendment defined "limited short-term rentals" as "[t]he rental of any Dwelling for any one or two rental periods of up to 14 days, not to exceed 14 days total in a calendar year."

Plaintiff applied for a short-term rental license; the Township denied the application. She appealed that decision to the Township's Zoning Board of Appeals (the ZBA), which denied her appeal. Plaintiff then appealed that decision in the trial court. Following a hearing, the trial court affirmed the Township's decision in a written opinion and order. We granted plaintiff's application for leave to appeal.

II. STANDARDS OF REVIEW

We review the interpretation of ordinances de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003). Ordinances are interpreted in the same manner as statutes: we must apply clear and unambiguous language as written, and any rules of construction are applied "in order to give effect to the legislative body's intent." *Brandon Charter Twp v*

Tippett, 241 Mich App 417, 422; 616 NW2d 243 (2000). We also review de novo the application of legal and equitable doctrines. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Sylvan Twp v City of Chelsea*, 313 Mich App 305, 315-316; 882 NW2d 545 (2015). It is well established that courts will consider the substance of pleadings and look beyond the names or labels applied by the parties. *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

"In general, we review de novo a circuit court's decision in an appeal from a ZBA decision." *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009). However, there is no single standard of review applicable to the appeal itself because zoning cases typically entail questions of both fact and law. *Macenas v Michiana*, 433 Mich 380, 394-395; 446 NW2d 102 (1989). Courts must defer to a ZBA's factual findings to the extent they are "supported by competent, material, and substantial evidence on the record[.]" *Id*. at 395. We, in turn, review the circuit court's factual findings for clear error to determine whether the circuit court properly applied the substantial-evidence test. *Hughes*, 284 Mich App at 60. The ZBA's decisions on the basis of its factual findings are also given deference "provided they are procedurally proper . . . and are a reasonable exercise of the board's discretion[.]" *Macenas*, 433 Mich at 395. The ZBA's determinations of law are afforded no deference. *Id*. at 395-396.

III. ESTOPPEL

We observe, initially, that much of plaintiff's argument is, in substance and effect, an equitable-estoppel argument. Equitable estoppel may preclude the enforcement of a zoning ordinance if a party reasonably

relies to its prejudice on a representation made by the municipality. *Lyon Charter Twp v Petty*, 317 Mich App 482, 490; 896 NW2d 477 (2016), vacated in part on other grounds 500 Mich 1010 (2017). Generally, plaintiff contends that before the Township's adoption of Ordinance Nos. 255 and 257, it had formally determined and communicated to plaintiff that her use of the property for short-term rentals was lawful. Plaintiff therefore concludes that her use of the property is necessarily "grandfathered" and that the Township may not deny her permission to continue using the property for short-term rentals. Plaintiff argues that she expended considerable sums of money on renovations and modifications to the property in reliance on the Township's alleged assurances that short-term rentals were lawful in the R-1 zoning district. However, plaintiff's argument turns on making untenable extrapolations from statements made by individuals who had no authority to bind the Township.

"[A] historical failure to enforce a particular zoning ordinance, standing alone, is insufficient to preclude enforcement in the present." *Lyon*, 317 Mich App at 489. A municipality may, in some cases, be estopped from enforcing zoning ordinances "because of the positive acts of municipal officials which induced plaintiff to act in a certain manner, and where plaintiff relied upon the official's actions by incurring a change of position or making expenditures in reliance upon the officials' actions." *Parker v West Bloomfield Twp*, 60 Mich App 583, 591; 231 NW2d 424 (1975); see also *Lyon*, 317 Mich App at 490. The general rule is against estopping municipalities from enforcing zoning ordinances in the absence of "exceptional circumstances," which must be viewed as a whole, and "no factor is in itself decisive." *Pittsfield Twp v Malcolm*, 375 Mich 135, 147-148; 134 NW2d 166 (1965). However, a municipality cannot be estopped

from enforcing zoning ordinances by the unauthorized or illegal conduct of its officers. *Parker*, 60 Mich App at 594-595; see also *Blackman Twp v Koller*, 357 Mich 186, 189; 98 NW2d 538 (1959). "Casual private advice offered by township officials does not constitute exceptional circumstances." *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 576; 425 NW2d 180 (1988), citing *White Lake Twp v Amos*, 371 Mich 693, 698-699; 124 NW2d 803 (1963).

Plaintiff's only argument of serious concern pertains to the conversation that Barbara Hass, the manager of the property-management company, had "with Connie Meiste at the Spring Lake Township offices via telephone[.]" According to Hass's affidavit, she was told "that Spring Lake Township had no restrictions on short term or long term rentals." It is reasonable to expect municipal employees to provide accurate information upon request. However, this record does not disclose enough detail about the conversation to draw any conclusions. For example, at the time of Hass's inquiry, it appears that the Township did not, in fact, have any formal regulations that specifically addressed the rental of property. Nevertheless, that is not necessarily equivalent to a statement that any kind of rental was explicitly authorized. We also do not know precisely what questions Hass asked. It is unclear whether Hass's affidavit repeats a direct quotation from Meiste's answer or whether the affidavit sets forth Hass's understanding of the gravamen of Meiste's answer. Importantly, the record provides no support for the proposition that Meiste had any authority to bind the Township. Because plaintiff has the burden of proof, we are unimpressed with plaintiff's protestations to the effect that the Township has not *disproved* Meiste's authority or anything about the nature of her statement to Hass.

Plaintiff argues that the Township's zoning administrator, Lukas Hill, explicitly approved plaintiff's revised rental listing after obtaining clarification that the property was not being improperly held out as a multifamily dwelling. Again, there is nothing in the record to show that Hill had individual authority to bind the Township to a zoning determination.[3] Furthermore, the record indicates that the Township's enforcement protocol has historically been to address violations as they are reported in the forms of complaints, rather than to affirmatively look for violations. The record does not reflect whether the Township had received any complaints at the time of the original rental listing alleging a violation of the R-1 zoning requirements. Plaintiff extrapolates too much from Hill's satisfaction that plaintiff's revised rental listing complied with the specific prohibition against multifamily dwellings in the R-1 zoning district. The fact that the revised listing did not contravene one restriction is not proof that it did not contravene *any* restrictions. In any event, as noted, failure to enforce a zoning ordinance does not constitute approval of an otherwise illegal use.

[3] Plaintiff cites *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 124; 440 NW2d 907 (1989), rev'd in part on other grounds 438 Mich 488 (1991), for the proposition that Hill's "interpretation" should be imputed to the Township. Hill does not appear to have rendered an "interpretation." More importantly, the pertinent holding in *Gordon Sel-Way* was that *knowledge* possessed by a corporation's managerial employees may be imputed to the corporation, such that the corporation may not willfully ignore any duties that might arise as a consequence of that knowledge. *Id*. In this case, the Township does not claim ignorance of any of the statements made by its employees and officers but, rather, properly challenges their meaning and significance. *Gordon Sel-Way* did not purport to contravene the caselaw we have discussed that limits the circumstances under which a municipality's employees or officers may bind the municipality.

Plaintiff also argues that Hill had "determined unequivocally that short-term rentals were lawful under the Spring Lake Township Zoning Ordinance . . . ." We have carefully reviewed the documents plaintiff provided in support. One document is a printout of an e-mailed complaint from one of plaintiff's neighbors regarding plaintiff's rentals on which an unidentified person handwrote, "Lukas says nothing we can do about it as yet." No explanation has been provided as to why Hill might have made the statement, and we decline to speculate. Another document, this one from Township Supervisor John Nash, conveyed advice to neighbors about actions they could take; it contains no hint of a determination that plaintiff's use of the property was actually lawful. Neither document constitutes a formal determination by the Township that plaintiff's use of the property for short-term rentals was actually lawful, and neither document is binding on the township. Indeed, neither document appears even to constitute a private opinion that plaintiff's use of the property was lawful. Plaintiff also relies on the fact that the Township had not cited any other short-term rentals, which, again, is not an expression of approval.

In summary, plaintiff mostly relies on seriously mischaracterizing statements made by individuals. We conclude that the statements do not provide a basis for estopping, formally or substantively, the Township from enforcing its zoning or regulatory ordinances to preclude plaintiff from using the property for short-term rentals.

IV. LAWFUL NONCONFORMING USE

MCL 125.3208(1) provides that "[i]f the use of a dwelling, building, or structure or of the land is lawful

at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment." This is often referred to colloquially as "grandfathering." A similar provision was included in § 335 of the Spring Lake Township Zoning Ordinance, which provides:

> Purpose and Intent. Nonconforming Buildings, Structures, Lots, and uses which do not conform to one (1) or more of the provisions or requirements of this Ordinance or any subsequent amendments thereto, but which were lawfully established prior to the adoption of this Ordinance or subsequent amendment, may be continued. However, no such Building, Structure or use shall be enlarged or extended, and no nonconforming Lot created or made more nonconforming, except as provided herein. It is the intent of this Section to reduce or remove the number of nonconforming occurrences in the Township.

"A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993).

On appeal, plaintiff does not challenge whether Ordinance Nos. 255 and 257 were properly adopted or whether the ordinances prohibit short-term rentals in properties zoned R-1. As discussed, there is no merit to plaintiff's contention that the Township had itself determined plaintiff's use of her property for short-term rentals to be lawful. Nevertheless, if that use of the property *actually was* lawful before the adoption of Ordinance Nos. 255 and 257, then plaintiff has a right to continue using her property for short-term rentals. We conclude, however, that the use was not lawful before the adoption of Ordinance Nos. 255 and 257.

Plaintiff argues that her use of the property as a short-term rental was lawful under the definition of the term "dwelling" in the Spring Lake Township Zoning Ordinance. We disagree. Section 205 of the Spring Lake Township Zoning Ordinance defines "dwelling" as follows:

> Any Building or portion thereof which is occupied in whole or in part as a home, residence, or sleeping place, either permanently or temporarily, by one (1) or more Families, but not including Motels or tourist rooms. Subject to compliance with the requirements of Section 322, a Mobile Home shall be considered to be a Dwelling.
>
> (1) Dwelling, Single-Family: A Building designed for use and occupancy by one (1) Family only.
>
> (2) Dwelling, Two-Family: A Building designed for use and occupancy by two (2) Families only and having separate living, cooking and eating facilities for each Family.
>
> (3) Dwelling, Multi-Family: A Building designed for use and occupancy by three (3) or more Families and having separate living, cooking and eating facilities for each Family.

The Spring Lake Township Zoning Ordinance does not define the term "tourist room," but it defines "motel" under § 214 as follows:

> A Building or group of Buildings on the same Lot, whether Detached or in connected rows, containing sleeping or Dwelling Units which may or may not be independently accessible from the outside with garage or Parking Space located on the Lot and designed for, or occupied by transient residents. The term shall include any Building or Building groups designated as a Hotel, motor lodge, transient cabins, cabanas, or by any other title intended to identify them as providing lodging, with or without meals, for compensation on a transient basis.

Finally, the term "family" is defined under § 207 as:

> A single individual or individuals, domiciled together whose relationship is of a continuing, non-transient, domestic character and who are cooking and living together as a single, nonprofit housekeeping unit, but not including any society, club, fraternity, sorority, association, lodge, coterie, organization, or group of students, or other individuals whose relationship is of a transitory or seasonal nature, or for anticipated limited duration of school terms, or other similar determinable period of time.

We note that the R-1, R-2, R-3, and R-4 zoning districts all permit "Dwelling, Single-Family" use, but only in the R-4 zoning district are "Dwelling, Two-Family" and "Dwelling, Multi-Family" uses permitted. The stated "intent" of R-4 zoning is that such zoning "is dispersed throughout the Township to avoid pockets of rental or transient housing."

Read as a whole, the definition of "Dwelling, Single-Family" unambiguously excludes transient or temporary rental occupation. Plaintiff focuses on the word "temporarily" in the overview definition of "Dwelling." Plaintiff fails to note that although *some* types of dwellings permit temporary occupancy, *single-family* dwellings do not. The definition of single-family dwelling emphasizes use by one family *only*, and "family" expressly excludes "transitory or seasonal" or otherwise temporary relationships. Notwithstanding the possibility of some temporary occupancy, *any* kind of "dwelling" excludes a "motel." "Motels" expressly provide transient lodging, or "tourist rooms," which are undefined but reasonably understood as also referring to transient lodging. Plaintiff's use of her property for short-term rentals seemingly fits the definition of a "motel." Finally, it is notable to contrast the descriptions of the R-1 through R-3 zoning districts with the description of the R-4 zoning district, which suggests that some form of temporary occupancy might be

permitted in two-family or multi-family dwellings. The Spring Lake Township Zoning Ordinance clearly forbids short-term rental uses of property in the R-1 zoning district, irrespective of whether the ordinance does so in those exact words.

As plaintiff notes, there was never any serious dispute that she actually was using the property for short-term rental purposes. However, doing so was not permitted in the R-1 district at any time. Therefore, plaintiff is not entitled to continue doing so as a prior nonconforming use, notwithstanding the Township's prior failure to enforce its zoning requirements.

V. PUBLICATION

Unpublished opinions of this Court have no precedential effect under either stare decisis, MCR 7.215(C)(1), or the "first-out rule," MCR 7.215(J)(1). Our court rules set forth a list of standards for publication in MCR 7.215(B). We note that Subrule (B) does not state that an opinion may not be published for other reasons, only that it "must be published if" any of the enumerated conditions are present. Under MCR 7.215(D), a party may request publication after an opinion has been issued. However, we remind the bar that if they believe any basis for publication exists, it is enormously more helpful—to us and to them—if they bring that basis to our attention *before* the case is submitted. Advocating for publication, or at least the possibility of publication, from the outset guarantees that we can properly consider any such basis at the most appropriate and optimal time, and doing so also avoids the taint of self-interested opportunism after issuance. We would likely look more favorably upon a publication request when we have already had the opportunity to holistically analyze

the potential merits of publication in context, i.e., while analyzing the rest of the case.

In this matter, plaintiff has brought to our attention the unpublished case of *Concerned Prop Owners of Garfield Twp, Inc v Garfield Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 342831). This case is unpublished, and we have not relied on it in our substantive analysis. However, the existence of this case supports that the issues presented in the current matter are of increasing importance and commonness in Michigan and that the bench and bar would benefit from the certainty that a published opinion would bring. We conclude that publication of this matter is warranted under MCR 7.215(B)(5).

VI. CONCLUSION

Plaintiff's use of the property for short-term rentals was never permitted under the Township's R-1 zoning. This is consistent with caselaw establishing that commercial or business uses of property—that is, uses intended to generate a profit—are generally inconsistent with residential uses of property. See *Terrien v Zwit*, 467 Mich 56, 61-65; 648 NW2d 602 (2002). Plaintiff's use of the property for short-term rental was not a prior nonconforming use because it was never lawful under the Spring Lake Township Zoning Ordinance. The Township's prior failure to enforce the ordinance does not confer upon plaintiff a right to continue violating the ordinance. Neither does a statement made by any individual without the power to bind the Township confer that right upon plaintiff, especially when none of the statements clearly or affirmatively expressed an opinion that short-term rentals in the R-1 zoning district were lawful. Accord-

ingly, the trial court properly affirmed the ZBA's denial of plaintiff's application for a short-term rental license.

Affirmed. Defendant, being the prevailing party, may tax costs. MCR 7.219(A).

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

OLIN v MERCY HEALTH HACKLEY CAMPUS

Docket Nos. 341523 and 342937. Submitted April 10, 2019, at Grand Rapids. Decided May 21, 2019, at 9:10 a.m.

In Docket No. 341523, Jaxon Olin, by his next friend, Nicole Curtis, brought an action in the Muskegon Circuit Court against Mercy Health Hackley Campus; Lakeshore Anesthesia Services PC; Edward Winiecke, M.D.; Elizabeth Pitt, M.D.; Shoreline E.N.T., PLC; and Paul E. Lomeo, D.O., alleging medical malpractice following a surgery plaintiff underwent on September 22, 2014, when he was 10 years old. On September 20, 2016, two days before the two-year period of limitations would have otherwise expired under MCL 600.5805(8), plaintiff's attorney served on defendants a notice of intent (NOI) to file a medical malpractice claim, which tolled the statutory limitations period for 182 days. On March 22, 2017, plaintiff filed his complaint, with Curtis, who was plaintiff's mother, operating as his next friend pending formal appointment by the trial court. The parties agreed that the statutory limitations period would have expired on March 23, 2017, and that plaintiff filed the complaint within the statutory limitations period. Defendants had filed their answers and the parties were engaged in discovery when plaintiff's counsel realized that the trial court had not yet formally appointed Curtis as plaintiff's next friend. On September 8, 2017, plaintiff's counsel filed a petition seeking Curtis's appointment and noting that, pursuant to MCR 2.201(E), the court was required to appoint a next friend because plaintiff did not have a conservator. Five days later, on September 13, 2017, the trial court entered an order appointing Curtis as plaintiff's next friend. On that same day, Lomeo and Shoreline E.N.T. moved for summary disposition pursuant to MCR 2.116(C)(5) (legal capacity to sue), (7) (statute of limitations), and (8) (failure to state a claim). The motion asserted that because Curtis had not been appointed as plaintiff's next friend when the action was filed, she did not have standing to file it. Defendants further argued that neither plaintiff nor Curtis had standing to pursue the action on March 22, 2017, or at any time before the expiration of the limitations period on March 23, 2017, according to *Cotter v Britt*, unpublished per curiam opinion of the Court of Appeals, issued May 31, 2007 (Docket No. 274776). The other defendants joined the motion. The

trial court, William C. Marietti, J., concluded that *Cotter* was persuasive and relied on its reasoning to grant defendants' motion for summary disposition and dismiss plaintiff's case with prejudice. In Docket No. 342937, plaintiff filed a lawsuit that was identical to Docket No. 341523 after receiving the trial court's written opinion with respect to the issue raised in Docket No. 341523. The trial court also dismissed that lawsuit. Plaintiff appealed, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. Michigan courts have held that when a plaintiff acts on behalf of a minor in a representative capacity, the cause of action still belongs to the minor. In this case, the trial court and defendants relied on *Cotter*'s assertion that a next friend is the real party in interest—even though the beneficial interest rests with the minor—to argue that Curtis was the real party in interest while plaintiff held the beneficial interest. However, the distinction between the real party in interest and the one with the beneficial interest typically arises in circumstances involving statutory standing and assignment of claims, in cases in which plaintiffs appear not to have an economic interest in the outcome of litigation, or when contracts are involved; no statute or published authority existed that made this distinction when a next friend acts on behalf of a minor to pursue the minor's personal-injury claim. A minor may sue and be sued as provided by MCR 2.201(E), which lays out the rules of representation and the procedure for appointing representatives for minors in court proceedings, including for minor plaintiffs. Nothing in the plain language of MCR 2.201(E) requires the filing of a petition for appointment or the completion of a next-friend appointment before suit or simultaneously with the filing of a complaint on behalf of a minor, nor do defendants point to any current statute or court rule containing such a requirement. In fact, the court rule repeatedly refers to what "the court" must do, clearly implying that it is the court assigned to the minor's lawsuit that handles the next-friend appointment process. In other words, the court rule implicitly assumes that the complaint has already been filed, and properly so, even though no next friend has yet been appointed. The language in MCR 2.201(E) expressly addressing circumstances under which the court is required to make such an appointment *after* a complaint is filed further belies the notion that a next friend must be appointed prior to or along with the filing of a complaint. The court rules operate in a manner that supports plaintiff's

position that the absence of a precomplaint appointment or a petition simultaneously filed with the complaint does not render defective a timely filed complaint on behalf of a minor plaintiff. In sum, the governing court rules and caselaw clearly indicate that a minor is the real party in interest in a claim for damages arising from alleged medical malpractice and that the appointment of a next friend prior to or simultaneously with the filing of the complaint on behalf of the minor is not expressly required.

2. MCL 600.5856(a) provides that the statutes of limitations or repose are tolled at the time the complaint is filed if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules. In this case, MCL 600.5856(a) applied to toll the applicable period of limitations pending proper service. Defendants argued that because the trial court did not formally appoint Curtis before the expiration of the applicable limitations period, she was never a "real party in interest" and that plaintiff, as a minor, did not have a right to commence suit in the first instance. However, the defense that a plaintiff is not the real party in interest is not the same as the legal-capacity-to-sue defense. Defendants in this case conflated the requirements of establishing capacity to sue and standing/real party in interest. There was no principled reason under the court rules or in Michigan's decisional law to require that the next-friend appointments occur before commencing suit or before the expiration of the statutory limitations period, even after a complaint has been filed. Even if a minor brings a suit to judgment without the appointment of a next friend, if represented by an attorney, the Legislature has provided that the judgment is valid. Accordingly, the formal appointment of a next friend is not a meaningful date for statute-of-limitations purposes.

Reversed and remanded for further proceedings.

INFANTS — MEDICAL MALPRACTICE ACTIONS — PROCEDURE FOR APPOINTING REPRESENTATIVES FOR MINORS IN COURT PROCEEDINGS — TIMING.

A minor may sue and be sued as provided by MCR 2.201(E), which lays out the rules of representation and the procedure for appointing representatives for minors in court proceedings, including for minor plaintiffs; a minor is the real party in interest in a claim for damages arising from alleged medical malpractice, and the appointment of a next friend prior to or simultaneous with the filing of the complaint on behalf of the minor is not expressly required.

Bendure & Thomas, PLC (by *Mark R. Bendure*) and *McKeen & Associates, PC* (by *Brian J. McKeen* and *John LaParl, Jr.*) for plaintiff.

Hackney Grover (by *Loretta B. Subhi* and *Randy J. Hackney*) for Paul E. Lomeo, D.O., and Shoreline E.N.T., PLC.

Rutledge, Manion, Rabaut, Terry & Thomas, PC (by *Dale A. Robinson*) for Edward Winiecke, M.D., and Lakeshore Anesthesia Services, PC.

Johnson & Wyngaarden, PC (by *David R. Johnson* and *Michael L. Van Erp*) for Mercy Health Hackley Campus.

Sullivan, Ward, Asher & Patton, PC (by *Keith P. Felty*) for Elizabeth Pitt, M.D.

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

PER CURIAM. In Docket No. 341523, plaintiff, Jaxon Olin, a minor, through his next friend, Nicole Curtis, appeals by right the trial court's order granting defendants' motion for summary disposition and dismissing with prejudice his medical malpractice lawsuit. The crux of the issue on appeal is whether a lawsuit, timely filed by or on behalf of a minor plaintiff, is defective and invalid until the trial court formally appoints a next friend for the minor. The trial court granted defendants' motion based on the expiration of the applicable limitations period before entry of an order formally appointing plaintiff's mother, Curtis, as plaintiff's next friend.[1] For

[1] In Docket No. 342937, plaintiff appeals by right the trial court's dismissal of a second, identical lawsuit he filed as a back-up plan after receiving the trial court's written opinion with respect to the issue raised in Docket No. 341523. Because we are reversing the trial court's ruling in Docket No. 341523, we need not review the trial court's order of dismissal in Docket No. 342937, given that the issue raised is effectively moot.

the reasons set forth in this opinion, we reverse and remand to the trial court for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

On September 22, 2014, plaintiff, who was 10 years old at the time, underwent an adenoidectomy, a direct laryngoscopy, and a lingual tonsillectomy. It is plaintiff's contention that defendants negligently performed the surgery, resulting in extensive tracheal tearing, total collapse of his lungs, severe and extensive subcutaneous emphysema, a pneumomediastinum, vocal-cord paralysis, and other injuries. On September 20, 2016, two days before the two-year period of limitations would have otherwise expired, MCL 600.5805(8), plaintiff's attorney served on defendants a notice of intent (NOI) to file a medical malpractice claim. This served to toll the statutory limitations period for 182 days. See MCL 600.2912b. On March 22, 2017, plaintiff filed his complaint, with Curtis operating as his next friend pending formal appointment by the trial court. The parties agree that the statutory limitations period would have expired on March 23, 2017, and that plaintiff filed the complaint within the statutory limitations period.

Defendants had filed their answers and the parties were engaged in discovery when plaintiff's counsel realized that the trial court had not yet formally appointed Curtis as plaintiff's next friend. Promptly after this discovery, plaintiff's counsel filed a petition seeking Curtis's appointment and noting that, pursuant to MCR 2.201(E), the court was required to appoint a next friend because plaintiff did not have a conservator. Plaintiff attached to the petition Curtis's written consent to be appointed and her verification that she was willing to become responsible for the costs of the

action. See MCR 2.201(E)(2)(a)(ii). Five days later, on September 13, 2017, the trial court entered an order appointing Curtis as plaintiff's next friend.

On the same day the trial court appointed Curtis as next friend, defendants Paul E. Lomeo, D.O., and Shoreline E.N.T., PLC, moved for summary disposition pursuant to MCR 2.116(C)(5) (legal capacity to sue), (7) (statute of limitations), and (8) (failure to state a claim). The motion asserted that defendants had become aware two days earlier that the trial court had not appointed Curtis as plaintiff's next friend and that because she was not the appointed next friend when the action was filed, she did not have standing to file it. Defendants further argued that, according to this Court's decision in *Cotter v Britt*, unpublished per curiam opinion of the Court of Appeals, issued May 31, 2007 (Docket No. 274776),[2] neither plaintiff nor Curtis had standing to pursue this action on March 22, 2017, or at any time before the expiration of the period of limitations on March 23, 2017. Thus, defendants claimed that plaintiff's case should be dismissed as time-barred. All the other defendants joined in the motion.

At the October 16, 2017 hearing on defendants' motion, defendants repeated the argument they had set forth in their summary-disposition motion and supporting brief. In opposition to the motion, plaintiff argued that nothing in the language of MCR 2.201(E) required appointment of the next friend before filing the complaint and that the language of the court rule actually contemplates the opposite because it refers to the nomi-

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[2] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). In some instances, they may be persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). As will become clear in our discussion of the issues on appeal, we do not find *Cotter* to be persuasive.

nation for appointment of a next friend "after service of process." MCR 2.201(E)(2)(a)(iii). Plaintiff also argued that the delay in formally appointing Curtis was, at most, a harmless oversight without prejudice. The trial court took the matter under advisement, and on November 15, 2017, it issued a written opinion in which it concluded that *Cotter* was directly on point and persuasive. Relying on the reasoning in *Cotter*, the trial court entered a corresponding order on December 4, 2017, granting defendants' motion for summary disposition and dismissing plaintiff's case with prejudice.

II. STANDARDS OF REVIEW

We "review de novo a trial court's decision regarding a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Bernardoni v Saginaw*, 499 Mich 470, 472; 886 NW2d 109 (2016). Defendants moved for summary disposition pursuant to MCR 2.116(C)(5), (7), and (8). Although the trial court did not identify the court rule under which it granted defendants' motion, it granted summary disposition for the reasons stated in *Cotter*. In *Cotter*, this Court relied on MCR 2.116(C)(8) to support summary disposition on the ground that the minor child "could not file suit on her own behalf, and suit was not filed by a properly appointed next friend." *Cotter*, unpub op at 3-4. A motion under MCR 2.116(8) tests the legal sufficiency of a complaint, and summary disposition is proper if "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citation omitted). "When deciding a motion brought under this section, a court considers only the pleadings." *Id*. at 119-120, citing MCR 2.116(G)(5).

This dispute primarily involves the interpretation and application of MCR 2.201.

> Interpretation of a court rule is a question of law that this Court reviews de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). When interpreting a court rule, we apply the same rules as when we engage in statutory interpretation. *Id*. at 553. The overriding goal of judicial interpretation of a court rule is to give effect to the intent of the authors. See *Bio-Magnetic Resonance, Inc v Dep't of Pub Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999). The starting point of this endeavor is the language of the court rule. *Id*. If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed. *CAM Constr*, [465 Mich at 554]. However, when reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate. *Benedict v Dep't of Treasury*, 236 Mich App 559, 563; 601 NW2d 151 (1999). [*Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002).]

III. ANALYSIS

A. NEXT-FRIEND APPOINTMENT

Plaintiff first contends that the trial court erred by granting defendants' motion for summary disposition on the ground that Curtis was not the "real party in interest" at the time the complaint was filed because she had not yet been appointed plaintiff's next friend. We agree.

" 'An action must be prosecuted in the name of the real party in interest . . . .' " *Maki Estate v Coen*, 318 Mich App 532, 539; 899 NW2d 111 (2017), quoting MCR 2.201(B). " 'A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another.' " *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339,

356; 833 NW2d 384 (2013), quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule "recognizes that litigation should be begun only by a party having an interest that will [ensure] sincere and vigorous advocacy." *Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997). The rule also protects the defendant by "requir[ing] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted" against the defendant. *Beatrice Rottenberg Living Trust*, 300 Mich App at 356 (quotation marks and citation omitted).

There can be no serious dispute that plaintiff owns the medical malpractice claim arising from injuries allegedly resulting from his surgery. Michigan courts have held that when a plaintiff acts on behalf of a minor in a representative capacity, the cause of action still belongs to the minor. See, e.g., *Gumienny v Hess*, 285 Mich 411, 414; 280 NW 809 (1938) (recognizing that when a minor is injured, the minor accrues a cause of action); *Walter v Flint*, 40 Mich App 613, 615; 199 NW2d 264 (1972) ("In Michigan, an infant's cause of action for damages and the parents' cause of action to recover their expenses and loss of services, though arising from the same set of circumstances, are separate and independent causes of action."); *Broitman v Kohn*, 16 Mich App 400, 402; 168 NW2d 311 (1969) (recognizing that when a father pursues a claim for his daughter's injuries, his claim is "in reality her cause of action").[3]

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[3] See also *Nielsen v Henry H Stevens, Inc*, 359 Mich 130, 134; 101 NW2d 284 (1960). In *Nielsen*, a truck owned by the defendant struck a minor while he was riding his bicycle. *Id*. at 131. The minor's father brought claims seeking recovery for the boy's injuries "and in his own right to recover for hospital and doctor bills." *Id*. In a concurring opinion, Justice BLACK explained:

As demonstrated by *Gumienny*, *Walter*, and *Broitman*, Michigan's substantive law supports the conclusion that when a minor is negligently injured by another and sues through his or her next friend, the claim still belongs to the minor, and it is the minor who is the real party in interest. The trial court and defendants rely on *Cotter*'s assertion that "[a] next friend is the real party in interest, even though the beneficial interest rests with the minor," to argue that Curtis is the real party in interest while the beneficial interest rests with plaintiff. *Cotter*, unpub op at 3. However, the distinction between the real party in interest from the one with the beneficial interest typically arises in circumstances involving statutory standing[4] and assignment of claims,[5] in cases in which plaintiffs appear not to have an economic interest in

> Before us are 2 separate rights of action. They arise together from the same factual circumstances, yet differ markedly by force of rules governing sustenance in court of each right. *The first of such rights belongs to a little boy; not his parent, guardian, or next friend. He is the legal plaintiff in his case and is the real party in interest*. [*Id*. at 134 (BLACK, J., concurring) (emphasis added).]

[4] See, e.g., *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 707-709; 698 NW2d 402 (2005) (holding that taxpayer plaintiffs were real parties in interest because they had statutory standing to bring an action on behalf and for the benefit of the treasurer of the Ann Arbor Public Schools); *Blue Cross & Blue Shield of Mich v Eaton Rapids Comm Hosp*, 221 Mich App 301, 311-312; 561 NW2d 488 (1997) (holding that the plaintiff that administered the General Motors health plan and had contractual and statutory standing was a real party in interest for purposes of a recovery action).

[5] See, e.g., *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 412; 875 NW2d 242 (2015) (holding that the township, as an assignee of homeowners whose home suffered damage due to an event caused by the school system's water-filtration system, had standing to sue the school district); *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 354-356 (holding that the plaintiff was not the proper party to pursue

the outcome of litigation,[6] or when contracts are involved.[7] Defendants have not cited any statute or published authority—nor have we found either—that makes this distinction when a next friend acts on behalf of a minor to pursue the minor's personal-injury claim. In fact, *Gumienny*, *Broitman*, and *Nielsen* support the conclusion that when a personal-injury claim belongs to a minor and a court-appointed next friend serves merely to bring the minor's claim and pay the costs of litigation, there is no distinction between the real party in interest (the child) and the party with the beneficial interest (also the child).[8]

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claims concerning the ownership of the right to demand repayment of loans to the decedent; that right belonged exclusively to the trustee of the decedent's trust).

[6] See, e.g., *Hofmann*, 211 Mich App at 96 (holding that even though the plaintiffs were test litigants and the litigation was financed by the Michigan Chiropractic Legal Action Commission, the individual chiropractors were real parties in interest because they had provided the products and services for which the suit sought reimbursement); *Weston v Dowty*, 163 Mich App 238, 242-243; 414 NW2d 165 (1987) (holding that the homeowner plaintiffs were real parties in interest even though they had agreed to give any proceeds obtained in their legal malpractice lawsuit to the slip-and-fall victim who had obtained a judgment against them because of the defendants' legal malpractice); *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278-279; 409 NW2d 804 (1987) (holding that when the plaintiff corporation had sold its vending-machine business to a third party but retained a security interest in the business's physical assets, the retention was sufficient to establish the plaintiff as a real party in interest).

[7] See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 623-624; 873 NW2d 783 (2015) (holding that the plaintiff was not a real party in interest in a lawsuit alleging that the city improperly reduced benefits through executive orders because the plaintiff was not a party to the collective-bargaining agreement (CBA) at issue and was not an assignee of a party to the CBA or a third-party beneficiary of the CBA).

[8] Defendants rely on *Woodman v Kera LLC*, 486 Mich 228; 785 NW2d 1 (2010), and *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich

In addition, contrary to defendants' position, the court rule governing a trial court's appointment of a next friend does not require such appointment prior to or simultaneous with the filing of a complaint on behalf of the minor. A minor may sue and be sued as provided by MCR 2.201(E), which lays out the rules of representation and the procedure for appointing representatives for minors in court proceedings, including for minor plaintiffs. MCR 2.201(E)(1)(a) provides, in relevant part, that if a minor has a conservator, the conservator may bring actions on behalf of the minor. If a minor plaintiff does not have a conservator, "the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action." MCR 2.201(E)(1)(b).

The appointment of representatives for minors is dictated by MCR 2.201(E)(2), which states, in relevant part:

> (a) Appointment of a next friend or guardian ad litem shall be made by the court as follows:
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> * * *
>
> (ii) if the party is a minor under 14 years of age or an incompetent person, on the nomination of the party's next of kin or of another relative or friend the court deems

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App 552; 550 NW2d 262 (1996), to support their argument that Curtis, as plaintiff's mother, has no authority to act on plaintiff's behalf. Defendants' reliance is misplaced. *Woodman* and *Smith* confirmed that parents have no authority to waive, release, or compromise their child's claim. *Woodman*, 486 Mich at 242-245 (opinion by YOUNG, J.); *Smith*, 216 Mich App at 554. Curtis is doing none of these things. Rather, as plaintiff's court-appointed next friend, she is acting on behalf of plaintiff to pursue his medical malpractice claim against defendants. *Woodman* and *Smith* have no applicability to the facts in the case at bar.

suitable, accompanied by a written consent of the person to be appointed; or

(iii) if a nomination is not made or approved within 21 days after service of process, on motion of the court or of a party.

(b) The court may refuse to appoint a representative it deems unsuitable.

Nothing in the plain language of MCR 2.201(E) requires the filing of a petition for appointment or the completion of a next-friend appointment before suit or simultaneously with the filing of a complaint on behalf of a minor, nor do defendants point to any current statute or court rule containing such a requirement. In fact, the court rule repeatedly refers to what "the court" must do, clearly implying that it is the court assigned to the minor's lawsuit that handles the next-friend appointment process. In other words, the court rule implicitly assumes the complaint has already been filed, and properly so, even though no next friend has yet been appointed.[9]

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[9] The Judicature Act of 1915 contained language explicitly requiring the circuit court to appoint a next friend before a complaint was filed or process was issued in the name of a minor who would be the sole plaintiff. See 1915 CL 12379; 1948 CL 612.28 ("Whenever an infant . . . shall have a right of action, he shall be entitled to maintain a suit thereon, *but before the declaration or bill of complaint is filed or any process issued in the name of such person who is* [*the*] *sole plaintiff, the circuit judge or circuit court commissioner of the same county shall appoint a competent and responsible person to appear as next friend for such plaintiff* . . . ."). The Legislature expressly repealed this requirement when it enacted the Revised Judicature Act of 1961. See MCL 600.9901. "[A] change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), citing *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944). Because this Court "cannot assume that the change means nothing at all," this Court cannot assume that the

The language in MCR 2.201(E) expressly addressing circumstances under which the court is required to make such an appointment *after* a complaint is filed further belies the notion that a next friend must be appointed prior to or along with the filing of a complaint. Pursuant to MCR 2.201(E)(2)(a)(ii), when the minor is under 14 years old, "[a]ppointment of a next friend . . . shall be made by the court . . . on the nomination of the [minor's] next of kin or of another relative or friend the court deems suitable . . . ." In addition, "if a nomination is not made or approved within 21 days *after service of process*, on motion of the court or of a party" the court shall appoint a next friend.[10] MCR 2.201(E)(2)(a)(iii) (emphasis added). The latter provision signifies that the lack of a precomplaint next-friend appointment—or a simultaneously filed nomination with the complaint and immediate next-friend appointment (the timing of which is in the

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requirement of appointing a next friend before a complaint is filed still pertains. See *Bush*, 484 Mich at 170.

Moreover, even while the Judicature Act of 1915—and its mandatory precomplaint appointment process—was in force, courts regularly overlooked technical deficiencies in the next-friend appointment process. Our Supreme Court held that strict compliance with the requirement of a formal precomplaint appointment process was not necessary, instead concluding that

> [i]t is not an absolute prerequisite to jurisdiction of an action by an infant that he should sue by guardian *ad litem* or next friend; but a failure to appoint a guardian *ad litem* or next friend for an infant plaintiff merely affects the regularity of the proceedings, and the defect is one which before verdict is amendable, and after verdict and judgment is cured. [*Graham v Nippress*, 222 Mich 386, 388; 192 NW 683 (1923) (quotation marks and citation omitted).]

[10] Defendants argue that MCR 2.201(E)(2)(a)(iii) must be referring only to next-friend appointments for minor defendants, but the plain language of the court rule does not require this restrictive interpretation.

court's control)[11]—is not fatal to the minor's case.[12] Because a plaintiff serves a complaint only subsequent

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[11] MCR 2.201(E)(2)(b) provides that "[t]he court may refuse to appoint a representative it deems unsuitable." Under defendants' proposed scenario, even if a petition for appointment of a next friend is filed with the complaint, the timing of a next-friend appointment is ultimately within the court's control and therefore will dictate whether there is any sand left in the statute-of-limitations hourglass in order to save the minor plaintiff's case from being dismissed with prejudice despite being timely filed.

[12] There are ample factual recitations that demonstrate that the failure to appoint a next friend prior to commencement of a suit is not fatal to the suit. See, e.g., *Markham v Markham*, 4 Mich 305, 307 (1856) (explaining that no statute, court rule, or other substantive law required dismissal of the complaint based on the absence of a formally appointed next friend before commencement of the suit); *Sick v Mich Aid Ass'n*, 49 Mich 50, 52-53; 12 NW 905 (1882) (concluding that when the plaintiff failed to designate herself as next friend, she was "really and manifestly proceeding as such," "appointment in such a case would be a mere formality," and "the court should have directed an amendment instead of sending the infants out of court for a defect so easily remedied"); *Kees v Maxim*, 99 Mich 493, 497; 58 NW 473 (1894) (acknowledging that "[t]he usual and proper course is to entitle a cause in the name of the infant by his next friend," but ordering amendment of a judgment because it was "plainly apparent from the face of the summons that [plaintiff] was prosecuting in the capacity and character of next friend" of the injured party); *McDonald v Weir*, 76 Mich 243, 246-247; 42 NW 1114 (1889) (rejecting the argument "that the plaintiffs must be nonsuited because no next friend had been appointed for [the minor] before commencement of suit" when the minor's status "must have been fully understood by defendant"); *Dillon v Howe*, 98 Mich 168, 170; 57 NW 102 (1893) (holding that the trial court's appointment of a next friend after issuance of process was valid); *Kamieniecki v Garden City Hosp, Osteopathic*, 375 Mich 257, 260; 134 NW2d 219 (1965) (holding that there was no error when a next friend was not appointed until the eve of trial). Defendants argue that all these cases are distinguishable from the issue at bar because they do not address the effect of the expiration of a period of limitations prior to appointment of the next friend. They assume from the silence that trial courts appointed next friends prior to expiration of the limitations period. However, it is equally likely that filing a complaint prior to expiration of the relevant limitations period tolled the period, as is true today under MCL 600.5856(a). Moreover, these cases perfectly illustrate that a court is not required to dismiss a

to its filing, MCR 2.105, these rules presuppose that it makes no practical difference whether a minor party obtains an appointment of a next friend before or after the filing of a complaint. In sum, our court rules operate in a manner that supports plaintiff's position that the absence of a precomplaint appointment or a petition simultaneously filed with the complaint does not render defective a timely filed complaint on behalf of a minor plaintiff. In the case at bar, these absences merely delayed the formal appointment as next friend of plaintiff's "natural guardian" and the person who "is really and manifestly proceeding as [plaintiff's next friend]." *Sick v Mich Aid Ass'n*, 49 Mich 50, 52; 12 NW 905 (1882).

To summarize, the governing court rules and caselaw clearly indicate that a minor is the real party in interest in a claim for damages arising from alleged medical malpractice and that the appointment of a next friend prior to or simultaneous with the filing of the complaint on behalf of the minor is not expressly required. However, even if we were to assume for the sake of argument that, despite having filed a timely complaint, plaintiff was nevertheless required to ensure that the trial court appointed a next friend by the very next day, March 23, 2017,[13] before the statute of limitations was set to expire, MCL 600.2301 operates in favor of reinstating plaintiff's case. MCL 600.2301 provides:

minor's suit simply because the person clearly acting as his or her next friend has yet to be formally appointed.

[13] It is worth noting that plaintiff was not permitted to file his lawsuit until the NOI waiting period set forth in MCL 600.2912b expired. *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 78, 94; 869 NW2d 213 (2015). It is not entirely clear how plaintiff could have obtained a next-friend appointment before the lawsuit commenced.

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

"The language in MCL 600.2301 requiring a court to disregard 'any' errors or defects if no substantial rights are affected plainly and unambiguously reaches both content and noncontent errors or defects, as the term 'any' is all-inclusive." *Furr v McLeod*, 304 Mich App 677, 702-703; 848 NW2d 465 (2014), reversed in part sub nom *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68 (2015). Defendants cannot claim any surprise or resulting prejudice on these facts. Plaintiff, not Curtis, is the real party in interest in this case, so no new parties are being added with her appointment as next friend. Curtis, plaintiff's mother and the person who would be seeking to be appointed next friend, was named in the case caption of the complaint. Defendants, who had full access to the registry of actions, were able to see that the trial court had not yet formally appointed Curtis as next friend. MCR 2.201(E)(2)(c). Yet they proceeded to conduct discovery and raised no concern until the time plaintiff filed the September 8, 2017 petition for appointment of a next friend. *Id*. The trial court, apparently without any hesitation, granted plaintiff's petition and appointed Curtis as next friend for her son as originally intended and as unambiguously stated on the complaint. Defendants argue that reinstating the case will deprive them of the substantial statute-of-limitations defense. However, as will be explained later, defendants have failed to show that, under the circumstances of this case, they were entitled to a statute-of-limitations defense.

B. STATUTE OF LIMITATIONS

Plaintiff argues that his complaint was timely filed and that process was properly served; therefore, the trial court obtained jurisdiction over defendants. Accordingly, the filing of the complaint tolled the period of limitations, and the trial court ought to have corrected any technical error relating to the next-friend appointment process and allowed plaintiff's case to proceed in the normal course. Defendants, meanwhile, argue that the statute of limitations was not tolled until a next friend was appointed. We agree with plaintiff. "Whether a period of limitations applies in particular circumstances constitutes a legal question that this Court also considers de novo." *Carmichael v Henry Ford Hosp*, 276 Mich App 622, 624; 742 NW2d 387 (2007).

MCL 600.5856 provides the substantive rule for tolling statutory periods of limitations or repose:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

MCL 600.5856(a) applies in this case to toll the applicable period of limitations pending proper service. Defendants do not contend that plaintiff failed to timely file the complaint or complete the service of process as

permitted by our court rules. Instead, defendants continue to argue that the trial court did not formally appoint Curtis before the expiration of the applicable limitations period, so she was never a "real party in interest" and that plaintiff, as a minor, did not have a right to commence suit in the first instance. Defendants conflate the requirements of establishing capacity to sue and standing/real party in interest. "Our Supreme Court has held that the defense that a plaintiff is not the real party in interest 'is not the same as the legal-capacity-to-sue defense.' " *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 620; 873 NW2d 783 (2015), quoting *Leite v Dow Chem Co*, 439 Mich 920, 920 (1992). As we have already explained, an action must be prosecuted by the real party in interest, plaintiff is the real party in interest in the case at bar, and he is prosecuting the case through his next friend.

Further, it is blackletter law that "[a] civil action is commenced by filing a complaint with the court." MCL 600.1901. It is the date of filing that is significant for statute-of-limitations defenses. See *Dunlap v Sheffield*, 193 Mich App 313, 315-316; 483 NW2d 464 (1992). "In general, . . . a statute of limitations requires only that a complaint be filed within the limitation period." *Scarsella v Pollak*, 461 Mich 547, 552 n 3; 607 NW2d 711 (2000).

It is simply not the case, as defendants suggest, that permitting this case to proceed will result in a limitless statutory limitations period. Rather, commencement of suit must always occur within the period of limitations (as tolled where applicable). Subsequently, pursuant to the mandatory requirements of MCR 2.201(E), the trial court must then make certain that a representative for the minor (whether a conservator or a next friend) is in place to carry the suit forward if appropriate.

There is no principled reason under the court rules or in Michigan's decisional law to require that the next-friend appointments occur before commencing suit or before the expiration of the statutory limitations period, even after a complaint has been filed. Even if a minor brings a suit to judgment without the appointment of a next friend, if represented by an attorney, our Legislature has provided that the judgment is valid. See MCL 600.2315(5).[14] Similarly, our Supreme Court has held that "[t]he validity of the proceedings and jurisdiction of the court in the premises is not defeated by the fact that a next friend had not been appointed at an earlier stage in the proceedings." *Kamieniecki v Garden City Hosp, Osteopathic*, 375 Mich 257, 260; 134 NW2d 219 (1965). Therefore, it makes no sense to conclude that the formal appointment of a next friend is a meaningful date for statute-of-limitations purposes.

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

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

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[14] MCL 600.2315 provides, in pertinent part:

> When a verdict has been rendered in a cause, the judgment thereon shall not be stayed, nor shall any judgment upon confession, or default, be reversed, impaired, or in any way affected, by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, record or proceedings, namely:
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> * * *
>
> (5) For a party under 18 years of age, having appeared by attorney, if the verdict or judgment be for him.

KUHLGERT v MICHIGAN STATE UNIVERSITY
OSTENDORF v MICHIGAN STATE UNIVERSITY

Docket Nos. 332442, 338363, and 344533. Submitted April 3, 2019, at Lansing. Decided May 21, 2019, at 9:15 a.m. Leave to appeal sought.

Plaintiff Elisabeth Ostendorf sustained serious injuries when she was hit by a truck as she was walking from her place of employment on the Michigan State University (MSU) campus to the lot where her car was parked, also on the MSU campus. Ostendorf was a German national who was in the United States on a J-1 visa as a participant in an Exchange Visitor Program (EVP) under the Mutual Educational and Cultural Exchange Act (MECEA), 22 USC 2451 *et seq*. Ostendorf worked for MSU as a postdoctoral research associate and lead scientist on a project funded by the Department of Energy. Ostendorf was hit by an MSU vehicle that was backing up to a loading dock as she walked across a driveway about 900 feet from the building where she worked. In Docket No. 332442, Ostendorf's conservator, Sebastian Kuhlgert, filed a negligence claim in the Court of Claims against MSU and its Board of Trustees. Kuhlgert did not file a claim for workers' compensation benefits, and MSU did not report any injury to the workers' compensation bureau. MSU's no-fault insurer was State Farm Mutual Automobile Insurance Company, and MSU's excess-liability insurer was United Educators (United). United would not provide coverage for any obligation if MSU could be held liable under the workers' compensation law. Nearly one year after the complaint was filed, United moved to intervene in the action because it believed that MSU had failed to pursue the argument that Ostendorf's claim was subject to the exclusive-remedy provision in the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The Court of Claims, CYNTHIA D. STEPHENS, J., ruled that United's motion was untimely and that MSU had adequately represented United's interests by raising the exclusive-remedy provision in its affirmative defenses. The Court of Appeals denied United's application for leave to appeal the Court of Claims' ruling, and United filed for leave to appeal in the Supreme Court. While the application for leave was pending in the Supreme Court, United and State Farm filed

petitions in a separate proceeding before the Workers' Compensation Board of Magistrates. The issues raised in the separate proceeding were (1) whether Ostendorf was an employee under the WDCA and (2) whether Ostendorf was injured in the course of her employment. The Court of Claims case was ultimately remanded back to the Court of Appeals for consideration as on leave granted with instructions to determine whether Ostendorf's claim was barred by the exclusive-remedy provision of the WDCA and, if not, whether the Court of Claims erred by denying United's motion to intervene. 500 Mich 890 (2016). The Court of Appeals agreed to hold the appeal in abeyance pending the workers' compensation magistrate's decision. The magistrate issued her decision in February 2017, concluding that Ostendorf was exempt from the definition of employee in MCL 418.161(1)(b), and United filed a claim for review with the Michigan Compensation Appellate Commission (MCAC). In Docket No. 338363, United filed an emergency delayed application for leave to appeal after the Court of Claims denied its second motion to intervene. The Court of Claims had held a trial at which United was not present and after which the Court of Claims ruled that workers' compensation did not apply. The Court of Appeals initially denied leave to appeal, but following an order of the Supreme Court, 501 Mich 950 (2018), the Court granted leave to appeal limited to whether Ostendorf was an MSU employee for purposes of the WDCA and whether United had the right to intervene. The appeals in Docket Nos. 332442 and 338363 were held in abeyance pending a decision of the MCAC. Abeyance was concluded the day after the MCAC issued its opinion in June 2018. In Docket No. 344533, United filed for leave to appeal the MCAC decision that adopted in full the magistrate's legal conclusion that Ostendorf was not an MSU employee for purposes of the WDCA. The Court of Appeals granted United's application for leave to appeal. Docket Nos. 332442, 338363, and 344533 were ultimately consolidated to resolve the question whether plaintiff's tort claim is barred by the exclusive-remedy provision of the WDCA and, if not, whether the Court of Claims erred by denying United's motions to intervene.

The Court of Appeals *held*:

1. Foreign nationals employed under the MECEA are exempt under MCL 418.161(7)(b) from the definition of "employee" in the WDCA, and therefore, Ostendorf's employment status—a German national in the United States with a J-1 visa employed under the MECEA—removed her from coverage under the WDCA. If Ostendorf had qualified as an MSU employee for purposes of the

WDCA, the exclusive-remedy provision in the WDCA would have precluded her from recovering for damages resulting from negligence or other nonintentional torts. United argued that Ostendorf was an "employee" for purposes of the WDCA because MSU, not the Department of State, paid her salary. The MECEA, 22 USC 2452(a)(1), authorizes the Director of the United States Information Agency to provide international educational exchanges by financing studies, research, instructions, and other educational activities in American schools and institutions of learning for citizens and nationals of foreign countries. 22 USC 2452(a)(1) is not limited to those educational exchange employees paid directly by the State Department, however. The State Department administers the exchange programs with the assistance of various third-party sponsors. By its plain language, the statute also applies to those employees who are indirectly financed by the State Department through an EVP. The language of 22 USC 2452(a)(1) is sufficiently broad to permit the specified authority to allow or encourage another entity or EVP sponsor, such as a university, to pay, on behalf of the State Department, the expenses of the participant, including wages and benefits. Because Ostendorf is a foreign national who is employed by MSU under the MECEA, she is not an employee for purposes of the WDCA, and the MCAC correctly concluded that Ostendorf's employment with MSU was exempted from WDCA coverage.

2. Even if Ostendorf could have been considered an employee for WDCA purposes, the exclusive-remedy provision of the WDCA did not apply because the injury did not arise out of and in the course of her employment. Except as it concerns intentional torts, the right to recover benefits under the WDCA is an employee's exclusive remedy against the employer for a personal injury arising out of and in the course of employment. The Bureau of Worker's Compensation has exclusive jurisdiction to decide whether an injury occurred in the course of employment. Consequently, a party's assertion of the exclusive-remedy provision as a defense—as United asserts in this case—necessarily constitutes a challenge to the trial court's subject-matter jurisdiction over the claim. Under MCL 418.301(3), an employee's injury is presumed to occur in the course of his or her employment when the employee is injured going to or from work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours. Notwithstanding that presumption, an injury is not covered under the WDCA if it is incurred while the employee is in pursuit of an activity the major purpose of which is social or recreational. In this case, Ostendorf was 900 feet away from the premises of

where her work was performed even though she was still on the MSU campus. The large and contiguous nature of the MSU campus weighs against looking at the premises generally and instead favors distinguishing between locations in the vicinity of the actual place of employment and those locations that are far removed from the actual place of employment. Because Ostendorf was not injured in the course of her employment on the premises of the Plant Biology Laboratories Building, the exclusive-remedy provision of the WDCA would not have barred her negligence claim against MSU and its Board of Trustees. The Court of Claims correctly concluded that Ostendorf had finished her work, had walked 900 feet from her worksite toward her parked car, was off her employer's premises, and was thus outside the inclusive presumption of MCL 418.301(3).

3. Both intervention by right and permissive intervention are conditioned on timely application. Under MCR 2.209(A)(3), a party may intervene by right when the party asserts an interest in the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest, unless that interest is adequately represented by existing parties. In deciding whether a party merits permissive intervention under MCR 2.209(B), a trial court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. United's motion to intervene was not timely, but it challenged the Court of Claims' subject-matter jurisdiction—an issue that can be raised at any time during a proceeding. United acknowledged that MSU pleaded the WDCA among its affirmative defenses but claimed that MSU did not inform United until much later that MSU was not pursuing the exclusive-remedy defense. No bad faith on MSU's part is asserted, and thus, good faith is presumed. Because United knew of the litigation from its inception and knew that it had a contractual right to participate in any attendant defense, United was—at the very least—on notice concerning the WDCA defense at the time the complaint was filed. United could have timely filed its motion to intervene, and the Court of Claims did not abuse its discretion by denying the motion. Notably, the only interest United has put forward for the purposes of intervention is its obligation to indemnify MSU to the extent that MSU may be obligated to cover tort damages in excess of MSU's other sources of coverage. But a potential duty to indemnify a claimant for benefits is separate and distinct from the underlying claim for benefits, which does not itself justify the potential indemnitor's intervention in litigation regarding that claim. United does not assert subrogation rights or any other

contractual rights in connection with MSU beyond MSU's duty of cooperation. Therefore, United's interest in the case relates directly to MSU's cooperation, not to the possible competing theories of recovery or remedy. In the end, if MSU files a claim against United for excess coverage for tort liability, and United remains persuaded that MSU did not conscientiously defend itself or otherwise cooperate with United, United may defend against MSU's claim on a contractual basis.

Affirmed.

WORKER'S DISABILITY COMPENSATION ACT — EXEMPTIONS FROM DEFINITION OF EMPLOYEE — FOREIGN NATIONALS.

Foreign nationals employed under the Mutual Educational and Cultural Exchange Act (MECEA), 22 USC 2451 *et seq*., and present in the United States through the Exchange Visitor Program, are specifically excluded from the definition of "employee" as that term is used in the Worker's Disability Compensation Act (WDCA) even when the Department of State does not directly pay their wages; because the MECEA authorizes the State Department to finance through a third party a foreign national's employment in the United States, a foreign national whose wages are paid by the educational institution where the foreign national is employed is not an "employee" under the WDCA and, therefore, the exclusive-remedy provision of the WDCA does not apply to the foreign national (MCL 418.161(1)(b)).

Docket No. 332442:

Collins Einhorn Farrell PC (by *Michael J. Cook*, *Deborah A. Hebert*, and *Richard A. Joslin*) for United Educators.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree*), *Kitch Drutchas Wagner Valitutti & Sherbrook* (by *Christina A. Ginter*), and *Dawda Mann Mulcahy & Sadler PLC* (by *Adam Kutinsky*) for Michigan State University and the Board of Trustees of Michigan State University.

Sinas, Dramis, Larkin, Graves & Waldman, PC (by *George T. Sinas*, *Michael E. Larkin*, and *Joel T. Finnell*) for Elisabeth Ostendorf.

Docket No. 338363:

Collins Einhorn Farrell PC (by *Michael J. Cook*, *Deborah A. Hebert*, and *Richard A. Joslin*) and *Bursch Law PLLC* (by *John J. Bursch*) for United Educators.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree*) for Michigan State University and the Board of Trustees of Michigan State University.

Sinas, Dramis, Larkin, Graves & Waldman, PC (by *George T. Sinas*, *Michael E. Larkin*, and *Joel T. Finnell*) for Elisabeth Ostendorf.

Docket No. 344533:

Collins Einhorn Farrell PC (by *Deborah A. Hebert* and *Richard A. Joslin*) and *Bursch Law PLLC* (by *John J. Bursch*) for United Educators.

Fraser Trebilcock Davis & Dunlap, PC (by *Anita G. Fox*) for Michigan State University.

Sinas, Dramis, Larkin, Graves & Waldman, PC (by *George T. Sinas*, *Michael E. Larkin*, and *Joel T. Finnell*) for Elisabeth Ostendorf.

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

CAMERON, J. Elisabeth Ostendorf, a German national, suffered injuries when a truck owned by Michigan State University (MSU) struck her as she was walking on campus; these consolidated appeals all concern whether the injuries triggered the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. See MCL 418.131(1) (except when an intentional tort is in-

volved, benefits provided by the WDCA constitute an employee's "exclusive remedy against the employer for a personal injury"). If not, then MSU's no-fault insurer, State Farm Mutual Automobile Insurance Company, and its excess-liability insurer, United Educators (UE), are responsible for providing insurance coverage for her injuries. We affirm.

I. FACTS

Ostendorf was a postdoctoral research associate at MSU and lead scientist on a project funded through a grant from the Advanced Research Projects Agency for the Department of Energy. She was in the United States on a J-1 visa as a participant in an exchange visitor program authorized under the Mutual Educational and Cultural Exchange Act (MECEA), 22 USC 2451 *et seq*. The goal of Ostendorf's project was to screen plants for increased photosynthetic capacity. She began her work in 2012 for a one-year term, with the anticipation that the project could be renewed annually and last for three or more years. She was injured during her third term.

In October 2014, Ostendorf left the Plant Biology Laboratories Building where she worked and walked toward her vehicle, which was parked in a lot located elsewhere on the MSU campus. She had walked approximately 900 feet when, while completing a text message, she emerged from a sidewalk abutting a driveway at the same time as Cole Gibson was backing up his truck—an MSU vehicle—toward a loading dock. The truck struck Ostendorf, and she suffered severe injuries.

II. PROCEDURAL BACKGROUND

This case involves a lengthy, complicated procedural history. In March 2015, Ostendorf's conservator,

Sebastian Kuhlgert (plaintiff), commenced a negligence action in the Court of Claims against MSU and its Board of Trustees. Plaintiff did not file a claim for workers' compensation benefits, and MSU did not report an injury to the workers' compensation bureau. MSU had an excess-liability insurance policy through UE that did not provide coverage for any obligation for which MSU may have been held liable under any workers' compensation law. Nearly a year after the complaint was filed, UE filed a motion to intervene in the action because it believed that MSU had failed to pursue the argument that plaintiff's claims were barred by the exclusive-remedy provision in the WDCA. The Court of Claims held that the motion to intervene was untimely and that MSU had adequately represented UE's interests by raising the exclusive-remedy provision in its affirmative defenses. The court further noted that the exclusive-remedy provision would not apply if, at the time of the impact, Ostendorf was not on the premises where her work was performed. We denied UE's application for leave to appeal (Docket No. 332442), and UE filed an application for leave to appeal in the Michigan Supreme Court.

While the application for leave was pending in our Supreme Court, UE and State Farm each filed an Application for Mediation or Hearing-Petition to Intervene in a separate proceeding with the Workers' Compensation Board of Magistrates. At issue in the separate proceeding was not the extent to which Ostendorf was engaged in her employment with MSU at the moment of impact, but rather whether she was precluded from workers' compensation coverage because of an exemption from the definition of "employee" set forth in MCL 418.161(1)(b) for "[n]ationals of foreign

countries employed pursuant to section 102(a)(1)[1] of the mutual educational and cultural exchange act of 1961 . . . ."

In November 2016, our Supreme Court remanded the Court of Claims case to this Court for consideration as on leave granted with instructions to address the exclusive-remedy provision of the WDCA and whether UE could intervene:

> The Court of Appeals shall consider: (1) whether the plaintiff's claims are barred by the exclusive remedy provision of the [WDCA], see MCL 418.131(1); *Sewell v Clearing Machine Corp*, 419 Mich 56, 62 (1984); and if not, (2) whether the Court of Claims erred by denying [UE's] motion to intervene. [*Kuhlgert v Michigan State Univ*, 500 Mich 890, 890 (2016).]

In February 2017, UE moved this Court to stay the appeal pending the outcome of the workers' compensation proceedings. We granted UE's request and agreed to hold the appeal in abeyance until the workers' compensation magistrate issued a decision.

In the Workers' Compensation Board of Magistrates proceeding, the magistrate examined the text and history of the pertinent legislation, along with the documents relating to Ostendorf's status as a foreign national in the United States. However, before the magistrate issued their opinion, plaintiff sought relief from the Court of Claims, asking the Court of Claims to consider the issue that was currently before the magistrate—whether Ostendorf's employment status itself exempted her from the definition of "employee" for purposes of the WDCA. UE requested that the Court of Claims decline to address the issue in deference to the workers' compensation proceedings and

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[1] 22 USC 2452(a)(1).

again sought to intervene so that it could challenge Ostendorf's status as being exempt from coverage under the WDCA should the court elect to decide that issue.

Before the Court of Claims could render a decision, the WDCA magistrate issued an opinion in which the magistrate concluded that Ostendorf "was a research scholar employed by MSU pursuant to . . . the MECEA and therefore considered not to be an employee pursuant to MCL 418.161(1)(b)." In March 2017, UE filed a claim for review with the Michigan Compensation Appellate Commission (MCAC). In April 2017, the Court of Claims again denied UE's motion to intervene. UE then filed an application for leave to appeal that decision in May 2017 (Docket No. 338363). After the appeal was filed, the Court of Claims issued another opinion and order holding that "[t]he errand that took Dr. Ostendorf to the accident site was purely personal and in no way related to her employment at MSU" and that Ostendorf "was employed by MSU under the United States J-1 Visa program and as such was not eligible for workers [sic] compensation." We granted leave to appeal, consolidated the appeals in Docket Nos. 332442 and 338363, and ultimately stayed the proceedings pending the outcome of the proceedings before the MCAC.[2]

The MCAC issued its opinion and order on June 6, 2018, noting the lack of factual disputes in the case and adopting in full the magistrate's legal conclusion that

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[2] This Court initially denied leave to appeal the Court of Claims' decision, but our Supreme Court, in lieu of granting leave, vacated that order and remanded the case with instructions to hold the consolidated appeals (Docket Nos. 332442 and 338363) in abeyance pending the outcome of the proceedings before the MCAC. *Kuhlgert v Mich State Univ*, 501 Mich 950 (2018).

"Ostendorf shall not be considered (an) employee [of Michigan State University] under the Worker's Disability Compensation Act" because of her employment status under the MECEA. UE filed its application for leave to appeal in this Court on July 5, 2018 (Docket No. 344533). This Court granted leave and consolidated the appeal with those in Docket Nos. 332442 and 338363. *Ostendorf v Mich State Univ*, unpublished order of the Court of Appeals, entered September 6, 2018 (Docket No. 344533).

Our Supreme Court has directed this Court to determine whether plaintiff's claims are barred by the exclusive-remedy provision of the WDCA and, if not, whether the Court of Claims erred by denying UE's motion to intervene.

III. EXCLUSIVE REMEDY UNDER MCL 418.131(1)

UE argues that the Court of Claims erred in two ways when it concluded that compensation under the WDCA was not Ostendorf's exclusive remedy for her injuries. First, UE argues that Ostendorf is not exempted as a foreign national under MCL 418.161(1)(b) of the WDCA. Second, UE argues that Ostendorf's injuries occurred while in the course of her employment, and that therefore, workers' compensation is her exclusive remedy.

A. FOREIGN-NATIONALS EXEMPTION UNDER MCL 418.161(1)(b)

UE first argues that the Court of Claims and the MCAC erred when they concluded that Ostendorf's employment status removed her from coverage under the WDCA by way of MCL 418.161(1)(b), which exempts "foreign nationals" from the definition of "employee." We disagree.

This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C). The MCAC reviews a decision of the Workers' Compensation Board of Magistrates to determine whether the decision is supported by competent, material, and substantial evidence on the whole record; absent fraud, the MCAC's factual conclusions are conclusive on appeal if supported by any competent record evidence. *Omian v Chrysler Group LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015). "A decision of the [MCAC] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Id*. (quotation marks and citation omitted). "Although judicial review of a decision by the MCAC is limited, questions of law in a workers' compensation case, including the proper interpretation of a statute, are reviewed de novo." *Arbuckle v Gen Motors LLC*, 499 Mich 521, 531; 885 NW2d 232 (2016).

It is undisputed that MSU, as an employer, generally comes under the protections and requirements of the WDCA. The exclusive-remedy provision under the WDCA requires that "[a]n *employee*" receive compensation as provided under the act. See MCL 418.301(1) (emphasis added). The WDCA defines "employee" broadly, see MCL 418.161, but in doing so sets forth the following exemption: "Nationals of foreign countries employed pursuant to section 102(a)(1) of the [MECEA] shall not be considered employees under this act." MCL 418.161(1)(b).

It is also undisputed that, as the WDCA magistrate found, "the Exchange Visitor Program (EVP) is an international exchange program administered by the Department of State to implement the MECEA by means of educational and cultural programs," that "[t]he EVP program is commonly known as the 'J visa program' as participants in the program are issued a 'J'

non-immigrant visa for entry into the United States," and that "[Ostendorf] was in the United States pursuant to a J-1 visa . . . ." However, UE maintains that Ostendorf was an employee because MSU, not the State Department, paid her salary.

The WDCA magistrate acknowledged that the MECEA was "subsequently codified in 22 USC Section 2451, et seq. . . ." That section, now designated as 22 USC 2452, was incorporated by reference in MCL 418.161(1)(b) and sets forth the activities authorized under the MECEA. 22 USC 2452(a) authorizes the Director of the United States Information Agency, in the interest of "strengthen[ing] international cooperative relations, to provide, by grant, contract, or otherwise," for the following:

> (1) educational exchanges, (i) *by financing* studies, research, instruction, and other educational activities—
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> (A) of or for American citizens and nationals in foreign countries, and
>
> (B) of or for citizens and nationals of foreign countries in American schools and institutions of learning located in or outside the United States;
>
> and (ii) by financing visits and interchanges between the United States and other countries of students, trainees, teachers, instructors, and professors . . . . [Emphasis added.]

The tribunals below thoroughly analyzed the pertinent statutory and legislative history and concluded that Ostendorf's employment excluded her from WDCA benefits under MCL 418.161(1)(b). We agree that 22 USC 2452(a)(1) is not limited to those educational exchange employees paid directly by the State Department. Instead, by its plain language, the statute also applies to those employees who are indirectly financed by that entity through its EVPs.

UE now argues that "Ostendorf's position was financed by MSU, not the Department of State" and so the MECEA does not apply and her exclusive remedy for recovery is under the WDCA. In doing so, UE characterizes 22 USC 2452(a)(1) as authorizing the State Department "to directly *finance* exchange programs." Thus, UE attempts to bolster its position by inserting the word "directly" before "finance," though the legislation actually refers more generally to mere "financing." In its second brief, UE refrains from speaking of "direct" financing, but nonetheless frames its argument as if the "financing" of an EVP participant necessarily requires that the State Department, not an EVP, pay a participant's compensation for attendant employment. In neither brief does UE acknowledge that the State Department might finance its EVP, including in connection with Ostendorf, by means other than directly paying salaries or stipends. We agree with the MCAC that the language of 22 USC 2452(a)(1) is sufficiently broad to permit the specified authority to allow or encourage another entity or EVP sponsor, "such as a university, to pay, on behalf of the State Department, expenses of the participant, including wages and benefits," and "does not bar the State Department from providing financing through a sponsor or some other benefactor." The MCAC further noted that, in this case, "the sponsor is, by contract with a federal government grant recipient, entitled to seek reimbursement from federal grant funds for compensation and expenses it pays the foreign national."

UE musters legislative history in support of the proposition that 22 USC 2452(a)(1) applies to Fulbright scholars, which is a program "financed by the Department of State." However, UE fails to appreciate that identifying Fulbright scholars as being employed pursuant to 22 USC 2452(a)(1) does not mean that

EVP participants less directly supported by the State Department can not also be employed pursuant to 22 USC 2452(a)(1). The regulations implementing the EVP include that "(a)n exchange visitor may receive compensation from the sponsor or the sponsor's appropriate designee, such as the host organization, when employment activities are part of the exchange visitor's program," 22 CFR 62.16(a), thus indicating that attendant salaries need not be funded directly by the State Department but may in fact be provided by other entities participating in the program.

Also instructive is *ASSE Int'l, Inc v Kerry*, 803 F3d 1059 (CA 9, 2015). In that case, the Ninth Circuit recognized that entities other than the State Department are eligible to act as sponsors of the EVP. See *id*. at 1064 ("The Department of State administers the EVP, with the assistance of various third-party program sponsors.").

For these reasons, we hold that the Court of Claims and the MCAC correctly concluded that Ostendorf's employment with MSU was exempted from WDCA coverage under MCL 418.161(1)(b).

B. COURSE OF EMPLOYMENT

UE also argues that the Court of Claims erred when it concluded that Ostendorf's injuries did not arise out of the course of her employment. We disagree.

This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C). Questions of law, including statutory interpretation, are reviewed de novo. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). The question whether a tribunal has subject-matter jurisdiction is also reviewed de novo. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007).

Even assuming that Ostendorf's status as a foreign national did not exempt her from being an employee, the exclusive-remedy provision of the WDCA still does not bar her negligence claim because she was not injured while in the course of her employment. Not in dispute is that, for present purposes, MSU is an employer subject to the provisions of the WDCA. Under MCL 418.131(1), except as concerns intentional torts, "[t]he right to the recovery of benefits as provided in [the WDCA] shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." Necessarily then, an employee who falls under the exclusive-remedy provision of the WDCA may not recover from his or her employer in tort by way of the employer's excess-liability insurer. MCL 418.301(1) specifies that compensation under the WDCA is available to an employee "who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury . . . ."

> The WDCA substitutes statutory compensation for common-law tort liability founded upon an employer's negligence in failing to maintain a safe working environment. Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault. In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer. [*Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000) (quotation marks and citations omitted).]

"Because the Bureau of Worker's Compensation is granted exclusive jurisdiction over the only remedy available as a result of the exclusive remedy provision, . . . a party's assertion of the exclusive remedy

provision as a defense to a claim necessarily constitutes a challenge to the trial court's subject-matter jurisdiction over the claim." *Harris v Vernier*, 242 Mich App 306, 312-313; 617 NW2d 764 (2000). A court must respect the limits of its jurisdiction. See *Straus v Governor*, 230 Mich App 222, 225, 227; 583 NW2d 520 (1998), aff'd 459 Mich 526 (1999).

Whether the Court of Claims erred when it did not defer to the administrative WDCA proceedings depends on whether Ostendorf's injury occurred while in the course of her employment with MSU.

> [A]s a general rule the question whether an injury arose out of and in the course of employment is a question to be resolved in the first instance by the bureau. However, there is an exception where it is obvious that the cause of action is not based on the employer/employee relationship. The question whether plaintiff's injury arose out of and in the course of his employment may be a question of law or one primarily of fact, or a mixed question of law and fact. Thus, where the facts are undisputed, the question is one of law for the courts to decide. [*Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994) (quotation marks and citations omitted).]

MCL 418.301(3) specifically addresses the question of course of employment in connection with a person injured while approaching, or departing from, the workplace. In pertinent part, the statute provides:

> An employee going to or from his or her work, *while on the premises where the employee's work is to be performed*, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. [Emphasis added.]

As earlier noted, the Supreme Court's remand order directed us to consider *Sewell*, 419 Mich at 62, in which the Court stated that the Bureau of Worker's Compensation "has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment," but that "[t]he courts . . . retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant." In *Sewell*, the Court noted that "the bureau's exclusive jurisdiction is inapplicable 'where it is obvious that the cause of action is not based on the employer-employee relationship.' " *Id*. at 62 n 5. We conclude that, just as the question whether an employer-employee relationship exists is a more fundamental issue than whether an injury took place in the course of employment, *id*., so too is the question whether the injury took place "on the premises where the employee's work is to be performed" more fundamental.

In this case, the Court of Claims recited the following facts as not being in dispute:

> [Ostendorf] left her place of work, which was the Plant and Biology Laboratories Building and she traversed the campus. She was walking toward a University operated parking lot where she did in fact park her vehicle on a regular basis; that is uncontested. It's also uncontested that she wasn't required to use this lot. She was in the process of traversing the campus when she was struck.

In the course of explaining that it was not obliged to defer to workers' compensation proceedings, the court elaborated as follows:

> First, the Court would indicate that we have jurisdiction over the case as pled. Additionally, while we are deprived of subject matter jurisdiction, over Worker's

> Disability Compensation, this Court finds that . . . we do have jurisdiction to decide a question of law where there are uncontested facts.
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> * * *
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> [T]here is no question, but that [Ostendorf] was an employee of the defendant.
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> * * *
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> [Ostendorf], while it may have taken her five or ten minutes, was at least 900 feet or three football fields away from the Plant Biology Laboratory where she actually worked. While the phrase "and for reasonable time after she leaves her work hours" might bring her within the Act, she is clearly not on the premises where the employee's work is performed. Any assertion that she was in pursuit of a recreational activity is irrelevant to this case.

At issue, then, is whether the Court of Claims erred by concluding that, in light of those facts, the evidence could not be interpreted to indicate that Ostendorf was still on her employer's premises when injured.

UE points out that even though Ostendorf parked some distance from her actual work station, "there was no opportunity for Ostendorf to leave MSU's property on her way to her car," thus recommending a broad view of what constitutes the employer's premises. The large and contiguous nature of MSU's main campus weighs against looking at MSU's premises generally, and instead favors focusing more specifically on Ostendorf's actual workplace within the premises of the Plant Biology Laboratories Building. See *Hills v Blair*, 182 Mich 20, 27; 148 NW 243 (1914) (noting that a worker injured on "a railway stretching endless miles across the country . . . might be on the premises of his employer and yet far removed from where his contract of labor called him").

In *Hills*, the Supreme Court concluded that an employee was not operating in the course of his employment when he was injured on his employer's premises but was 950 feet from where he had discharged his employment duties, he had finished his work day, and he was leaving the workplace by way of a route he had chosen for himself. *Id*. at 29-30. Although *Hills* predates the effective date of MCL 418.301(3), the latter's specification of not just the employer's premises, but rather of "the premises where the employee's work is to be performed," comports with *Hills* by distinguishing between locations on the employer's premises in the vicinity of the actual place of employment and those locations that are far removed from the actual place of employment.

For these reasons, the Court of Claims correctly concluded that Ostendorf, having finished her work and having walked approximately 900 feet from her worksite to where she had chosen to park, was off her employer's premises and thus outside the inclusive presumption of MCL 418.301(3).

The Court of Claims correctly recognized that because Ostendorf was off premises at the time of impact, there was no need to consider whether she intended to go straight home, as opposed to some social or recreational activity, and thus that it was not necessary to address UE's theory that Ostendorf's immediate plan was to walk a friend's dog.[3] The exception for social or recreational activity within MCL 418.301(3) concerns not what an employee departing the workplace premises intends to do next, but rather, the exception recognizes that employees sometimes choose to use

[3] Although the Court of Claims did not make any such factual finding, the parties appear prepared to agree that, as plaintiff put it, "Ostendorf left work early so that she could '*babysit*' a friend's dog."

their workplaces outside of working hours for their own social or recreational purposes. Therefore, the purpose of the exception is to distinguish such purely personal activity from activity in the service of the employer. See *Buitendorp v Swiss Valley, Inc*, 485 Mich 879, 879-880 (2009) (determining whether the statutory "social or recreational bar applies" does not require determining whether the injured person's "*overall* activities were work-related" but rather whether "the major purpose of the [injured person's] activity *at the time of injury*" was work-related).

For these reasons, the Court of Claims did not err in its conclusion that Ostendorf was removed from her employer's premises at the time she was injured.

IV. MOTION TO INTERVENE

Finally, UE argues that the Court of Claims erred when it denied UE's motions to intervene. We disagree.

Regarding the issues addressed previously, we note that UE's intervention claim is moot as it concerns the exclusive-remedy issues because UE has had the opportunity to litigate those issues on appeal. However, our Supreme Court's remand order directed this Court, if we were to conclude that the Court of Claims action was not barred by the exclusive-remedy provision of the WDCA, to consider whether the Court of Claims erred by denying UE's motion to intervene. Therefore, we will follow our Supreme Court's directive, recognizing that UE may wish to advocate other issues if the litigation in the Court of Claims continues.

"This Court reviews a trial court's decision on a motion to intervene for abuse of discretion." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). "An abuse of discretion occurs when the decision is outside the range of prin-

cipled outcomes." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659-660; 819 NW2d 28 (2011).

Intervention is governed by MCR 2.209. MCR 2.209(A) provides:

> Intervention of Right. On timely application a person has a right to intervene in an action:
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> (1) when a Michigan statute or court rule confers an unconditional right to intervene;
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> (2) by stipulation of all the parties; or
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As for permissive intervention, MCR 2.209(B) states:

> Permissive Intervention. On timely application a person may intervene in an action
>
> (1) when a Michigan statute or court rule confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Thus, under Subrule (A)(3), a person may intervene by right in an action on timely application when that person asserts an interest in the subject of the action "and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Importantly, under Subrule (B), a court deciding a request for permissive intervention must "con-

sider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Hill v L F Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008).

In this case, the Court of Claims found that although UE had knowledge of the complaint from the outset of the proceedings, UE waited approximately a year to request to intervene. Not only did the court conclude that UE's motion to intervene was untimely, but because there was nothing to suggest that MSU had exercised bad faith or had failed to adequately represent UE's interests and to assert all affirmative defenses, the court concluded that UE had not shown that intervention was necessary to ensure that its interests were adequately represented or that intervention would not delay or prejudice the adjudication of the rights of the original parties. UE does not take issue with the Court of Claims' concern that granting UE's motion to intervene would cause substantial delay in the case, but in trying to make its case, UE argues that its imperatives for intervention justify the delay. We disagree.

A. UNTIMELINESS

MCR 2.209(A)(3) and (B) both condition intervention on timely application. At oral argument below, UE's attorney admitted that "we're coming in late into the lawsuit," but suggested that this should not weigh against intervention because "we're raising a subject matter jurisdiction issue and you're never too late to raise . . . subject matter jurisdiction." Similarly, in this Court, UE admits that it brought its motion nearly one year after the complaint was filed but argues that the position it wished to advocate below was one challenging the jurisdiction of the Court of Claims to hear the case. In so doing, UE relies on the familiar rule that

challenges to subject-matter jurisdiction may be raised at any time. See *Adams*, 276 Mich App at 708-709. UE claims that it is not alleging an alternative theory of causation but rather is "seeking to intervene to implement a procedure that must occur in this tort action . . . ." However, UE cites no authority for its proposition that the criteria for determining whether a party or entity may intervene in civil litigation are viewed more favorably when the prospective intervenor challenges jurisdiction. Although parties have no time constraints when challenging subject-matter jurisdiction, procedurally a nonparty wishing to do so must first be a party to the action in the action's normal course.

UE also acknowledges that MSU pleaded the WDCA among its affirmative defenses but asserts that "MSU didn't inform UE until much later that it wasn't pursuing the exclusive-remedy defense . . . ." UE insists that MSU lacked an incentive in the matter because while MSU would have to fund any remedy under the WDCA, it could pass remedial costs on to its insurers in the event of liability in tort. However, in light of UE's admission that it knew of the litigation from its inception, and UE's contractual right to participate in any attendant defense, UE was, at the very least, on notice concerning the WDCA defense from the time the complaint was filed. Therefore, UE could have timely filed its motion to intervene.

B. REPRESENTATION OF INTERVENOR'S INTERESTS

MCR 2.209(A)(3) allows intervention by right when an applicant's interests are not adequately represented by an existing party. In arguing that there was "clearly not" another party advancing UE's interests, counsel for UE argued that

> the irony . . . is that you have plaintiffs saying this is MSU's issue. MSU will stand up for this issue and take a position; and then you have MSU saying we're not taking a position. . . . MSU is standing on the sidelines. Plaintiff clearly is opposed to our position. We are the only party speaking on behalf of this being a Worker's Comp claim.

MSU raised the workers' compensation exclusive-remedy provision in its affirmative defenses, but it did not pursue the defense beyond the pleading stage. Significantly, despite UE's protestations over MSU's incentives in the matter, UE has stopped short of challenging as clearly erroneous the Court of Claims' finding that "[n]o one is asserting that Michigan State University has exercised bad faith . . . ."[4] In light of this restraint on UE's part, we presume good faith on MSU's part and will not speculate as to why it abandoned the WDCA defense. Moreover, in light of our holding on the exclusive-remedy issue, an issue in which UE has participated fully, we conclude that UE's intervention argument is meritless.

The only interest that UE has put forward for the purposes of intervention, by right or with permission, is its obligation to indemnify MSU to the extent that the latter ends up obliged to cover tort damages in excess of its other sources of coverage. But a potential duty to indemnify a claimant for benefits is "separate and distinct" from the underlying claim for benefits, which does not itself justify the potential indemnitor's intervention in litigation regarding that claim. See *Black v Dep't of Social Servs*, 212 Mich App 203,

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[4] We note that ultimately MSU may not have pursued the affirmative defense under the WDCA because it believed that the defense would not be successful, even though a workers' compensation award would have eliminated the possibility of tort liability. Of course, it is also possible that MSU did not pursue the defense because MSU was self-insured through State Farm and UE.

205-206; 537 NW2d 456 (1995). UE does not assert subrogation rights in the matter, or any other contractual rights in connection with MSU beyond MSU's admitted duty of cooperation. Therefore, UE's interest in this case relates directly to MSU's cooperation, not to the possible competing theories of recovery or remedy. In the end, if MSU files a claim against its policy with UE for excess coverage for tort liability, and UE remains persuaded that MSU did not conscientiously defend itself or otherwise cooperate with UE in the matter, then UE may defend the claim on such contractual bases.

For these reasons, UE fails to show, with its arguments relating to jurisdiction and the extent to which MSU represented UE's interests in the litigation below, that the Court of Claims erred by denying as untimely its motion for intervention, either by right or with permission.

Affirmed.

SWARTZLE, P.J., and CAVANAGH, J., concurred with CAMERON, J.

EVERSON v WILLIAMS

Docket No. 340521. Submitted April 12, 2019, at Detroit. Decided May 21, 2019, at 9:20 a.m.

Marsheri D. D. Everson brought an action in the Wayne Circuit Court to quiet title to a property that her grandparents had conveyed to her when she was a minor, with a provision that the grandparents would have the right to occupy the property for the rest of their lives. In 1997, when plaintiff was 11 years old, her grandfather died, and after a proceeding in the Wayne County Probate Court, Freddie G. Burton Jr., J., a quitclaim deed was executed that purported to convey plaintiff's interest to her grandmother. Her grandmother then sold the property to Rondalyn Everson. Rondalyn Everson later defaulted on the mortgage, and in 2004, the mortgage company quitclaimed the property to WM Specialty Mortgage, LLC. WM Specialty then sold the property in 2005 to a man who ultimately quitclaimed the property to defendant, Delores J. Williams, in 2010. Plaintiff's grandmother died in 2014. After plaintiff brought this action, defendant moved for summary disposition, arguing that plaintiff's claim was barred by the statute of limitations and precluded by the doctrine of res judicata, in light of the fact that the probate court had granted the petition of plaintiff's grandmother to sell the property in 1997. In response, plaintiff argued that her claim was not time-barred because it did not accrue until her grandmother's death in 2014 and that her grandmother did not have legal authority to convey plaintiff's interest in the property. After a hearing, the trial court, Megan Maher Brennan, J., granted summary disposition in favor of defendant and entered an order extinguishing plaintiff's interest in the property and vesting title in defendant. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by ruling that plaintiff's claim was barred by the statute of limitations. Under MCL 600.5801(4), the general limitations period for bringing an action for the recovery or possession of any lands is 15 years. However, MCL 500.5829(3) provides that when a party is claiming the land by force of a remainder or reversion, the claim accrues when the precedent estate would have expired by its own limitation. Plaintiff's interest

in the subject property was best characterized as a remainder under MCL 554.11, because her right to possess the property was postponed until the precedent estate expired upon the deaths of her grandparents. Accordingly, under MCL 554.32, plaintiff's expectant estate could not have been defeated by her grandmother's sale of the property, because her grandmother was precluded from conveying any greater interest in the land than she herself possessed, which was a life estate. Because plaintiff's claim to the property did not accrue until her grandmother's death in 2014, plaintiff pursued this action within the 15-year limitations period in MCL 600.5801(4).

2. The trial court erred by concluding that plaintiff's claim was barred by res judicata. For res judicata to preclude a claim, the prior action must have been decided on the merits, both actions must have involved the same parties or their privies, and the matter in the second case must have been capable of being resolved in the first case. In the 1997 probate court proceedings, plaintiff's grandmother filed a petition for appointment of a conservator or for a protective order concerning plaintiff's estate, explaining that she and her husband had conveyed an interest in their property to plaintiff in an effort to provide for her financially if they passed away and that she sought to sell the property and buy a new residence that would be held in trust for plaintiff. The probate court granted the petition and stated that the proceeds of any sale of the original property were to be placed into escrow on plaintiff's behalf until a trust was established. Two years later, plaintiff's grandmother, acting as the court-appointed representative for plaintiff's estate, conveyed the property to Rondalyn Everson. The Revised Probate Code, MCL 700.1 *et seq.*, which was the law in effect at the time, set forth specific circumstances under which the real estate of a ward could be sold by a fiduciary. Specifically, MCL 700.636(1) provided that, subject to confirmation by the court, the real estate interest of a ward could be sold by a fiduciary, among other circumstances, when the income of the ward's estate was insufficient to maintain or educate the minor ward, and when it appeared that it would be for the benefit of the ward that the ward's real estate or any part of it be sold and the proceeds thereof reinvested. Further, MCL 700.634 provided that a fiduciary could sell real estate if the fiduciary had the authority to sell it under MCL 700.634 to MCL 700.638, if the fiduciary reported the sale in writing to the court for confirmation and had a hearing thereon, if the fiduciary gave notice of the hearing on the report of sale to all parties in interest, if the fiduciary filed and had approved the bond required by the court as a condition of the sale, and if the fiduciary obtained an order from

the court confirming the sale and directing the giving of a deed or other conveyance pursuant to the sale. In this case, there was no indication in the record that the probate court was given the opportunity to confirm the actual sale, the sale price of the property, or that the proceeds of the sale would indeed be held in trust for plaintiff when the property was conveyed to Rondalyn Everson in 1999, and it did not appear from the record that the proceeds of the sale were placed in trust for plaintiff. Accordingly, while the probate court authorized plaintiff's grandmother generally to proceed with the sale of the property, it was not clear whether the probate court authorized the actual sale of the property in 1999. Under these circumstances, the trial court's granting of summary disposition on the basis of res judicata pursuant to MCR 2.116(C)(7) was not appropriate.

3. The trial court erred by granting summary disposition pursuant to MCR 2.116(C)(10) and quieting title to the property in favor of defendant because the record yielded genuine issues of material fact with respect to plaintiff's remainder interest in the subject property.

Reversed and remanded for further proceedings.

1. REAL PROPERTY — FUTURE ESTATES — REMAINDERS — ACTIONS TO QUIET TITLE — STATUTE OF LIMITATIONS — ACCRUAL OF CLAIMS.

Under MCL 600.5801(4), the general limitations period for bringing an action for the recovery or possession of land is 15 years; when a party brings an action to claim land by force of a remainder or reversion, under MCL 500.5829(3), the claim accrues when the precedent estate would have expired by its own limitation.

2. REAL PROPERTY — REMAINDERS — ALIENATION OF PRECEDENT ESTATE.

A conveyance of property by the holder of a life estate does not defeat the remainder interest of another (MCL 554.32).

John J. Cooper for plaintiff.

The Darren Findling Law Firm, PLC (by *Darren Findling* and *Andrew J. Black*) for defendant.

Before: MARKEY, P.J., and FORT HOOD and GADOLA, JJ.

FORT HOOD, J. Plaintiff Marsheri D. D. Everson appeals as of right the trial court's order granting

summary disposition and quieting title to 20280 Kentfield, Detroit, Michigan (the Kentfield property) in favor of defendant Delores J. Williams. We reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND AND PROCEDURAL HISTORY

A. THE KENTFIELD PROPERTY

This action involves the Kentfield property, which originally belonged to plaintiff's grandparents, Cedric D. Everson and Elizabeth A. Everson. While plaintiff was still a minor,[1] her grandparents conveyed their interest in the Kentfield property to plaintiff, while retaining life estates in the property. The conveyance provided, in pertinent part, as follows:

> With the filing of this Quit Claim Deed it is hereby noted that the Grantors Cedric and Elizabeth Everson Becomes [sic] Tenants of the subject property[.] [I]t is therefore a conditio[n] of this Conveyance that Cedric D. Everson and Elizabeth A. Everson enjoy Peaceful and Continual Occupan[c]y of said property for the remainder of their natural lives.

Cedric died on January 17, 1997. On April 2, 1997, plaintiff, 11 years old at the time, purportedly conveyed her interest in the Kentfield property to Elizabeth by way of a quitclaim deed. Following proceedings in the Wayne Probate Court that will be discussed in detail subsequently in this opinion, on August 26, 1999, Elizabeth executed a warranty deed for the Kentfield property to Rondalyn Everson for the sum of $70,000. Rondalyn subsequently defaulted on her mortgage against the property, and a sheriff's deed on mortgage sale was entered on February 26, 2004. On March 12,

[1] Plaintiff was born on November 13, 1985.

2004, Ameriquest Mortgage Company quitclaimed the property to WM Specialty Mortgage, LLC. WM Specialty Mortgage executed a covenant deed to Charles Smith for the Kentfield property on January 25, 2005. Finally, on February 24, 2010, Smith quitclaimed the Kentfield property to defendant. Elizabeth died on July 18, 2014.

B. THE PRESENT ACTION

On August 19, 2016, plaintiff filed the instant action seeking to quiet title to the Kentfield property. As pertinent to this appeal, defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10), claiming that plaintiff's action was (1) barred by the applicable statute of limitations and (2) precluded by the application of the doctrine of res judicata, and asserting that title to the Kentfield property should be quieted in favor of defendant. Plaintiff responded, arguing that (1) her claim was not time-barred because it did not accrue until Elizabeth's death in July 2014 and (2) Elizabeth did not have legal authority to convey plaintiff's interest in the Kentfield property. Plaintiff also pointed out that she did not receive any proceeds from the sale of the Kentfield property or an interest in the property that Elizabeth purchased using the proceeds from the sale of the Kentfield property. Following a hearing on defendant's motion, the trial court granted summary disposition in favor of defendant and entered a concomitant order stating that plaintiff's interest in the Kentfield property was extinguished. Plaintiff now appeals as of right.

II. STANDARDS OF REVIEW

We review de novo the trial court's ruling in response to defendant's motion for summary disposition.

Beach v Lima Twp, 489 Mich 99, 105; 802 NW2d 1 (2011). The trial court's written order reflects that summary disposition was granted pursuant to MCR 2.116(C)(7) and (C)(10). A motion for summary disposition brought pursuant to MCR 2.116(C)(10)

> tests the factual support of a plaintiff's claim. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. [*Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004) (citation omitted).]

Defendant also moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that plaintiff's claim was barred by the applicable statute of limitations as well as the doctrine of res judicata. "In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Similarly, this Court reviews de novo the trial court's determination regarding whether the doctrine of res judicata is applicable to plaintiff's claim. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

III. ANALYSIS

As an initial matter, plaintiff argues that this action seeking to quiet title to the Kentfield property is not barred by the applicable 15-year statute of limitations because her claim did not accrue until 2014, when

Elizabeth died and Elizabeth's life estate in the Kentfield property was terminated. We agree.

MCL 600.5801 provides, in pertinent part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
>
> * * *
>
> (4) In all other cases under this section, the period of limitation is 15 years.

Similarly, MCL 600.5829 offers guidance with respect to when a claim to recover land *accrues*. It provides:

> The right to make an entry on, and the claim to recover land accrue:
>
> (1) Whenever any person is disseised, his right of entry on and claim to recover land accrue at the time of his disseisin;
>
> (2) When he claims as heir or devisee of one who died seised, his claim accrues at the time of the death, unless there is another estate intervening after the death of the ancestor or devisor in which case his claim accrues when the intermediate estate expires or would have expired by its own limitation;
>
> (3) *When there is an intermediate estate, and in all other cases where the party claims by force of any remainder or reversion, his claim accrues when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture of the intermediate or precedent estate for which he might have entered at an earlier time*.
>
> (4) The provision of (3), does not prevent any person from entering when he is entitled to do so by any forfeiture

> or breach of condition, but if he claims under either of them his claim accrues when the forfeiture is incurred or the condition broken.
>
> (5) In all cases not otherwise provided for, the claim accrues when the claimant or the person under whom he claims first becomes entitled to the possession of the premises under the title upon which the entry or action is founded. [Emphasis added.]

Plaintiff contends that her interest in the property did not accrue until the death of Elizabeth and the termination of her life estate on July 18, 2014. Therefore, plaintiff argues, her complaint seeking to quiet title, filed on August 19, 2016, was timely. Specifically, plaintiff argues that her cause of action did not accrue until Elizabeth died in 2014, because plaintiff held a remainder in the Kentfield property subject to the life estates of Elizabeth and Cedric. Plaintiff is correct in her assertion, and it is supported by the applicable caselaw.

MCL 554.7 provides that "[e]states, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy." An estate in possession is one in which the owner of the estate "has an immediate right to the possession of the land," and an estate in expectancy is one in which "the right to the possession is postponed to a future period." MCL 554.8. When an estate is to commence on a future day, it is a future estate. MCL 554.9. "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time." MCL 554.10. If dependent on "a precedent estate," a future estate is classified as a "remainder," MCL 554.11, and the person who holds it is called a "remainderman," *Black's Law Dictionary* (11th ed). In *Wengel v Wengel*,

270 Mich App 86, 101; 714 NW2d 371 (2006), this Court observed, in the context of considering whether adverse possession may extinguish the right of a remainderman to real property, that "[i]n relation to their time of enjoyment, estates are divided into estates in possession and estates in expectancy, and estates in expectancy, denominated as future estates and reversions, exist where the right to possession is postponed until a future date."

> "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time." MCL 554.10. A remainder is created when a future estate is dependent upon the precedent estate. MCL 554.11. Future estates are contingent "whilst the person to whom, or the event upon which they are limited to take effect remains uncertain." MCL 554.13. . . . "When a remainder on an estate for life . . . shall not be limited on a contingency, defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker[.]" MCL 554.29. "Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession." MCL 554.35. [*Wengel*, 270 Mich App at 101-102.]

Plaintiff's interest in the subject property is best characterized as a remainder estate, because her right to possession of the Kentfield property was postponed until the occurrence of a specific event, that being the deaths of Elizabeth and Cedric. "A remainder is created when a future estate is dependent upon the precedent estate." *Id*. at 101, citing MCL 554.11. Importantly, the *Wengel* Court recognized that "[c]ontingent remainders are not possessory estates" and that a remainderman's right of entry and possession of the subject property will not accrue until the life tenant passes away. *Wengel*, 270 Mich App at 102-103; see also *Lowry v Lyle*, 226 Mich

676, 682; 198 NW 245 (1924) (observing that "[a]dverse possession as to the rights of the remaindermen did not commence to run until their right of entry and possession accrued at the death of the life tenant"). The *Wengel* Court observed, in the factual context of a claim involving adverse possession, that a contingent remainderman does not have a present right of possession that would give rise to a cause of action against an individual adversely possessing property. *Wengel*, 270 Mich App at 104. Instead, a remainderman cannot take action until the preceding estate expires, which in this case was when the holders of the life estate, Cedric and Elizabeth, passed away. See *id*.; *Lowry*, 226 Mich at 682.

For example, in *Wengel*, concluding that the contingent remainder interest of a remainderman could not be "destroyed by adverse possession," this Court reasoned as follows, in pertinent part:

> The statutes and the case law make clear that the contingent remainder interest held by defendant in the case at bar could not be destroyed by adverse possession *because a claim to recover possession of the property on the basis of said interest, or defendant's status as a remainderman, would not accrue, if at all and at a minimum, until the occurrence of the contingency, which is plaintiff's death, or, in other words, the expiration of the precedent estate*. . . . *The 15-year statutory period would not commence running against defendant until a cause of action accrued in which defendant sought to enforce his rights as the holder of the contingent remainder, which interest, at the time of plaintiff's death, would vest and leave defendant with a fee simple*. [*Wengel*, 270 Mich App at 104 (emphasis added).]

Although *Wengel* addressed contingent remainders rather than the vested remainder at issue here, statutory authority makes clear that "[n]o expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor

by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise." MCL 554.32. Moreover, in *Lowry* (citing *Jeffers v Sydnam*, 129 Mich 440; 89 NW 42 (1902), and the predecessor statute to MCL 554.32), the Michigan Supreme Court recognized that the holder of a life estate is precluded from conveying "any greater interest in the land than possessed by him," and a grantee of such an interest will hold only a life estate. *Lowry*, 226 Mich at 684. See also *Rendle v Wiemeyer*, 374 Mich 30, 40-41; 131 NW2d 45 (1964) (observing that because the testator devised vested remainders to his grandchildren, any partition of the property by the holders of a life-estate interest in the property were void against the remaindermen). Put simply, any conveyance by the holder of the life estate is not able to defeat the remainder interest of another. *Lowry*, 226 Mich at 684. Therefore, plaintiff's claim to the Kentfield property did not accrue until the death of Elizabeth in July of 2014 when the occurrence of the event that allowed plaintiff to take possession of the property, the death of Elizabeth, took place and plaintiff first was able to assert her rights of possession of the Kentfield property.[2] Before that point, plaintiff simply had no "right of entry or of possession during the existence of [Elizabeth's] life estate." *Lowry*, 226 Mich at 683. Plaintiff pursued this action within the 15-year limitation period; accordingly, this action is not barred by MCL 600.5801(4). The trial court erred by holding otherwise.[3]

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[2] The *Wengel* Court recognized that the statute governing the accrual of a claim for a remainderman is MCL 600.5829(3). *Wengel*, 270 Mich App at 103.

[3] While defendant relies on the deed that plaintiff signed as an 11-year-old child on April 2, 1997, asserting that she conveyed her remainderman interest at that time and that any cause of action she possessed accrued then, this argument is dubious, given that it is well

Plaintiff also argues that the trial court erred in concluding that her claim is barred by res judicata. We agree.

This Court has explained:

> " 'The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation.' " For res judicata to preclude a claim, three elements must be satisfied: "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." "[T]he burden of proving the applicability of the doctrine of res judicata is on the party asserting it." [*Garrett v Washington*, 314 Mich App 436, 441; 886 NW2d 762 (2016) (citations omitted).]

Pivotal to our determination regarding whether res judicata applies to bar plaintiff's claim are the proceedings that transpired in the probate court in 1997. On June 19, 1997, Elizabeth filed a petition for appointment of a conservator or for a protective order concerning plaintiff's estate. In the petition, Elizabeth outlined how she and Cedric had conveyed an interest in the Kentfield property to plaintiff in an effort to provide for her financially if they passed away. According to the petition, Elizabeth sought to sell the Kentfield property with the intention "to provide a similar benefit for [plaintiff] but to do so by taking title in [a] new residence in the name of herself as trustee, and providing in her trust agreement that said real estate shall be held for distribution to [plaintiff] upon Elizabeth A. Everson's

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settled in Michigan that "a minor lacks the capacity to contract." *Woodman v Kera LLC*, 486 Mich 228, 236; 785 NW2d 1 (2010) (opinion by YOUNG, J.). Accordingly, the April 2, 1997 deed can only be asserted against plaintiff if she confirmed it after she reached the age of majority because it does not have a binding effect unless it is ratified. *Id*. at 236-237 (opinion by YOUNG, J.).

death, and upon [plaintiff] attaining age 21."[4] On August 11, 1997, the probate court granted Elizabeth's June 19, 1997 petition, stating that the proceeds of any sale of the Kentfield property were to be "placed into escrow on behalf of [plaintiff] until a trust est[ate] is established—order [to be] presented." As noted earlier in this opinion, two years later, on August 26, 1999, Elizabeth, as the "court appointed representative for the estate of [plaintiff]," who was a 13-year-old minor at the time, conveyed the Kentfield property to Rondalyn Everson. Notably, all of these events predated the enactment of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., effective April 1, 2000. See 1998 PA 386. Therefore, the law in effect at the time was the Revised Probate Code, MCL 700.1 *et seq*.

MCL 700.636 set forth specific circumstances under which the real estate of a "ward"[5] could be sold by a fiduciary:

> (1) Subject to confirmation by the court, the real estate, an interest therein, or easement of a ward may be sold by the fiduciary in any of the following instances:
>
> * * *

[4] Waivers and consents for Elizabeth's petition for a protective order were signed by plaintiff's parents, Aaron Moore and Madeline H. Everson, giving their agreement for entry of the protective order "permitting Elizabeth A Everson to deed property commonly known as 20280 Kentfield, Detroit, Michigan, and thereby extinguishing any interest in said property of Marsheri Dominique Depree Everson." However, the Michigan Supreme Court has made it clear that "a parent is without authority to bind his child by contract" and that a parent lacks the authority to "waive the rights of the child." *Woodman*, 486 Mich at 240, 242 (opinion by YOUNG, J.).

[5] MCL 700.12(2) defined "[w]ard" as "a minor or a legally incapacitated person for whom a guardian is appointed pursuant to article 4 or a protected person for whom a conservator is appointed pursuant to article 4."

> (c) When the income of the estate of a ward is insufficient to maintain the ward and his family or is insufficient to educate a minor ward or the children of a ward.
>
> (d) When it appears that it would be for the benefit of the ward that his real estate or any part thereof be sold and the proceeds thereof reinvested.

Moreover, MCL 700.634 set forth certain requirements that the fiduciary of an estate had to comply with before selling real property:

> A fiduciary may sell real estate, an interest therein or easement at private or public sale if all the following occur:
>
> (a) He has the authority to sell under [MCL 700.634 to MCL 700.638].
>
> (b) He reported the sale in writing to the court for confirmation and had a hearing thereon.
>
> (c) He gave notice of the hearing on the report of sale to all parties in interest as provided by supreme court rule.
>
> (d) He filed and had approved the bond required by the court as a condition of the sale.
>
> (e) He obtained an order from the court confirming the sale and directing the giving of a deed or other conveyance pursuant to the sale.

While the record reflects that Elizabeth, as fiduciary of plaintiff's estate, sought *permission* from the probate court to sell the Kentfield property, and the court approved the sale of the Kentfield property as a general matter, directing that the proceeds of the sale be held in trust for plaintiff, there is no indication in the record that the probate court was given the opportunity to *confirm* the actual sale, the sale price of the property, or that the proceeds of the sale would indeed be held in trust for plaintiff when the property was actually conveyed to Rondalyn Everson in 1999. MCL 700.634(e); MCL 700.636(d). In any event, it does not appear from

the record that Elizabeth complied with the terms of the probate court's order to place the proceeds of the sale in trust for plaintiff. Accordingly, while the probate court authorized Elizabeth generally to proceed with the sale of the Kentfield property, the record is unclear with respect to whether the probate court authorized the actual sale of the Kentfield property in 1999 when it was conveyed to Rondalyn Everson.[6] Under such circumstances, given the serious questions that remain outstanding regarding whether (1) plaintiff's remainderman interest in the Kentfield property was protected while she was a minor and (2) the applicable law, and the probate court's orders, were complied with before the Kentfield property was conveyed to Rondalyn Everson in 1999, we disagree with the trial court's assessment that res judicata operates to bar plaintiff's claims. Specifically, we are not persuaded that the issue of whether plaintiff's remainderman interest in the Kentfield property could be lawfully conveyed was raised, addressed, or resolved in the probate court action or that it could have been.[7] *Garrett*, 314 Mich

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[6] Notably, MCL 600.2928(1) provides:

> The circuit court may order the sale, lease, exchange, conveyance, and if necessary or desirable, the platting, of all or any part of any lands, tenements, and hereditaments held by an infant or other incompetent person, by way of mortgage, in trust only for others, in fee, life tenancy, tenant for years, or in any other way when it appears that the sale, lease, exchange or conveyance is necessary and proper for the support, maintenance and education of the infant or other incompetent or that the interest of such person or the person for whom the property is held will be substantially promoted by the sale, lease, exchange, conveyance or platting. This power shall be exercised in accordance with the rules of court and in the manner and with the restrictions as the court deems expedient.

[7] Our review of the probate court's July 11, 2016 written opinion confirms our conclusion.

App at 441. Notably, plaintiff herself, an 11-year-old child at the time, was not able to do so, and the record reflects that the adults in her family did not take steps to protect plaintiff's interest in the Kentfield property or the proceeds from its sale. Therefore, the trial court's granting of summary disposition on the basis of res judicata pursuant to MCR 2.116(C)(7) was not appropriate. Moreover, because the record yields genuine issues of material fact with respect to plaintiff's remainderman interest in the Kentfield property, the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(10) and quieting title to the Kentfield property in favor of defendant.

IV. CONCLUSION

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs.

MARKEY, P.J., and GADOLA, J., concurred with FORT HOOD, J.

LUECK v LUECK

Docket No. 341018. Submitted May 8, 2019, at Detroit. Decided May 21, 2019, at 9:25 a.m. Leave to appeal denied 504 Mich 999 (2019).

Karen S. Lueck and James F. Lueck were divorced in September 2014 after 29 years of marriage. A consent judgment of divorce was entered, and it incorporated the terms of the parties' settlement agreement, which essentially split the parties' sizable estate and marital assets. The consent judgment awarded Karen spousal support of $10,000 a month for 10 years or until Karen's death or remarriage, whichever happened first. Karen started dating Matthew Bassett about a year after the divorce. Karen and Matthew exchanged wedding vows at a private commitment ceremony in December 2015. The two did not obtain a marriage license, and the ceremony was never legally recognized as a marriage. James filed a complaint in the Oakland Circuit Court, Family Division, seeking the termination of his obligation to pay spousal support to Karen. Karen asserted that spousal support should continue because she had not remarried. The court, Lisa O. Gorcyca, J., terminated Karen's spousal support after finding that the ceremonial exchange of vows and Karen's holding herself out as Matthew's wife qualified as "remarriage" as the term was contemplated by the consent judgment of divorce. Karen appealed.

The Court of Appeals *held*:

Under MCL 551.2, a valid marriage by law is a civil contract between two parties capable of contracting and of consenting to the marriage contract. MCL 551.101 requires all parties intending to be legally married to obtain a marriage license to be given to the officiant before the marriage can be performed. The trial court abused its discretion when it terminated James's obligation to pay Karen $10,000 a month in spousal support. The consent judgment of divorce contained definite terms regarding the duration of spousal support and lacked any reference to future adjustments or modifications. The agreement plainly contemplated that James was obligated to pay the spousal support for 10 years or until Karen died or remarried, whichever event occurred first. "Remarried" is unambiguous. A person is not married in Michigan simply by participating in a commitment ceremony even if it contains

certain embellishments found in many traditional marriage ceremonies. Michigan law requires the execution of a marriage license and solemnization of the union. In this case, Karen and Matthew did not get a marriage license and so did not trigger the provision in the consent judgment that would have terminated Karen's right to spousal support. The trial court erred by finding that the commitment ceremony and Karen's conducting herself as though she were married to Matthew triggered the termination provision.

Reversed and remanded.

DIVORCE — CONSENT JUDGMENTS — PAYMENT OF SPOUSAL SUPPORT — WHEN OBLIGATION TO PAY TERMINATES UPON PAYEE'S REMARRIAGE.

The term "remarries" is unambiguous; a remarriage is a legal marriage recognized under Michigan law, which is the union of two parties accompanied by a solemnization and a marriage license; a provision in a consent judgment of divorce providing that one party may stop paying spousal support to the other party when the other party remarries is not triggered when the party receiving spousal support participates in a commitment ceremony with another person but has not obtained and executed a marriage license (MCL 551.2; MCL 551.101).

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

Clark Hill PLC (by *Cynthia M. Filipovich* and *Randi P. Glanz*) for James F. Lueck.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Plaintiff appeals by leave granted the July 20, 2017 order that terminated defendant's obligation to provide spousal support under the parties' divorce settlement and consent judgment of divorce. We reverse.

I. BACKGROUND

Plaintiff and defendant married in 1985. On September 5, 2014, after 29 years of marriage, they

entered into a divorce settlement agreement, and on September 8, 2014, they signed a consent judgment of divorce, which merged and incorporated the terms of their settlement. At the time of their divorce, plaintiff and defendant had two grown children and a sizable estate. The parties' settlement essentially split their marital assets.

The parties' consent judgment of divorce provided the following regarding spousal support:

> A. No Spousal Support/Section 71 payments to Defendant by Plaintiff are awarded and same shall be forever waived and barred. This is non-modifiable.
>
> B. Commencing September 1, 2014 Defendant shall pay to Plaintiff each month, through a direct deposit into an account that Wife will establish, *alimony/spousal support in the amount of $10,000, for a period of 10 years (120 months), until Wife's death, or until Wife remarries, which ever event was to occur first.* All such payments of alimony/spousal support shall be deductible to Husband for income tax purposes pursuant to IRC §215 and includable by Wife's [sic] in her gross income for income tax purposes pursuant to IRC § 71, and neither party shall file any income tax return inconsistent therewith. The foregoing alimony/spousal support payments to Wife by Husband shall not be modifiable as to amount or duration. [Emphasis added.][1]

Approximately one year after her divorce, in September 2015, plaintiff met and dated Matthew Bassett. Not long after, plaintiff considered marrying Bassett but she decided against it, and instead, on December 24, 2015, they participated in a "commitment ceremony" performed at plaintiff's church. Plaintiff considered herself a "spiritual person," did not want to "live in sin," and

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[1] Defendant wished to include a cohabitation clause in the spousal-support provision of the Consent Judgment, but plaintiff refused, so one was not included.

"wanted to be right with God," and therefore, she decided to have a "private prayer ceremony" without guests or witnesses. Plaintiff discussed with her close friend the possibility of losing spousal support. Plaintiff told her friend that she had done her "homework" and was only having a spiritual ceremony with Bassett because the ceremony was not considered legal without a marriage license; accordingly, she could continue to receive spousal support from defendant.

Plaintiff and defendant's mutual friend, Kimberly Kleinfelter, testified that plaintiff told her that plaintiff couldn't be married legally under the terms of the divorce but that she desired the blessing of God on her union with Bassett. Plaintiff told Kleinfelter that she did not intend to marry under state law so that she could keep her spousal support, which was important to her.

The lead pastor of the First Congregational Church of Traverse City, Chad Oyer, met plaintiff because she attended the church and had been a "very active" member of his congregation. Oyer testified that plaintiff desired to live in a recognized Christian union where "they put God at the center," so she asked Oyer for "a ceremony of Christian commitment for one another." Oyer testified that plaintiff told him that "a legal civil marriage would compromise" her rights and that her spousal support would be terminated. Oyer obliged her request because he believed that he could perform a "Christian marriage" without it resulting in a legal marriage. Oyer performed "a ceremony of Christian marriage, and all traditional vows were exchanged within the context and understanding that this was a Christian marriage, not a legal or civil marriage." Plaintiff and Bassett exchanged the "tradi-

tional Christian vows," represented each other as "husband and wife," and exchanged rings. Oyer performed the ceremony without witnesses present or the signing of a marriage license.

Defendant learned from one of his friends of the private ceremony between plaintiff and Bassett. Defendant contacted plaintiff's counsel believing that plaintiff's spousal support should cease under the language of the consent judgment of divorce because she had remarried. Plaintiff's counsel told him that plaintiff did not have a "legal" marriage and that it did not affect his obligation to pay spousal support. Defendant, however, understood that the spousal-support provision would terminate upon "marriage," and he did not understand the terms of the parties' settlement and consent judgment to mean that spousal support would cease only upon a "legal marriage." Defendant moved for an order dismissing his spousal-support obligation and requested reimbursement, sanctions, and attorney fees.

The trial court held an evidentiary hearing on May 15, 2017. Following the hearing, the parties each submitted proposed findings of fact and conclusions of law. On July 20, 2017, the trial court issued its opinion and order. The trial court found that plaintiff had participated in a private religious ceremony performed by her pastor and afterward held herself out as married in a manner that convinced others that she had remarried. The trial court concluded that plaintiff had not signed a marriage license in an effort to prevent the termination of her spousal support. The trial court further found that plaintiff lacked credibility and concluded that her actions were taken to defraud the court and circumvent the parties' consent judgment of divorce. The trial court stated that divorce actions are

equitable proceedings, and a court of equity molds its relief according to the character of the case. The trial court ruled that equity required the termination of plaintiff's spousal support, and therefore, it granted defendant's motion in part and terminated his obligation to pay plaintiff spousal support. This appeal followed.

II. STANDARDS OF REVIEW

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). "[T]he interpretation of a contract is a question of law reviewed de novo on appeal . . . ." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). "An unambiguous contract must be enforced according to its terms." *Id*. We review for clear error a trial court's factual findings relating to the award of spousal support, and we review for an abuse of discretion a trial court's decision regarding spousal support. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A finding is clearly erroneous if, after a review of the record, we are left with a definite and firm conviction that the trial court made a mistake. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). We are not limited to review for clear error when a trial court's finding is "derived from an erroneous application of law to facts . . . ." *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). We review de novo a trial court's ruling on a matter of statutory construction. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007). "A divorce judgment entered upon the settlement of the parties represents a contract, which, if unambiguous, is to be interpreted as a question of law." *Holmes v Holmes*, 281 Mich App

575, 587; 760 NW2d 300 (2008) (quotation marks, citation, and ellipsis omitted).

III. ANALYSIS

A trial court may modify spousal support on the basis of new facts or different circumstances arising after entry of the divorce judgment. *Ackerman v Ackerman*, 197 Mich App 300, 301; 495 NW2d 173 (1992). The burden is on the party seeking modification to establish that the new facts or changed circumstances warrant modification. *Id*.

Plaintiff argues that the trial court erred by ruling that her conduct triggered the consent judgment's provision terminating spousal support. We agree.

In Michigan, a marriage license is required to recognize a "legal marriage" and to obtain certain legal rights and obligations that come with marriage. Michigan law does not recognize common-law marriage. MCL 551.2 provides:

> So far as its validity in law is concerned, marriage is a civil contract between a man and a woman, to which the consent of parties capable in law of contracting is essential. Consent alone is not enough to effectuate a legal marriage on and after January 1, 1957. Consent shall be followed by obtaining a license as required by [MCL] 551.101 . . . , or as provided for by [MCL] 551.201 . . . , and solemnization as authorized by [MCL 551.7 to MCL 551.18].

Michigan law requires persons to obtain and execute a marriage license to have their union recognized as a "legal marriage" under MCL 551.101, which states in relevant part:

> It shall be necessary for all parties intending to be married to obtain a marriage license from the county clerk of the county in which either the man or woman resides,

> and to deliver the said license to the clergyman or magistrate who is to officiate, before the marriage can be performed.

The consent judgment of divorce in this case contains definite terms regarding the duration of spousal support and lacks any reference to future adjustments or modifications. By its terms, the agreement plainly contemplated that defendant had the obligation to pay such support "for a period of 10 years (120 months), until Wife's death, or until Wife remarries, which ever event was to occur first." The term "remarries" lacks ambiguity and means only a legal marriage recognized under Michigan law. The record reflects that plaintiff did not marry under Michigan law. Although she went through a commitment ceremony that contained certain embellishments found in many traditional marriage ceremonies, the marriage license and solemnization required by MCL 551.7 to MCL 551.18 were absent. Therefore, plaintiff's conduct did not constitute a marriage or trigger the spousal-support-termination provision of the parties' consent judgment of divorce. The trial court erred by finding that plaintiff's conducting herself as though she was married to Bassett could trigger the spousal-support-termination provisions of the parties' settlement and consent judgment of divorce. The unambiguous terms of the consent judgment of divorce govern when defendant's spousal-support obligation terminates, and those terms were not met by plaintiff's conduct. Therefore, the trial court erred by finding that although no marriage license was signed, plaintiff's actions required the termination of defendant's spousal-support obligation.

The trial court's factual findings were clearly erroneous, and it erroneously applied the law to the facts of this case. Defendant failed to meet his burden to

establish that the facts warranted modification of his spousal-support obligation. Consequently, the trial court abused its discretion when it terminated plaintiff's spousal support.

We reverse and remand this case to the trial court to enter an order reinstating plaintiff's spousal support as provided under the terms of the consent judgment of divorce. We do not retain jurisdiction.

REDFORD, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

PEOPLE v WILLIAMS

Docket No. 341703. Submitted May 8, 2019, at Detroit. Decided May 23, 2019, at 9:00 a.m.

In 1993, Donald W. Williams was convicted following a jury trial in the Macomb Circuit Court of first-degree felony murder, MCL 750.316(1)(b); defendant was 16 years old when he committed the offense. The court, George E. Montgomery, J., sentenced defendant as an adult to life imprisonment without parole. In June 2012, the United States Supreme Court decided *Miller v Alabama*, 567 US 460 (2012), which held that the Eight Amendment's prohibition of cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders. In response, the Michigan Legislature enacted MCL 769.25a, which would provide a procedural framework for resentencing certain juvenile offenders in the event that the United States Supreme Court determined that *Miller* applied retroactively. Thereafter, in *Montgomery v Louisiana*, 577 US ___ (2016), the Court held that the *Miller* rule applied retroactively. In 2016, the prosecution filed a motion under MCL 769.25a(4)(b), requesting that defendant again be sentenced to life imprisonment without parole. Defendant opposed the motion and moved for the approval of public funds in the amount of $42,650 to hire experts to analyze the *Miller* factors—that is, to hire mitigation experts—including those with specialized knowledge in adolescent development. The court, James M. Biernat, Jr., J., granted in part and denied in part defendant's motion, concluding that while defendant was entitled to financial assistance to pay for the experts, the requested amount was excessive. The trial court awarded defendant $2,500 to retain experts for his resentencing without explaining its reasoning for the amount; pro bono counsel advanced fees of $75,000 for the four mitigation experts who testified at defendant's resentencing hearing. At the resentencing hearing, the trial court denied the prosecution's request for life imprisonment without parole and sentenced defendant to 30 to 60 years in prison. Defendant appealed by delayed leave granted the reduced amount the trial court awarded for the experts' fees.

The Court of Appeals *held*:

When a prosecutor seeks a life-without-parole sentence for a juvenile offender, the defendant must be afforded the opportunity and the financial resources to present evidence of mitigating factors relevant to the offender and the offense. The due-process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985), governs the appointment or funding of an expert at government expense in that circumstance. Courts must apply the reasonable-probability standard set forth in *People v Kennedy*, 502 Mich 206 (2018), as articulated in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), when determining whether an indigent juvenile criminal defendant has made a sufficient showing to be entitled to expert assistance at government expense under *Ake*'s due-process analysis. In particular, a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense during the sentencing phase and that denial of expert assistance would result in a fundamentally unfair sentence. Therefore, to satisfy constitutional requirements, a trial court must consider the principles set forth in *Kennedy* when determining the amount of funds to reimburse a juvenile defendant for mitigation experts, and the court must support that decision with facts on the record. In this case, the trial court correctly concluded that defendant was entitled to funding for mitigation experts. However, the trial court abused its discretion by failing to articulate why it believed the requested amount was excessive and by failing to explain how it arrived at the sum of $2,500 as the appropriate amount for experts' fees.

Order vacated and case remanded.

CRIMINAL LAW — INDIGENT DEFENDANTS — JUVENILE DEFENDANTS — LIFE-WITHOUT-PAROLE SENTENCES — APPOINTMENT OF EXPERT WITNESSES AT GOVERNMENT EXPENSE.

Courts must apply the reasonable-probability standard set forth in *People v Kennedy*, 502 Mich 206 (2018), when determining whether an indigent juvenile criminal defendant has made a sufficient showing to be entitled to expert assistance at government expense; in particular, a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense during the sentencing phase and that denial of expert assistance would result in a fundamentally unfair sentence; to satisfy constitutional requirements, a trial court must consider the principles set forth in *Kennedy* when determining the amount of funds to reimburse a juvenile defendant for mitigation experts, and the court must support that decision on the record.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

Law Offices of Deborah LaBelle (by *Anlyn Addis*) and *Latham & Watkins LLP* (by *Dean W. Baxtresser* and *Lauren K. Sharkey*) for defendant.

Amicus Curiae:

Jonathan Sacks, *Michael Mittlestat*, *Tina N. Olson*, and *Erin Van Campen* for the State Appellate Defender Office.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

MARKEY, J. Defendant, a juvenile lifer, appeals by delayed leave granted[1] the trial court's order granting in part and denying in part his motion for approval of public funds to hire "mitigation" experts for his resentencing hearing. Defendant had requested expert-witness funding in the amount of $42,650. The trial court awarded him $2,500, but it did not articulate how it had arrived at that figure. We vacate the order and remand for further proceedings.

The prosecutor sought to have defendant resentenced to life imprisonment without parole (LWOP) for his 1993 jury-trial conviction of first-degree felony murder, MCL 750.316(1)(b), which he committed as an aider and abettor in 1993 at the age of 16. See *People v Williams*, unpublished per curiam opinion of the Court

[1] *People v Williams*, unpublished order of the Court of Appeals, entered June 4, 2018 (Docket No. 341703).

of Appeals, issued February 14, 1997 (Docket No. 176570), p 1. Defendant was sentenced as an adult in 1994 to mandatory LWOP for the first-degree murder conviction. *Id*.

In *People v Hayes*, 323 Mich App 470, 473-474; 917 NW2d 748 (2018), this Court explained the recent evolution in the law regarding the treatment of juveniles who committed murder and face or received sentences of LWOP:

> In *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that mandatory punishment of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishments. The *Miller* Court did not indicate whether its decision was to be retroactively applied to closed cases involving juvenile offenders. In light of *Miller*, the Michigan Legislature enacted MCL 769.25, which provides a procedural framework for sentencing juvenile offenders who have committed offenses punishable by life imprisonment without the possibility of parole; this provision applied to pending and future cases. Anticipating the possibility of *Miller*'s retroactive application for closed cases, the Legislature also enacted MCL 769.25a, which would be triggered if our Supreme Court or the United States Supreme Court were to hold that *Miller* applied retroactively. And subsequently, in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the United States Supreme Court held that the rule announced in *Miller*, which was a new substantive constitutional rule, was retroactive on state collateral review. Accordingly, MCL 769.25a took effect.

Under MCL 769.25a(4)(b), prosecutors are directed to "file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the

possibility of parole." MCL 769.25a(4)(b) further states that a hearing on the motion must be conducted as provided in MCL 769.25. And MCL 769.25 provides, in pertinent part:

> (6) If the prosecuting attorney files a motion . . . , the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller . . . , and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

Here, on July 6, 2016, the prosecutor filed a motion pursuant to MCL 769.25a(4)(b), requesting that defendant be again sentenced to LWOP. Defendant opposed the prosecutor's motion and sought dismissal of the motion on various grounds that are not relevant to this appeal. Defendant also moved for the approval of public funds to hire experts. Defendant argued that he needed experts to analyze the *Miller* factors, including experts with specialized knowledge in adolescent development.[2] Defendant refers to these experts at times

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[2] The *Miller* factors include: (1) the defendant's "chronological age and its hallmark features," including any "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the defendant's "family and home environment," including any brutality or dysfunctionality as well as the possibility that the defendant is unable to leave that environment; (3) the circumstances of the crime, including the extent of the defendant's participation and the effect of any familial or peer pressures; (4) the possibility that the defendant may have been convicted of a lesser offense but for any youthful "incompetencies" such as an inability to deal with the police, the prosecutor, or attorneys; and (5) the possibility of rehabilitation. *Miller*, 567 US at 477-478.

as “mitigation specialists.” The trial court granted in part and denied in part defendant’s motion. The court stated that defendant was entitled to financial assistance to pay for the experts but found that defendant’s request for $42,650 was “highly excess[ive].” The trial court ruled that $2,500 would be made available to defendant to retain experts in connection with his resentencing; the court did not explain how it arrived at that sum.[3]

On appeal, defendant argues that the trial court erred by limiting expert funding to $2,500. The prosecution agrees, acknowledging that the trial court’s decision was “arbitrary” and that the court’s action in “foreclosing any potential increase to the fee was an abuse of discretion.” There is no dispute between the parties that defendant is constitutionally entitled to some level of funding for mitigation experts. Indeed, in *People v Carp*, 496 Mich 440, 473; 852 NW2d 801 (2014), our Supreme Court specifically stated that when a prosecutor seeks a LWOP sentence for a juvenile offender, the defendant “must be afforded the opportunity *and the financial resources* to present evidence of mitigating factors relevant to the offender and the offense[.]” (Emphasis added.)[4] See also *Better-*

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[3] At oral argument and in a letter submitted to this Court, defendant indicated that a resentencing hearing was conducted in December 2018, that the trial court denied the prosecutor’s request for LWOP and sentenced defendant to 30 to 60 years’ imprisonment, and that the Michigan Department of Corrections Parole Board subsequently granted parole to defendant. He is scheduled to be released on May 29, 2019. Furthermore, defendant indicated he hired four mitigation experts who testified at the hearing at a total cost of $75,000. These fees were advanced by pro bono counsel. Defendant continues to seek reimbursement.

[4] *Carp* was vacated on other grounds and remanded sub nom *Carp v Michigan*, 577 US ___; 136 S Ct 1355; 194 L Ed 2d 339 (2016), and sub

man v Montana, 578 US ___; 136 S Ct 1609, 1617; 194 L Ed 2d 723 (2016) ("After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair.").

Recently, in *People v Kennedy*, 502 Mich 206, 210; 917 NW2d 355 (2018), our Supreme Court determined that contrary to earlier caselaw, MCL 775.15[5] does not apply in the context of a criminal defendant's request for the appointment or funding of an expert. Instead, the *Kennedy* Court held that the United States Supreme Court's decision in *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985), is the controlling law on the matter. *Kennedy*, 502 Mich at 210. And to assist a trial court in determining whether a defendant has made a sufficient showing to be entitled to assistance of an expert under *Ake*, the Court in *Kennedy*

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nom *Davis v Michigan*, 577 US ___; 136 S Ct 1356; 194 L Ed 2d 339 (2016).

[5] MCL 775.15 provides:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

adopted the "reasonable probability" standard from *Moore v Kemp*, 809 F2d 702 (CA 11, 1987). *Kennedy*, 502 Mich at 210.

We direct the trial court on remand to take into consideration the principles set forth in *Kennedy* in determining the amount of funds to reimburse defendant for his mitigation experts so as to satisfy constitutional requirements. Special attention should be given to the *Kennedy* Court's adoption of the "reasonable probability" standard articulated by the United States Court of Appeals for the Eleventh Circuit in *Moore*, 809 F2d at 712. See *Kennedy*, 502 Mich at 226-228. In particular, the *Moore* "reasonable probability" standard provides:

> "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather . . . a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not

> know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." [*Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712 (alteration in original).]

We recognize that this passage is not focused on sentencing and pertains more to whether any funding for an expert, irrespective of the amount, should be authorized. But a court may employ and be guided by those same principles in determining how much funding is necessary to protect a defendant's rights during the sentencing phase.

In the instant case, defendant asked for the appointment of experts at public expense to assist in analyzing the *Miller* factors for the purpose of the resentencing hearing. In its opinion and order granting in part and denying in part defendant's request for expert costs, the trial court acknowledged that defendant was entitled to financial assistance to pay for experts in connection with his resentencing. The trial court's determination on this point was consistent with our Supreme Court's recognition that financial assistance to present evidence regarding mitigating factors must be provided to a defendant in this situation. See *Carp*, 496 Mich at 473.

Although the trial court recognized that defendant was entitled to funding for experts for his resentencing, the court stated that defendant's request for

$42,650 was "highly excess[ive]" and that the court would instead provide $2,500 to defendant to retain those experts. The trial court provided no substantive analysis to explain why it believed that defendant's requested sum was excessive, nor did the court explain how it arrived at the sum of $2,500. Therefore, on the present record and as conceded by the prosecution, we conclude that the trial court's limitation of expert funding to $2,500 lacks support and must be vacated. On remand, the trial court must apply the *Kennedy* principles and any other relevant authorities in setting the amount of funding for the mitigation experts defendant employed.

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

REDFORD, P.J., and K. F. KELLY, J., concurred with and MARKEY, J.

PEOPLE v TRAVER (ON REMAND)

Docket No. 325883. Submitted July 11, 2018, at Lansing. Decided May 23, 2019, at 9:05 a.m. Leave to appeal denied 505 Mich 975 (2020).

Gary M. Traver was convicted following a jury trial in the Mackinac Circuit Court of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant and his neighbor were involved in a property dispute that culminated in a physical altercation between the two men and resulted in defendant initially being charged with felonious assault, interfering with electronic communications, and carrying a concealed weapon. Defendant entered into a plea agreement that allowed him to avoid incarceration, but defendant later withdrew that plea. After the plea withdrawal, the prosecution charged defendant with the additional crime of felony-firearm, which requires a mandatory two-year prison term. The trial court, William W. Carmody, J., provided the jury with written instructions regarding the elements of the charged offenses but did not read them aloud. Additionally, the written instructions omitted the actual elements of felony-firearm. Defendant was convicted of felonious assault and felony-firearm but acquitted of interfering with electronic communications and carrying a concealed weapon. Defendant appealed. The Court of Appeals, GLEICHER, P.J., and M. J. KELLY, J. (SAWYER, J., dissenting), concluded that the trial court erred by providing the jury with only written instructions on the elements of the offenses without also reading the instructions to the jury and that the written instructions were "hopelessly incorrect" with respect to the felony-firearm charge. 316 Mich App 588 (2016). The Court of Appeals directed the trial court to hold a *Ginther* hearing[1] and to consider defendant's claim that trial counsel was ineffective by failing to advise defendant of the potential consequences of withdrawing his plea. Judge SAWYER dissented, concluding that defendant waived any claimed error in the instructions by expressing satisfaction with the instructions. Judge SAWYER also

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[1] *People v Ginther*, 390 Mich 436 (1973).

rejected defendant's claim of ineffective assistance of counsel. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave, agreed with the dissent that defendant had waived any issue of instructional error and remanded the matter to the Court of Appeals to consider the previously unaddressed arguments related to defendant's claims of ineffective assistance of counsel. 502 Mich 23 (2018). In an unpublished order, the Court of Appeals, GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ., remanded the case to the trial court to consider the previously unaddressed arguments related to defendant's claims of ineffective assistance of counsel. On remand, the trial court, William W. Carmody, J., concluded that defendant was well aware of the potential consequences of withdrawing his plea. Defendant appealed.

On remand, the Court of Appeals *held*:

A defendant seeking relief based on a claim of ineffective assistance of counsel must show (1) that trial counsel's performance was objectively deficient and (2) that the deficiencies prejudiced the defendant. Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. With regard to defendant's arguments that defense counsel was constitutionally ineffective to the extent that defendant's claims of instructional error were waived, defendant's claim was rejected and Judge SAWYER's dissenting opinion as it related to this issue was adopted; defendant waived any claimed error in the instructions by expressing satisfaction with the instructions. With regard to the issue of plea withdrawal, the trial court held a hearing and concluded that defendant was adequately advised on the potential consequences of withdrawing his plea. The trial court found credible the testimony of the attorneys that defendant was fully aware that the prosecution would add a charge of felony-firearm carrying a two-year minimum sentence, and that credibility determination merited deference. Furthermore, because defendant was informed of the likely consequence of withdrawing his plea, defendant's claim that counsel was ineffective for failing to inform him of that very consequence necessarily failed. With regard to defendant's claim that trial counsel was ineffective for failing to obtain a ruling on the motion to quash, consideration of this issue was improper because the scope of the Supreme Court's remand order was for review of defendant's *previously* unaddressed argu-

ments relating to ineffective assistance of counsel and defendant had not raised this issue in his original brief on appeal. Therefore, the issue was not addressed on appeal. Finally, with regard to defendant's remaining issues regarding effective assistance of counsel, defendant did raise those issues in his original brief; however, the trial court had not been directed to consider those issues or hold a hearing on remand regarding those issues. The remand order specifically limited the scope of remand to the plea-withdrawal issue. Accordingly, to the extent that the trial court considered or even took testimony on any claim of ineffective assistance of counsel other than the plea-withdrawal issue, the trial court exceeded the scope of remand. Consideration of those remaining issues was therefore limited to the record as it existed at the time of the original opinion. In his original brief on appeal, defendant argued that counsel was ineffective by failing to investigate and present character witnesses and an expert medical witness; however, these alleged mistakes were not apparent on the record, and in any event, defense counsel's decision not to pursue those unnamed witnesses was a trial strategy that did not deprive defendant of a substantial defense.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Jessica E. LePine* and *Scott R. Shimkus*, Assistant Attorneys General, for the people.

K and Q Law, PC (by *Cecilia Quirindongo Baunsoe*) for defendant.

ON REMAND

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. This matter is once again before us, following a remand by the Supreme Court. *People v Traver*, 502 Mich 23; 917 NW2d 260 (2018) (*Traver II*). In the original appeal, this Court reversed defendant's convictions for assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commis-

sion of a felony (felony-firearm), MCL 750.227b. *People v Traver*, 316 Mich App 588, 592; 894 NW2d 89 (2016) (*Traver I*). The majority concluded that the trial court erred by providing the jury with only written instructions on the elements of the offenses without also reading the instructions to the jury and that the written instructions were "hopelessly incorrect" with respect to the felony-firearm charge. *Id*. at 591-592. Judge SAWYER dissented, concluding that defendant waived any claimed error in the instructions by expressing satisfaction with the instructions. *Id*. at 603 (SAWYER, J., dissenting). Judge SAWYER also rejected defendant's claim of ineffective assistance of counsel. *Id*. at 611.

The Supreme Court, in lieu of granting leave, agreed with the dissent that defendant had waived any issue of instructional error and remanded the matter to this Court to consider the previously unaddressed arguments related to defendant's claims of ineffective assistance of counsel. *Traver II*, 502 Mich at 43. In our prior opinion, we directed the trial court to hold a *Ginther* hearing[1] and to consider defendant's claim that trial counsel was ineffective by failing to advise defendant of the potential consequences of withdrawing his plea. *Traver I*, 316 Mich App at 602-603. Because the Supreme Court did not disturb this portion of our opinion, we remanded this matter to the trial court for that purpose. *People v Traver*, unpublished order of the Court of Appeals, entered July 20, 2018 (Docket No. 325883).

On remand, the trial court concluded that defendant was well aware of the potential consequences of withdrawing his plea. Following that remand, we now must

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

address the resolution of that issue as well as the claims previously raised by defendant that trial counsel was ineffective for (1) failing to call character witnesses, (2) failing to call a tow-truck driver to testify, and (3) failing to retain an expert witness. Defendant also now raises a new claim that counsel was ineffective for failing to move to quash the information. After further considering these claims, we now affirm defendant's convictions and sentences.

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). The trial court's factual findings are reviewed for clear error, while the ultimate constitutional issue is reviewed de novo. *Id*.

A defendant seeking relief based on a claim of ineffective assistance must show "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. The measure of an attorney's performance under the first prong of the analysis is "simply reasonableness under prevailing professional norms." *Padilla v Kentucky*, 559 US 356, 366; 130 S Ct 1473; 176 L Ed 2d 284 (2010) (quotation marks and citation omitted). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's compe-

tence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

We turn first to the issue specifically mentioned by the Supreme Court in its opinion remanding the matter to this Court. The Supreme Court briefly addressed the issue in a footnote as follows:

> The majority further erred by holding that it need not "resort to ineffective assistance of counsel principles to circumvent potential waiver issues . . . ." *Traver*, 316 Mich App at 601. In this case, defendant must establish a valid claim of ineffective assistance of counsel in order for him to be entitled to relief on his waived claims of instructional error. Defendant raised the claims of ineffective assistance in the Court of Appeals, but they were not addressed by the majority. We decline to address them in the first instance and instead remand to the Court of Appeals for consideration of defendant's arguments that defense counsel was constitutionally ineffective to the extent that defendant's claims of instructional error were waived. [*Traver II*, 502 Mich at 43 n 10.]

While the issue was not addressed in the majority opinion in the original appeal, Judge SAWYER thoroughly discussed—and rejected—the claim of ineffective assistance of counsel as it relates to the claims of instructional error in his dissenting opinion. *Traver I*, 316 Mich App at 603-609 (SAWYER, J., dissenting). Moreover, defendant did not provide further argument on this issue in his supplemental brief following remand. Accordingly, we now adopt Judge SAWYER's dissenting opinion as it relates to this issue and reject defendant's claim.

Turning next to the issue of the plea withdrawal, the trial court held the hearing on remand and concluded that defendant was adequately advised on the potential consequences of withdrawing his plea. The trial court concluded as follows:

The principle [sic] argument by the Defendant in support of his ineffective assistance of counsel position was that he was never advised of the consequences of a conviction under the Weapons-Felony charge, if convicted. Attorney Hartman was adamant in his testimony at the *Ginther* Hearing, that he advised the Defendant of the "risk-reward" circumstances if he were to proceed to trial with an added count of Felony Firearm, and the consequences of a conviction being a mandatory two years in prison. The Court can, and does, confirm that the People advised the Defendant on the record that if the matter proceeded to trial, the Felony Firearm charge would be added to the Information. Despite Defendant's testimony to the contrary, the Court is satisfied that this fact was known by the Defendant, as his testimony noted below demonstrates. As further testified by Attorney Hartman, it was "inconceivable" that this was not explained to the Defendant on more than one occasion. Attorney Hartman further testified at the *Ginther* Hearing that the Defendant led him to believe he was more interested than anything else in harvesting a large marijuana crop that would result in large payout. The Defendant denied this reasoning.

* * *

The Defendant's first trial on the four-count information ended in a mistrial. For the Defendant to argue he didn't understand the consequences of the Felony Firearm charge, given the facts, stretches credulity. Attorney Hickman, who conducted the trial which resulted in acquittal on two of the four counts, Carrying a Concealed Weapon (CCW) and Interfering with an Electronic Device, echoed the same sentiments of Attorney Hartman. Attorney Hickman was adamant that he advised the Defendant of the inherent risks in taking the matter to trial, but regardless of those efforts, the Defendant was adamant about having of [sic] his day in court. Further, the Defendant at the *Ginther* Hearing, acknowledged that he understood the benefit of the original plea bargain when he testified that,

why would he risk prison or jail given the bargain he was offered. The Defendant testified as follows:

> As far as good goes, it was—as Mr. Hartman explained it, a no-brainer. He says, if you got 80 percent chance of—this is how they explained it to me. You got 20 percent chance to lose. This is all you got to do. Call in probation and this, this, this. Is that worth a 20 percent chance, he says to me, to go to *prison* or to go to jail for whatever amount of time?

This statement alone indicates that Attorney Hartman advised the Defendant of the consequences of taking the matter to trial long before Attorney Hickman became involved, and despite the fact that the Defendant stated he didn't understand it could be a mandatory two years if convicted.

The Defendant's testimony, the Court finds, given the complete record of the *Ginther* Hearing, when compared to the facts and testimony of the two attorneys and the Court's recollection of the facts, failed to support any argument of ineffectiveness of counsel. The Court finds a lack of credibility demonstrated by the Defendant, given the record before the Court. All the witnesses had difficulty in remembering certain aspects of the case, but this Court cannot find the lack of recall by counsel for the Defendant determinative of any ineffectiveness. In every trial, reasons may exist as to why things were done or not, and nothing in the record before the Court depicts what, in this Court's view, constitutes proof of ineffectiveness.

Defendant now contends that this Court should ignore the trial court's factual findings and conclude that defendant was not, in fact, aware that he would be charged with one count of felony-firearm, carrying a mandatory sentence of two years' imprisonment, when he withdrew his plea. The testimony of the attorneys was clear: defendant was fully aware that the prosecutor would add a charge of felony-firearm, carrying a

two-year minimum sentence, if defendant withdrew his plea. The trial court found this testimony credible; it found that defendant's contradictory testimony was not believable. This Court should defer to the trial court's credibility determinations. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). Because defendant was, in fact, informed of the likely consequence of withdrawing his plea, his claim that counsel was ineffective for failing to inform him of that very consequence necessarily fails. Indeed, we agree with the trial court's concluding sentence in its opinion: "The ineffectiveness, the Court further finds, was in the Defendant's ability to listen, his erroneous belief that he understood more than his several counsel about the law, and in the end got exactly what he bargained for, a trial and the subsequent results."

We next turn to defendant's claim that trial counsel was ineffective for failing to obtain a ruling on the motion to quash. This issue, however, is not properly before us. The scope of the Supreme Court's remand to this Court was "for review of defendant's *previously* unaddressed arguments relating to ineffective assistance of counsel." *Traver II*, 502 Mich at 43 (emphasis added). Defendant did not raise this issue in his original brief on appeal; he first raised it in his supplemental brief following remand. Therefore, it does not constitute one of his "previously unaddressed arguments." As we noted in *Russell*, 297 Mich App at 714, when "an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order." Because the Supreme Court did not direct us to consider any new issues raised by defendant, it would be improper for us to now consider this issue and we decline to do so.

A similar problem exists with defendant's remaining issues regarding ineffective assistance of counsel. Defendant did raise those issues in his original brief; therefore, those issues are properly before us. But we did not direct the trial court to consider those issues or hold a hearing on remand on those issues. Indeed, we specifically limited the scope of remand to the plea-withdrawal issue:

> Pursuant to Part IV of this Court's opinion in *People v Traver*, 316 Mich App 588, 602-603; 894 NW2d 89 (2016), aff'd in part, rev'd in part, lv den in part [502] Mich [23] (2018) (Docket No. 154494), the Court orders that the matter is remanded so that defendant-appellant may, if he so chooses, move for an evidentiary hearing in support of his claim that his trial counsel did not adequately apprise him of the potential consequences of withdrawing his plea. If such a hearing is requested, an evidentiary hearing must be held, and the trial court shall determine whether counsel was ineffective after conducting the evidentiary hearing. *Id*. "If the court determines that counsel performed ineffectively by failing to advise [defendant] that the prosecutor intended to file a felony-firearm charge carrying a mandatory two-year imprisonment penalty, and that [defendant] would have declined to withdraw his plea had he been aware of this risk, the court must then order the prosecutor to reoffer the original plea agreement." *Id*. at 603. *Proceedings on remand are limited to the plea-withdrawal issue*. [*Traver*, unpub order at 1 (emphasis added).]

Accordingly, to the extent that the trial court considered or even took testimony on any claim of ineffective assistance of counsel other than the plea-withdrawal issue, the trial court exceeded the scope of remand. Therefore, we have not considered any such testimony or arguments based upon the testimony given at the hearing on remand as it relates to any claim other than the plea-withdrawal issue. Rather, we

have limited our consideration to the record as it existed at the time of our original opinion.

In his original brief on appeal, defendant contended that he received ineffective assistance of counsel when counsel failed to investigate and present character witnesses and an expert medical witness. "Trial counsel's failure to a call [sic] a witness is only considered ineffective assistance if it deprived the defendant of a substantial defense. A substantial defense is one that could have affected the outcome of the trial." *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015) (citation omitted).

Defendant claims that defense counsel failed to contact "multiple witnesses who all attested in writing that I was not a bully and that I had never been in a fight for as long as they had known me." These alleged mistakes are not apparent on the record. In any event, defense counsel's decision not to pursue these unnamed witnesses was a trial strategy that we will not second-guess. *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013).

Moreover, these purported character witnesses would not have provided an outcome-determinative defense given that there is no evidence that they would have directly refuted the two eyewitnesses who testified to seeing defendant physically assault the victim with a gun in his hand. Similarly, defense counsel's decision not to pursue an expert to testify as to defendant's physical capacity cannot be considered outcome-determinative in light of the eyewitness testimony.

Affirmed.

GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ., concurred.

PEOPLE v WALKER (ON REMAND)

Docket No. 332491. Submitted December 14, 2018, at Lansing. Decided May 23, 2019, at 9:10 a.m. Leave to appeal denied 505 Mich 1057 (2020).

After a jury trial in the Wayne Circuit Court in 2001, Juan T. Walker was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The court, Thomas E. Jackson, J., originally sentenced defendant to life imprisonment without the possibility of parole for the murder conviction to be served consecutively to two years' imprisonment for the felony-firearm conviction. The Court of Appeals, MURPHY, P.J., and COOPER, J. (LEVIN, J., dissenting), affirmed defendant's convictions and sentences on direct review. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2005 (Docket No. 239711). In 2011, defendant moved in the trial court for relief from the judgment, arguing that his trial counsel was ineffective for not informing him of the prosecutor's pretrial offer—that defendant could plead guilty to second-degree murder and felony-firearm and receive a two-year sentence for felony-firearm and a consecutive sentence of 25 to 50 years' imprisonment for second-degree murder. The trial court denied the motion for relief from the judgment. Defendant filed a delayed application for leave to appeal, which was also denied; defendant then sought leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court remanded defendant's case to the trial court for a hearing under *People v Ginther*, 390 Mich 436 (1973), with instructions to determine whether defendant was deprived of his right to the effective assistance of counsel. The Court ordered that if defendant were to establish that his counsel was ineffective in failing to convey the plea offer, defendant should be given the opportunity to establish entitlement to relief from the judgment and that if he could do so, the trial court would then need to determine whether the remedy articulated in *Lafler v Cooper*, 566 US 156 (2012)—ordering the prosecution to reoffer the plea—should be applied retroactively. 497 Mich 894 (2014). On remand, the trial court determined that defendant was denied the effective assistance of counsel when his trial attorney failed to inform him of the plea offer. As the Michigan Supreme Court had

instructed, defendant then moved in the trial court for relief from the judgment. The trial court granted the motion and ordered the prosecution to reoffer defendant the plea deal. Defendant pleaded guilty and was sentenced to 25 to 50 years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. The prosecution filed a delayed application for leave to appeal. The Court of Appeals, SAAD, P.J., and CAVANAGH and CAMERON, JJ., reversed the trial court and remanded the case for the reinstatement of defendant's original sentences. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332491). Defendant sought leave to appeal, and the Michigan Supreme Court reversed, in part, the Court of Appeals' judgment, stating that the record supported the trial court's unequivocal finding that there existed a reasonable probability that defendant would have accepted the plea offer had it been presented to him. The Michigan Supreme Court remanded the case to the Court of Appeals to determine whether *Lafler* should be applied retroactively. 503 Mich 908 (2018).

The Court of Appeals *held*:

1. Ordinarily, judicial decisions are to be given complete retroactive effect, but judicial decisions that express new rules do not normally apply to cases already closed. New rules break new ground or impose a new obligation on the states or the federal government—that is, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. A result is dictated by precedent when it would have been apparent to all reasonable jurists. A case does not announce a new rule if the case is merely applying to a different set of facts a principle that governed a prior decision. Accordingly, garden-variety applications of the ineffective-assistance-of-counsel test in *Strickland v Washington*, 466 US 668 (1984), do not produce new rules.

2. In *Lafler*, the Supreme Court decided how to apply *Strickland*'s prejudice test when ineffective assistance of counsel resulted in the rejection of a plea offer and the defendant was convicted at the ensuing trial. Successful application of the *Strickland* test after a defendant rejects a plea agreement and is convicted following a fair trial requires that a defendant show that but for the ineffective assistance of counsel there was a reasonable probability that the plea offer would have been presented to the court, the court would have accepted its terms, and the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that

were in fact imposed. The majority of courts that have examined the question whether *Lafler* created a new rule of constitutional law have concluded that it did not. Rather, *Lafler* merely determined how *Strickland* applied in the context of plea bargaining. There was no threshold question concerning *whether* the *Strickland* test applied. Although *Lafler* was the first case in which the United States Supreme Court applied *Strickland* in the specific factual context presented in *Lafler*, i.e., when a defendant had rejected a plea offer because of ineffective assistance of counsel and then had received a fair trial, the same rule—the one announced in *Strickland*—was simply applied to a new factual context in *Lafler*, and no new rule of constitutional law was created. Because *Lafler* did not express a new rule, the decision applied retroactively, and the trial court correctly ordered the prosecution to reoffer the plea deal to defendant.

Affirmed.

CRIMINAL LAW — THE RIGHT TO COUNSEL — INEFFECTIVE ASSISTANCE — FAILURE TO COMMUNICATE A PLEA OFFER TO THE DEFENDANT — REMEDY.

When counsel was ineffective for failing to inform the defendant of a plea offer and the defendant establishes entitlement to relief from the judgment, the remedy articulated in *Lafler v Cooper*, 566 US 156 (2012)—ordering the prosecution to reoffer the plea—may be applied retroactively.

Dana Nessel, Attorney General, *Fadwa Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

ON REMAND

Before: CAVANAGH, P.J., and BORRELLO and CAMERON, JJ.

CAMERON, J. Our Supreme Court has directed this Court to consider whether the decision in *Lafler v Cooper*, 566 US 156; 132 S Ct 1376; 182 L Ed 2d 398

(2012), should be applied retroactively to allow defendant to successfully assert that his trial counsel provided ineffective assistance of counsel in the plea-bargaining context by failing to notify defendant of a plea offer before trial. We hold that *Lafler* applies retroactively because the case does not announce a new rule. Therefore, applying the *Lafler* decision here, we affirm the trial court's order granting relief to defendant.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2001, a jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Defendant was originally sentenced to life imprisonment without parole for the first-degree premeditated-murder conviction to be served consecutively to two years' imprisonment for the felony-firearm conviction. This Court affirmed defendant's convictions and sentences on direct review. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2005 (Docket No. 239711) (*Walker I*).

In 2011, defendant moved in the trial court for relief from judgment on the ground that his trial counsel was ineffective for not informing him of the prosecutor's pretrial offer that he plead guilty to second-degree murder and felony-firearm with a sentence agreement of 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. The trial court denied defendant's motion for relief from judgment. Defendant filed a delayed application for leave to appeal, which this Court denied "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v Walker*, unpub-

lished order of the Court of Appeals, entered May 21, 2012 (Docket No. 307480). Defendant sought leave to appeal this Court's order in the Michigan Supreme Court, which held defendant's application in abeyance pending the decision in *Burt v Titlow*, 571 US 12; 134 S Ct 10; 187 L Ed 2d 348 (2013). *People v Walker*, 829 NW2d 217 (Mich, 2013). After *Burt* was decided, our Supreme Court remanded the instant case to the trial court for a *Ginther*[1] hearing with these instructions:

> [W]e remand this case to the Wayne Circuit Court for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436 (1973), as to the defendant's contention that his trial counsel was ineffective for failing to inform him of the prosecutor's September 26, 2001 offer of a plea bargain to second-degree murder and a sentence agreement of 25 to 50 years. See *Missouri v Frye*, 566 US [134]; 132 S Ct 1399; 182 L Ed 2d 379 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance. *People v Carbin*, 463 Mich 590, 599-600 (2001). In order to establish the prejudice prong of the inquiry under these circumstances, the defendant must show that: (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the defendant's conviction or sentence under the terms of the plea would have been less severe than the conviction or sentence that was actually imposed. *Lafler v Cooper*, 566 US [156, 164]; 132 S Ct 1376; 182 L Ed 2d 398 (2012).
>
> If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain as outlined above, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR

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

> 6.508(D). If the defendant successfully establishes his entitlement to relief pursuant to MCR 6.508(D), the trial court must determine whether the remedy articulated in *Lafler v Cooper* should be applied retroactively to this case, in which the defendant's conviction became final in October 2005. [*People v Walker*, 497 Mich 894, 894-895 (2014).]

On remand, the trial court held a *Ginther* hearing, after which the trial court entered an order holding that defendant was denied the effective assistance of counsel when his trial attorney failed to inform him of the plea offer.

> Defendant then filed another motion for relief from judgment in the trial court, as required by our Supreme Court's remand order, and the trial court granted that motion and ordered the prosecution to reoffer defendant the plea deal. Defendant then pleaded guilty and was resentenced to 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. [*People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332491) (*Walker II*), rev'd in part and remanded 503 Mich 908 (2018) (*Walker III*).]

In September 2016, this Court granted the prosecution's delayed application for leave to appeal, which challenged the trial court's order granting defendant's motion for relief from judgment. *People v Walker*, unpublished order of the Court of Appeals, entered September 9, 2016 (Docket No. 332491). In October 2017, this panel issued an opinion reversing the trial court's order and remanding the case for the reinstatement of defendant's original convictions and sentences. *Walker II*, unpub op at 1, 9. This Court agreed with the prosecutor's argument "that defendant was afforded the effective assistance of counsel because he was not prejudiced, i.e., he did not demonstrate that there was a reasonable probability that he would have accepted

the plea offer had it been made known to him." *Id*. at 3.[2] With respect to the prejudice requirement, this Court was "left with a definite and firm conviction that the trial [court] made a mistake in its findings, failed to engage in a proper analysis under *Lafler*, and thereby abused its discretion when it granted defendant's motion for relief from judgment." *Id*. at 7. That is, "the trial court clearly erred in finding a reasonable probability defendant would have accepted the plea offer. Therefore, defendant did not satisfy his burden in proving ineffective assistance of counsel, and the trial court abused its discretion when it granted defendant's motion for relief from judgment." *Id*. at 9.

Our Supreme Court entered an order reversing in part this Court's decision and remanding the case to this Court for consideration of whether *Lafler* applies retroactively to this case; in particular, our Supreme Court's order stated as follows:

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the trial court clearly erred in finding a reasonable probability that the defendant would have accepted the plea offer, and we remand this case to that court for consideration of whether *Lafler v Cooper*, 566 US 156 (2012), should be applied retroactively to this case, in which the defendant's convictions became final in 2005.
>
> The Court of Appeals found clear error in the trial court's memorandum opinion and in its statements during

[2] The prosecutor made only a cursory argument regarding the first prong of defendant's ineffective-assistance claim, i.e., whether defense counsel's performance was deficient. This panel found no clear error in the trial court's finding that defense counsel had failed to inform defendant of the plea offer, and therefore, the trial court's determination that the deficient-performance prong was satisfied was left undisturbed. *Walker II*, unpub op at 4 n 4.

> oral argument at a subsequent hearing. However, in its review of the record, the Court of Appeals failed to recognize that, at the end of that hearing, the trial court quoted the applicable standard from *Lafler* and unequivocally found that there was a reasonable probability that the defendant would have accepted the plea offer. This finding—made by the trial judge who presided over the trial and the evidentiary hearing—is supported by the record, and we are not "left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289 (2011). [*Walker III*, 503 Mich 908.]

On remand, we must determine whether *Lafler* should apply retroactively to this case. If it does, then we must affirm the trial court's order ruling that defendant was denied the effective assistance of counsel when his trial attorney failed to inform defendant of the plea offer.

II. ANALYSIS

"The issue whether a United States Supreme Court decision applies retroactively presents a question of law that we review de novo. We review for an abuse of discretion the trial court's ultimate ruling on a motion for relief from a judgment." *People v Gomez*, 295 Mich App 411, 414; 820 NW2d 217 (2012) (citation omitted).

Our Supreme Court has recently explained:

> Ordinarily, judicial decisions are to be given complete retroactive effect. But judicial decisions which express new rules normally are not applied retroactively to other cases that have become final. New legal principles, even when applied retroactively, do not apply to cases already closed, because at some point, the rights of the parties should be considered frozen and a conviction final. Thus, as to those cases that have become final, the general rule allows only prospective application. [*People v Barnes*, 502 Mich 265, 268; 917 NW2d 577 (2018) (quotation marks, ellipsis, and citations omitted).]

In *Barnes*, 502 Mich at 269, our Supreme Court quoted from *Montgomery v Louisiana*, 577 US ___, ___; 136 S Ct 718, 728; 193 L Ed 2d 599 (2016), for the most recent explanation of the federal standard for retroactivity:

> Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288[; 109 S Ct 1060; 103 L Ed 2d 334] (1989), set forth a framework for retroactivity in cases on federal collateral review. Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Second, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. [Brackets in original; quotation marks, ellipsis, and citations omitted.]

In short, "*Teague* makes the retroactivity of [the United States Supreme Court's] criminal procedure decisions turn on whether they are novel." *Chaidez v United States*, 568 US 342, 347; 133 S Ct 1103; 185 L Ed 2d 149 (2013). Absent one of the two exceptions noted above, a new rule announced by the United States Supreme Court may not collaterally benefit a person whose conviction is already final. *Id*. "Only when [the United States Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review." *Id*.

Therefore, the first question under *Teague* is whether a judicial decision establishes a new rule. *Barnes*, 502 Mich at 269, citing *People v Maxson*, 482 Mich 385, 388; 759 NW2d 817 (2008). A judicial deci-

sion's rule is considered to be new if "it breaks new ground or imposes a new obligation on the States or the Federal Government." *Maxson*, 482 Mich at 388 (quotation marks and citation omitted); see also *Chaidez*, 568 US at 347. In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Chaidez*, 568 US at 347 (quotation marks and citation omitted). "And a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." *Id*. (quotation marks and citation omitted).

But a case does *not* announce a new rule if the case is merely applying a "principle that governed a prior decision to a different set of facts." *Id*. at 347-348 (quotation marks and citations omitted). "[W]hen all [the United States Supreme Court does] is apply a general standard to the kind of factual circumstances it was meant to address, [the Court] will rarely state a new rule for *Teague* purposes." *Id*. at 348. Therefore, "garden-variety applications of the test in [*Strickland*] for assessing claims of ineffective assistance of counsel do not produce new rules." *Strickland v Washington*, 466 US 668 (1984). The *Strickland* standard "provides sufficient guidance for resolving virtually all claims of ineffective assistance, even though their particular circumstances will differ." *Id*. (quotation marks and citation omitted). The United States Supreme Court has therefore "granted relief under *Strickland* in diverse contexts without ever suggesting that doing so required a new rule." *Id*.

In *Chaidez*, 568 US at 344, the United States Supreme Court considered the retroactivity of its decision in *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010), in which the Supreme Court "held that the Sixth Amendment requires an attorney

for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." The Supreme Court concluded in *Chaidez* that *Padilla* announced a new rule because the holding in *Padilla* was not "apparent to all reasonable jurists" before *Padilla* was decided. *Chaidez*, 568 US at 354 (quotation marks and citation omitted). Indeed, there had been no United States Supreme Court precedent before *Padilla* that dictated the rule that the *Strickland* test applied to a defense counsel's failure to advise a defendant about noncriminal consequences of sentencings, like the possibility of deportation. *Id*. at 353. The Supreme Court stated in *Chaidez* that "*Padilla* would not have created a new rule had it only applied *Strickland*'s general standard to yet another factual situation—that is, had *Padilla* merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent." *Id*. at 348-349. *Padilla* did more than this, however; it considered a "threshold question" about whether deportation advice fell within the scope of the Sixth Amendment right to counsel. *Id*. at 349. "In other words, prior to asking *how* the *Strickland* test applied ('Did this attorney act unreasonably?'), *Padilla* asked *whether* the *Strickland* test applied ('Should we even evaluate if this attorney acted unreasonably?')." *Id*. The Supreme Court's determination in *Padilla* that the *Strickland* test applied thus constituted a new rule. *Id*. at 349, 358. Therefore, under *Teague*, defendants whose convictions became final before *Padilla* was issued could not benefit from the holding in *Padilla*. *Id*. at 358.

Our Supreme Court has directed this Court to consider whether *Lafler*'s holding applies retroactively. In doing so, this Court must consider, under the federal retroactivity jurisprudence summarized earlier, whether *Lafler* created a new rule of constitutional law.

In *Lafler*, the defendant rejected a plea offer on the advice of his attorney. *Lafler*, 566 US at 160. After the plea offer was rejected, the defendant had a full and fair jury trial that resulted in a guilty verdict, and the defendant received a harsher sentence than what was offered in the rejected plea bargain. *Id*. The parties agreed in *Lafler* that the defense counsel's performance was deficient when he advised the defendant to reject the plea offer. *Id*. at 163. The Supreme Court noted in *Lafler* that the Court had held in *Hill v Lockhart*, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1985), that the *Strickland* test applied "to challenges to guilty pleas based on ineffective assistance of counsel." *Lafler*, 566 US at 162-163, quoting *Hill*, 474 US at 58. The Supreme Court stated that "[t]he question for this Court is *how* to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Lafler*, 566 US at 163 (emphasis added). The Supreme Court quoted from *Strickland*'s prejudice test and then noted that, while *Hill* involved a "claim that ineffective assistance led to the improvident acceptance of a guilty plea," in *Lafler*, "the ineffective advice led not to an offer's acceptance but to its rejection." *Id*. The Supreme Court then explained how the *Strickland* prejudice test was to be applied to the circumstances in *Lafler*:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the

> context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. [*Id*. at 164.]

The Supreme Court in *Lafler* rejected the argument that "there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial." *Id*. "The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding," including pretrial critical stages of the criminal proceeding. *Id*. at 165. Moreover, the Supreme Court stated that it had "not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue." *Id*. In *Lafler*, the trial did not cure the error but "caused the injury from the error." *Id*. at 166. "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id*.

The Supreme Court in *Lafler* also rejected an argument that providing a remedy for the type of error that occurred in *Lafler* would "open the floodgates to litigation by defendants seeking to unsettle their convictions." *Id*. at 172. The Supreme Court noted that "[c]ourts have recognized claims of this sort for over 30 years, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims." *Id*. (citation omitted).

The *Lafler* Court noted that the defendant had brought "a federal collateral challenge to a state-court conviction." *Id*. at 172.

> Under [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)], a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established law if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases. [*Lafler*, 566 US at 172-173 (quotation marks, brackets, and citation omitted).]

The Supreme Court concluded that AEDPA did not present a bar to granting relief in *Lafler* because the state appellate court had failed to apply *Strickland* when assessing the defendant's ineffective-assistance-of-counsel claim. *Id*. at 173. "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim [the defendant] raised, the state court's adjudication was contrary to clearly established federal law." *Id*. The defendant satisfied the *Strickland* test, and the parties had conceded the existence of deficient performance. *Id*. at 174.

> As to prejudice, [the defendant] has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, [the defendant] received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied. [*Id*. (citation omitted).]

As a remedy, the *Lafler* Court ordered the prosecutor to reoffer the plea agreement to the defendant, and if the defendant accepted the plea offer, the state trial court was to "exercise its discretion in determining whether to vacate the convictions and resentence [the defendant] pursuant to the plea agreement, to vacate only

some of the convictions and resentence [the defendant] accordingly, or to leave the convictions and sentence from trial undisturbed." *Id*.

Justice Scalia dissented; he opined that "the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law." *Id*. at 175 (Scalia, J., dissenting). Justice Scalia explained:

> [The defendant] received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that [the defendant] is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the [state appellate court's] decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard of and quite absurd for violation of a constitutional right. I respectfully dissent. [*Id*. at 176.]

Justice Scalia found it "apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense." *Id*. at 177.

> Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence. That has been, until today, entirely clear. A defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Impairment of fair trial is how we distinguish between

> unfortunate attorney error and error of constitutional significance. [*Id*. at 178 (quotation marks and citations omitted).]

Justice Scalia further opined that AEDPA barred granting relief given the "[n]ovelty" of the holding in *Lafler*. *Id*. at 181. Because the Supreme Court had never held that *Strickland* prejudice could be established in the circumstances presented in *Lafler*, Justice Scalia stated that the Supreme Court violated AEDPA in granting habeas relief. *Id*. at 183. The portion of Justice Scalia's dissent summarized above was joined by Chief Justice Roberts and by Justice Thomas. See *id*. at 175. Justice Alito wrote a separate dissent in which he expressed agreement, in part, with the analysis of Justice Scalia. See *id*. at 187 (Alito, J., dissenting).[3]

Neither the United States Supreme Court nor the Michigan appellate courts have addressed whether *Lafler* applies retroactively. See *People v Hobson*, 500 Mich 1005, 1006 (2017) (MARKMAN, C.J., concurring) ("This Court has not specifically assessed the retroactivity of *Lafler* . . . ."). In their supplemental briefs on remand, the parties have brought to this Court's attention the opinions of lower federal courts as well as an opinion from the Utah Supreme Court. "While the decisions of lower federal courts and other state courts

[3] To be sure, Justice Scalia's dissent in *Lafler* suggested that the holding in *Lafler* created a new rule. See *Lafler*, 566 US at 176-178, 183 (Scalia, J., dissenting). But the majority in *Lafler* did not share this view, given the majority's analysis and conclusion that AEDPA did not bar granting relief. Although dissenting opinions may be considered in assessing whether a case created a new rule, "[d]issents have been known to exaggerate the novelty of majority opinions; and the mere existence of a dissent, like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new." *Chaidez*, 568 US at 353 n 11.

are not binding on this Court, they may be considered as persuasive authority." *People v Woodard*, 321 Mich App 377, 385 n 2; 909 NW2d 299 (2017).

The lower federal courts have concluded that *Lafler* did not create a new rule of constitutional law. See *In re Liddell*, 722 F3d 737, 738 (CA 6, 2013) (citing cases in support of the proposition that every federal circuit to consider the issue has concluded that *Lafler* did not create a new rule of constitutional law). Of particular note is the analysis in *In re Perez*, 682 F3d 930, 932-933 (CA 11, 2012), concluding that *Lafler* and its companion case, *Frye*, did not announce new rules. The *Perez* court noted that "the Supreme Court's language in *Lafler* and *Frye* confirm[s] that the cases are merely an application of the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context." *Id*. at 932. "The Court has long recognized that *Strickland*'s two-part standard applies to 'ineffective assistance of counsel claims arising out of the plea process.' " *Id*., citing *Hill*, 474 US at 57.

> The Court has also said that *Strickland* itself clearly establishes Supreme Court precedent for evaluating ineffective assistance of counsel claims under AEDPA. Because we cannot say that either *Lafler* or *Frye* breaks new ground or imposes a new obligation on the State or Federal Government, they did not announce new rules. Put another way, *Lafler* and *Frye* are not new rules because they were dictated by *Strickland*. [*Perez*, 682 F3d at 932-933 (quotation marks and citation omitted).]

Further, the *Perez* court concluded that

> any doubt as to whether *Frye* and *Lafler* announced new rules is eliminated because the Court decided these cases in the post conviction context. Indeed, in *Lafler*, the Supreme Court held that the state court's decision was "contrary to clearly established [federal] law" under AEDPA. To be "clearly established federal law" within the

> meaning of AEDPA, the rule applied in *Lafler* must, by definition, have been an old rule within the meaning of *Teague*. . . . [T]he [Supreme] Court rarely, if ever, announces and retroactively applies new rules of constitutional criminal procedure in the postconviction context. Given the general policy of not announcing or applying new rules of constitutional law in habeas proceedings reflected in *Teague* and AEDPA, it stands to reason that the holdings in *Frye* and *Lafler* do not constitute new rules of constitutional law. [*Id*. at 933-934 (citations omitted).]

Other lower federal-court opinions likewise reason that *Lafler* did not create a new rule. See, e.g., *Gallagher v United States*, 711 F3d 315, 315-316 (CA 2, 2013) ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law: Both are applications of *Strickland* . . . .") (quotation marks omitted); *Williams v United States*, 705 F3d 293, 294 (CA 8, 2013) ("We . . . conclude, as have the other circuit courts of appeals that have addressed the issue, that neither [*Lafler*] nor *Frye* announced a new rule of constitutional law."); *Buenrostro v United States*, 697 F3d 1137, 1140 (CA 9, 2012) ("[N]either *Frye* nor *Lafler* . . . decided a new rule of constitutional law. The Supreme Court in both cases merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in *Strickland* . . . and established in the plea-bargaining context in *Hill* . . . ."); *In re King*, 697 F3d 1189, 1189 (CA 5, 2012) ("[W]e agree with the Eleventh Circuit's determination in *In re Perez* . . . that [*Lafler*] and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."). But see *Berry v United States*, 884 F Supp 2d 453, 462 (ED Va, 2012), app dis 490 F Appx 583 (CA 4, 2012) ("Although *Hill* and its progeny provided some foundation for the Court's decisions in *Lafler* and *Frye*, it did not *dictate*

the result in these cases, nor did it foreclose all possibility of an alternative decision.”).

Contrary to the overwhelming view of the lower federal courts, the Utah Supreme Court has concluded that “*Lafler* and *Frye* announced a new rule . . . .” *Winward v Utah*, 355 P3d 1022, 1023; 2015 UT 61 (2015). The Utah Supreme Court acknowledged that its conclusion was “in tension with the federal circuit courts’ unanimous determination that *Lafler* and *Frye* did not announce a ‘new rule’ . . . .” *Id*. at 1026 n 3 (citing cases). The Utah Supreme Court explained its reasoning as follows:

> The key holding of *Lafler* and *Frye* is that a defendant who has been convicted as the result of a fair trial or voluntary plea, and sentenced through a constitutionally immaculate sentencing process, can claim to have been prejudiced by his counsel’s ineffectiveness during plea bargaining. And this key holding is simply not to be found in the Supreme Court’s prior case law—not explicitly, and not by clear implication. [*Id*. at 1027.]

In other words, “[t]he holding of *Lafler*—that prejudice is possible even if a defendant has received a fair trial—decides an issue neither contemplated nor addressed by *Strickland*.” *Id*. at 1028. Also, before *Lafler*, the United States Supreme Court’s cases expanding on the *Strickland* prejudice test “did not dictate the result in *Lafler* and *Frye*.” *Id*. For example, although the Supreme Court’s opinion in *Hill* “established that prejudice exists where a defendant accepts a plea bargain because of ineffective assistance, and thus waives his right to trial,” *id*., the *Hill* opinion “did not establish the converse: that prejudice exists when a defendant rejects a plea bargain because of ineffective assistance, thereby exercising his right to trial.” *Id*. “In short,” the Utah Supreme Court explained, “we cannot

conclude that *Lafler* and *Frye* merely applied the principles of old cases to new facts, as the 'dictated by precedent' standard requires." *Id*.

We find the analyses of the lower federal courts, such as in *Perez*, more persuasive than that of the Utah Supreme Court in *Winward*. The *Lafler* opinion did not create a new rule—it merely determined *how* the *Strickland* test applied to the specific factual context concerning plea bargaining. Unlike in *Padilla*, there was no threshold question in *Lafler* concerning *whether* the *Strickland* test applied. The Supreme Court's analysis in *Lafler* indicated that the "rule" being applied was the test for ineffective assistance of counsel set forth in *Strickland* and applied to the plea process in *Hill*. Although *Lafler* was the first case in which the Supreme Court applied the *Strickland* prejudice test to the specific factual context presented in *Lafler*—i.e., when a defendant rejected a plea offer due to ineffective assistance of counsel and then received a fair trial—this does not change the fact that the same rule set forth in *Strickland* was being applied to a new factual context in *Lafler*. The application of the *Strickland* test in *Lafler* therefore did not produce a new rule of constitutional law. See *Chaidez*, 568 US at 348.

This conclusion is reinforced by the fact that the defendant in *Lafler* was seeking federal collateral review of a state-court conviction. By concluding that AEDPA did not bar granting relief to the defendant, the Supreme Court made clear that *Strickland* was the "clearly established Federal law," *Lafler*, 566 US at 172-173, citing 28 USC 2254(d)(1), that was being applied in *Lafler*. " '[C]learly established' law is not 'new' within the meaning of *Teague*." *Chaidez*, 568 US at 348 n 4. Therefore, because the Supreme Court in

Lafler held that AEDPA did not bar granting relief to the defendant in that case, *Lafler*, 566 US at 173, it follows that the Supreme Court was applying "clearly established Federal law," i.e., the Sixth Amendment right to counsel as defined in *Strickland*, and such clearly established federal law does not constitute a new rule of constitutional law, *Chaidez*, 568 US at 348 n 4; see also *Perez*, 682 F3d at 933-934.[4]

Accordingly, we conclude that *Lafler* did not create a new rule and that it therefore applies retroactively to this case. Thus, we affirm the trial court's order granting relief to defendant predicated on *Lafler*.

Affirmed.

CAVANAGH, P.J., and BORRELLO, J., concurred with CAMERON, J.

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[4] In *Winward*, 355 P3d at 1027 n 5, the Utah Supreme Court stated that

> contrary to *Perez*, the *Lafler* Court did not hold that the state court had acted contrary to clearly established law by applying *Strickland* in a manner that failed to anticipate the outcome of *Lafler* and *Frye*. Instead, the *Lafler* Court concluded that the state court had failed to apply *Strickland* at all. It was this failure, not the failure to anticipate *Lafler* and *Frye*, that was contrary to clearly established law and therefore allowed the Court to grant habeas relief. [Citation omitted.]

The Utah Supreme Court's analysis on this point is unconvincing. It is *Strickland* itself that the state appellate court failed to apply in *Lafler*; this is what led the United States Supreme Court in *Lafler* to conclude that the state appellate court had failed to apply "clearly established federal law." By concluding that AEDPA did not present a bar to granting habeas relief, the Court in *Lafler* concluded that the law being applied was "clearly established," and thus a new rule was not created. See *Lafler*, 566 US at 173 ("By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim [the defendant] raised, the state court's adjudication was contrary to clearly established federal law.").

MENDELSON ORTHOPEDICS PC v EVEREST NATIONAL INSURANCE COMPANY

Docket No. 341013. Submitted May 7, 2019, at Detroit. Decided May 28, 2019, at 9:00 a.m.

Donald Devore and Larry Morgan intervened in an action brought in the Wayne Circuit Court by Mendelson Orthopedics PC and Synergy Spine and Orthopedic Center LLC (SSOC) against Everest National Insurance Company, seeking payment for medical services rendered to Devore and Morgan for injuries they suffered in a June 2, 2015, automobile accident while in a vehicle owned by Cracynthia Havlicsek and insured by Everest. Everest paid Morgan's and Devore's claims for personal protection insurance (PIP) benefits from June 2, 2015 until December 31, 2015, when it terminated their benefits. The court, Annette J. Berry, J., permitted Mendelson and SSOC to amend their complaint to add the Michigan Assigned Claims Plan (MACP) as a defendant. Morgan and Devore alleged that they were entitled to PIP benefits that Everest refused to pay and that the Michigan Automobile Insurance Placement Facility (MAIPF) had the obligation to immediately assign their benefits claims to an insurer. Everest moved for summary disposition on the ground that it had rescinded Havlicsek's insurance policy because she misrepresented her address on the policy application, which Everest argued rendered the policy void *ab initio*. Morgan and Devore responded that, because they were innocent third parties and Everest only raised the fraud defense after the no-fault act's one-year limitations period expired, their ability to seek benefits from the MAIPF would be substantially prejudiced if Everest was not equitably estopped from asserting rescission as a bar to their claims. The trial court granted Everest summary disposition, ruling that Everest had the absolute right to rescind the policy for material misrepresentation, but it also dismissed Everest without prejudice subject to the case being reinstated if the Supreme Court reversed *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016), aff'd in part and rev'd in part 502 Mich 390 (2018), which had held that when an insurer rescinds an insurance policy because the insured committed fraud, it is not required to pay benefits to a third party who is innocent of the fraud. The court also granted summary disposition in favor of the

MAIPF, citing MCL 500.3174, which requires a claimant to notify the MAIPF of his or her claim within one year of the accident that caused the injuries. Devore appealed both orders.

The Court of Appeals *held*:

1. The trial court erred by granting Everest summary disposition without considering the equities to determine whether Everest had a right to rely on the rescission of Havlicsek's policy to dispose of Devore's claims for PIP benefits. The Supreme Court's decision in *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), confirmed that the innocent-third-party rule, which precludes an insurer from rescinding an insurance policy procured through fraud when there is a claim involving an innocent third party, did not survive the Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012). However, *Bazzi* held that although an insurer may raise fraud as a defense, it is not categorically entitled to rescission as between all parties by operation of law. Accordingly, the trial court appropriately recognized Everest's right to rescind the policy and treat it as void *ab initio* as between itself and Havlicsek, but it erred by failing to consider the equities to determine whether Everest could rely on the rescission with respect to Devore's claims.

2. The trial court erred by granting the MAIPF summary disposition because Devore complied with the notice requirements of MCL 500.3174 and MCL 500.3145. MCL 500.3174, which specifies how PIP benefits claims may be made through the MACP by notifying the MAIPF, requires a claimant to notify the MAIPF within the time that the no-fault act permits the claimant to file an action for PIP benefits if an insurance policy provided applicable coverage. Actions for recovery of PIP benefits are governed by MCL 500.3145(1), which requires a claimant to bring an action for PIP benefits within one year after the accident unless the claimant provided written notice of the injury to the insurer within one year of the accident. In *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29 (2016), the Supreme Court held that MCL 500.3145(1) allows an action for no-fault benefits to be filed more than one year after the date of the accident causing the injury if the insurer has either received notice of the injury within one year of the accident or has made a payment of no-fault benefits for the injury at any time before the action is commenced. Accordingly, if an insurer has made any payment of PIP benefits, the one-year notice limitation period commences upon the date that the most recent allowable expense, work loss, or survivor's loss was incurred. In this case, the last date on which Everest made a payment occurred on January 22, 2016, for medical services

rendered on December 11, 2015. Devore filed his intervening complaint against the MACP and the MAIPF on September 23, 2016, and the MAIPF conceded in its motion for summary disposition that it received a copy of Devore's complaint on September 19, 2016, which was well within the one-year notice limitation period extended by the payment exception that applied in this case. Therefore, Devore's notice to the MAIPF fell within the time that would have been allowed for filing an action for PIP benefits as prescribed by MCL 500.3174.

Reversed and remanded for further proceedings.

1. INSURANCE — NO-FAULT — FRAUD BY INSURED — INNOCENT THIRD PARTIES — RESCISSION — EQUITY.

An insurer may seek rescission of an insurance policy on the basis of fraud committed by the insured; however, when there is a claim involving an innocent third party, the insurer is not categorically entitled to rescission as between all parties by operation of law; rather, the trial court must balance the equities to determine whether the insurer may rely on the rescission to defend against an innocent-third-party claim.

2. INSURANCE — NO-FAULT — STATUTE OF LIMITATIONS — EXCEPTIONS — PAYMENT OF BENEFITS BEFORE ACTION COMMENCED.

An action for no-fault benefits may be filed more than one year after the date of the accident causing the injury if the insurer has either received notice of the injury within one year of the accident or has made a payment of no-fault benefits for the injury at any time before the action is commenced; if an insurer has made any payment of personal protection insurance benefits, the one-year notice limitations period commences on the date that the most recent allowable expense, work loss, or survivor's loss was incurred (MCL 500.3145(1), MCL 500.3174).

Mike Morse Law Firm (by *Eric M. Simpson*, *Joshua B. Farr*, and *Stacey L. Heinonen*) for Donald Devore.

Anselmi Mierzejewski Ruth & Sowle, PC (by *Rita Arabo*) for the Michigan Automobile Insurance Placement Facility.

Zausmer, August & Caldwell, PC (by *Amy S. Applin*, *James C. Wright*, and *Michael A. Schwartz*) for Everest National Insurance Company.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Intervening plaintiff, Donald Devore, appeals as of right the trial court's orders granting summary disposition in favor of defendants Everest National Insurance Company (Everest) and the Michigan Automobile Insurance Placement Facility (MAIPF). We reverse both rulings and remand for further proceedings consistent with this opinion.

I. BACKGROUND

While driving a motor vehicle owned by Cracynthia Havlicsek in Birmingham, Michigan on June 2, 2015, intervening plaintiff, Larry Morgan, and Devore, his passenger, were rear-ended by another driver. Both Morgan and Devore suffered injuries. Havlicsek had recently obtained an auto insurance policy issued by Everest on her vehicle. Everest paid some but not all of Morgan's and Devore's medical bills. Everest covered Morgan's and Devore's claims for personal protection insurance (PIP) benefits from June 2, 2015 until December 31, 2015, when it terminated their benefits on the basis of the results of independent medical examinations.

Plaintiffs, Mendelson Orthopedics PC (Mendelson) and Synergy Spine and Orthopedic Center, LLC (SSOC), sued Everest to recover payments for medical services rendered to Morgan related to the injuries he suffered in the June 2, 2015 accident. Pursuant to the parties' stipulation, the trial court permitted Mendelson and SSOC to amend their complaint to add the Michigan Assigned Claims Plan (MACP) as a defendant. Morgan and Devore sued Everest in a separate action in Oakland County, but on September 2, 2016,

they moved to intervene in this action. The trial court granted their motion and ordered them to dismiss their pending lawsuit against Everest without prejudice. In their intervening complaint, Morgan and Devore alleged claims against Everest and the MAIPF. They alleged that Everest insured the vehicle in which they were injured and that they were entitled to PIP benefits under the policy, which Everest refused to pay. They also alleged that the MAIPF had the obligation to immediately assign their benefits claims to an insurer to immediately provide them PIP benefits. Everest defended against Morgan's and Devore's claims on the ground that it had rescinded Havlicsek's policy because she misrepresented material facts in her insurance application. The MAIPF denied having any obligations to provide Morgan and Devore PIP benefits. Among its affirmative defenses, it stated that Morgan and Devore failed to provide proof of loss as required under the no-fault act, MCL 500.3101 *et seq*., and failed to provide notice of their claims within the time permitted for filing an action for PIP benefits.

Everest moved for summary disposition under MCR 2.116(C)(10) of Morgan's and Devore's claims for PIP benefits on the ground that it had rescinded Havlicsek's insurance policy because she misrepresented her address on the policy application. Everest explained that it learned of Havlicsek's misrepresentation in August and September 2016, about one year and three months after the accident, during depositions of Havlicsek's mother and Devore. Everest argued that Michigan law permitted its rescission of Havlicsek's policy because misrepresentations in the application justified rescission and declaration that the policy was void *ab initio*. Everest contended that its rescission of Havlicsek's policy precluded all plaintiffs from seeking coverage under the policy. Everest argued

that, even though Morgan and Devore may have been innocent of fraud, rescission of Havlicsek's policy precluded them from any recovery of benefits from it.

In opposition to Everest's motion, Morgan and Devore argued that, because they were innocent third parties and Everest failed to raise the alleged misrepresentation in its reservation-of-rights letters to them, and only raised the fraud defense after the no-fault act's one-year limitation period expired, their ability to seek benefits from the MAIPF would be substantially prejudiced if Everest was not equitably estopped from asserting rescission as a bar to their innocent-third-party claims. Morgan and Devore asserted that Everest could not raise the fraud defense to deny them PIP benefits and that Havlicsek's misrepresentations did not automatically permit Everest to rescind the policy as to all parties. They contended that the trial court should consider whether Everest had a right to the equitable remedy of rescission under the circumstances.

The trial court ruled that Everest had the absolute right to rescind the policy for material misrepresentation. The trial court held that no genuine issue of material fact existed regarding that a material misrepresentation had been made by Havlicsek in her application for insurance. The trial court, therefore, granted Everest summary disposition. However, the trial court dismissed Everest without prejudice subject to the case being reinstated if our Supreme Court reversed this Court's decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 770; 891 NW2d 13 (2016), aff'd in part and rev'd in part 502 Mich 390 (2018).

The MAIPF moved under MCR 2.116(C)(8) and (10) for summary disposition of Devore's claims on the ground that he did not submit an application for

benefits or notice of a claim until more than one year after his June 2, 2015 accident, which resulted in his ineligibility for no-fault benefits under MCL 500.3172 and MCL 500.3174. The MAIPF argued that Devore lacked eligibility because he failed to provide notice of his claim within one year after his accident, and first gave it notice of his claim by filing his suit against it on September 19, 2016, one year and three months after his accident, which absolutely barred his claims. Devore opposed the MAIPF's motion by arguing that *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 39; 878 NW2d 799 (2016), clarified that the one-year time limit for submitting a claim is extended under MCL 500.3145(1) when previous payments have been made to or for the benefit of an injured person by an insurer. Devore explained that Everest had rescinded Havlicsek's policy months after the one-year anniversary of his accident, which triggered his suit against the MAIPF. He argued that his suit against the MAIPF, nevertheless, fell within one year after the last payment made by Everest. He argued that he had complied with the no-fault act's notice requirement set forth in MCL 500.3174 in conjunction with MCL 500.3145(1). The trial court disagreed and granted the MAIPF's motion. Devore now appeals both orders.

II. STANDARDS OF REVIEW

We review de novo the trial court's decisions on motions for summary disposition under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the

nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (citation omitted). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). We review de novo questions of statutory interpretation and the proper interpretation of a contract. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). We also review de novo motions for summary disposition under MCR 2.116(C)(8). *Bedford v Witte*, 318 Mich App 60, 64; 896 NW2d 69 (2016). A motion under MCR 2.116(C)(8) tests whether the opposing party has failed to state a claim on which relief can be granted. *Id*. "When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Id*. (quotation marks and citation omitted). A trial court may grant summary disposition under MCR 2.116(C)(8) "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

Devore first argues that the trial court erred by granting Everest summary disposition because it declined to consider the equities to determine whether Everest had a right to rescind Havlicsek's policy and rely on the rescission, based on the fraud-in-the-application defense, for disposition of Devore's PIP benefits claims. We agree.

In *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), a case very similar to this case, our Supreme Court addressed "whether the judicially created innocent-third-party rule, which precludes an insurer from rescinding an insurance policy procured through fraud when there is a claim involving an innocent third party, survived [the Supreme] Court's decision in *Titan*[, 491 Mich 547,] which abrogated the judicially created easily-ascertainable-fraud rule." *Id*. at 396. The plaintiff incurred an injury in an auto accident while driving his mother's vehicle, which was insured by the defendant insurer. The plaintiff sued the insurer for mandatory PIP benefits. The insurer obtained a default judgment rescinding the insurance policy on the ground that the plaintiff's mother had procured the policy through fraud because the policy had been issued to the mother's company for commercial use of the vehicle, but her son regularly drove the vehicle, and she never disclosed that he would be a regular driver of it. *Id*. at 396-397. The insurer moved for summary disposition of the plaintiff's claim on the ground that rescission made the policy void *ab initio*, resulting in the preclusion of recovery of benefits under the policy. *Id*. at 397. The trial court applied the innocent-third-party rule, "which prevents an insurer from rescinding an insurance policy on the basis of material misrepresentations in the application for insurance as to a claim made by a third party who is innocent of the fraud" and denied the motion. *Id*.

This Court denied the insurer's interlocutory application for leave to appeal, and our Supreme Court remanded the case to this Court for consideration as on leave granted. On remand, this Court reversed the trial court and remanded for further proceedings, holding that *Titan* abrogated the innocent-third-party rule and that no statute prohibited an insurer from raising

a fraud defense in relation to PIP benefits claims. *Id*. at 397-398. The plaintiff again sought leave to appeal in our Supreme Court, which granted his application. The Supreme Court affirmed this Court's holding that *Titan* abrogated the innocent-third-party rule but reversed this Court's holding that the insurer was automatically entitled to rescission. *Id*. at 398.

Our Supreme Court explained that "unless clearly prohibited by statute, an insurer may continue to avail itself of any common-law defenses, such as fraud in the procurement of the policy." *Id*. at 400, citing *Titan*, 491 Mich at 554-555. Therefore, the insurer could raise the defense and seek rescission of the no-fault insurance policy, *id*. at 401, and could " 'avoid liability . . . on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party,' " *id*. at 403, quoting *Titan*, 491 Mich at 571. The Supreme Court stated that, in *Titan*, it determined that the innocent-third-party rule and the easily-ascertainable-fraud rule overlapped, and whether taken together or separately, neither sufficed to preclude rescission. *Id*.

Our Supreme Court stated that "the no-fault act neither prohibits an insurer from invoking the common-law defense of fraud nor limits or narrows the remedy of rescission." *Id*. at 406. Further, "an insurer has a reasonable right to expect honesty in the application for insurance, and there is nothing in the no-fault act that indicates that the reasonable expectations of an innocent third party surmount the reasonable expectations of the insurer." *Id*. at 407 (citation omitted).

Nevertheless, even though an insurer may raise the fraud defense, our Supreme Court clarified that insurers are not "categorically entitled to rescission." *Id*. at

408. Because "a claim to rescind a transaction is equitable in nature, it is not strictly a matter of right but is granted only in the sound discretion of the court," and when a party seeks rescission, "the trial court must balance the equities" to determine whether the party is entitled to the relief it seeks. *Id*. at 409-410 (quotation marks and citations omitted). Trial courts are not required to grant rescission in all cases. *Id*. at 410. Our Supreme Court explained:

> Moreover, when two equally innocent parties are affected, the court is "required, in the exercise of [its] equitable powers, to determine which blameless party should assume the loss . . . ." *Lenawee* [*Co Bd of Health v Messerly*], 417 Mich [17], 31[; 331 NW2d 203 (1982)]. "[W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong." *Zucker v Karpeles*, 88 Mich 413, 430; 50 NW 373 (1891). "The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked." *Id*.
>
> In this instance, rescission does not function by automatic operation of the law. Just as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third parties. Equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies. This Court has recognized that "[e]quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life" and that "[e]quity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case." *Tkachik v Mandeville*, 487 Mich 38, 45-46; 790 NW2d 260 (2010) (quotation marks omitted), citing *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25, and 27A Am Jur 2d, Equity, § 2, pp 520-521; see also

> *Lenawee*, 417 Mich at 29 (adopting a case-by-case approach to rescission when a "mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties"), and Am Jur 2d, § 2, pp 548-549.
>
> Accordingly, although the policy between Sentinel and the insured, Mimo Investment, is void *ab initio* due to the fraudulent manner in which it was acquired, the trial court must now determine whether, in its discretion, rescission of the insurance policy is available as between Sentinel and plaintiff. Therefore, we remand this matter to the trial court to exercise its discretion. *Lenawee*, 417 Mich at 31. [*Id*. at 410-412.]

In this case, Devore invoked the doctrines of equitable estoppel, laches, and promissory estoppel in an effort to persuade the trial court to consider the equities as between the parties because Everest's conduct placed Devore in the position of having no recourse to any further recovery of PIP benefits. Devore argued that Everest could not assert Havlicsek's fraud in the application as an absolute defense against his claims irrespective of the equities of the parties. The trial court declined to consider the equities because it believed that Michigan law compelled it to grant Everest summary disposition.[1]

Our Supreme Court decided *Bazzi* on July 12, 2018. *Bazzi* confirms that the trial court appropriately recognized Everest's right to rescind and treat the policy as void *ab initio* as between itself and Havlicsek. The Supreme Court, however, clarified in *Bazzi* that the

[1] In the matter at bar, the trial court granted summary disposition on November 8, 2016, in favor of Everest and against Mendelson, Synergy, Morgan and Devore. On March 31, 2017, the trial court granted summary disposition in favor of the MAIPF and against Devore. On October 20, 2017, the trial court entered an order dismissing Morgan's claims against Farmers.

trial court should consider and balance the equities to determine, as between Everest and Devore, whether the equities permit Everest the equitable remedy of rescission as to Devore or precluded it from relying on the fraud defense to Devore's claims. De novo review of the record establishes that the trial court did not consider or determine the equities as between Everest and Devore. The trial court specifically stated on the record that it would not do so. Under our Supreme Court's decision in *Bazzi*, the trial court should have exercised its discretion and determined whether Everest could rely on the rescission for its defense of Devore's claims because an insurer is not automatically entitled to rescission as between all parties by operation of law. Because the trial court did not consider or determine the equities as between Everest and Devore, we reverse its decision and remand this case to the trial court for further proceedings consistent with our Supreme Court's *Bazzi* decision.

Devore next argues that the trial court failed to properly interpret the interplay between MCL 500.3174 and MCL 500.3145(1) and incorrectly applied these statutory provisions because MCL 500.3145(1) permits a PIP benefits claimant to give notice of a claim for benefits to the MAIPF one year from the last payment made by an insurer, which he did when he learned that Everest terminated his benefits because of Havlicsek's fraud in procurement of the policy. We agree.

This issue primarily presents a question of statutory interpretation. The primary goal in statutory interpretation is to ascertain and give effect to the Legislature's intent. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 695; 671 NW2d 89 (2003). This Court recently clarified:

> The proper role of the judiciary is to interpret and not write the law . . . . Accordingly, this Court enforces a statute as written if the statutory language is unambiguous. While a term must be applied as expressly defined within a given statute, undefined words are to be given their plain and ordinary meaning, taking into account the context in which the words are used[.] We may consult a dictionary to ascertain common and ordinary meaning[s]. This Court must avoid an interpretation that would render any part of a statute surplusage or nugatory. [*Williams v Kennedy*, 316 Mich App 612, 616; 891 NW2d 907 (2016) (quotation marks and citations omitted).]

MCL 500.3174 specifies how PIP benefits claims may be made through the MACP by notifying the MAIPF. MCL 500.3174 provides:

> A person claiming through the assigned claims plan shall notify the [MAIPF] of his or her claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The [MAIPF] shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.

This statutory provision lacks ambiguity. The plain language of the statute requires a claimant to notify the MAIPF within the time that the no-fault act permits the claimant to file an action for PIP benefits if an insurance policy provided applicable coverage. Actions for recovery of PIP benefits under the no-fault act are governed by MCL 500.3145(1), which provides:

> An action for recovery of [PIP] benefits payable under this chapter for accidental bodily injury may not be

> commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of [PIP] benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

This statutory provision also lacks ambiguity. The plain language of the statute requires a claimant to bring an action for PIP benefits within one year after the accident unless the claimant provided written notice of the injury to the insurer within one year of the accident. The statute provides alternatively that, if an insurer had previously paid PIP benefits for the injury, an action may be commenced at any time within one year after the most recent allowable expense has been incurred. The statute does not prescribe a formal manner of giving notice but simply requires the claimant to plainly provide the injured person's name and the time, place, and nature of the injury.

The Legislature used the same language in MCL 500.3174 and MCL 500.3145 to specify when an action may be commenced. Because the Legislature chose to use the same language in each provision, "the Legislature intended that the different sections be treated in the same manner to accomplish the same purpose,"

and these provisions must be consistently interpreted. *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 227; 779 NW2d 304 (2009). Further, because our Supreme Court interpreted the language of MCL 500.3145(1) as constituting statutes of limitations, use of the same terms in MCL 500.3174 must be interpreted in the same manner. *Id*.

Therefore, proper interpretation and application of MCL 500.3174 requires applying MCL 500.3145(1) to determine when notice of claims to the MAIPF must be provided to make a claim through the MACP to the MAIPF for PIP benefits. In *Jesperson*, 499 Mich at 33-34, our Supreme Court explained that MCL 500.3145(1) provides two exceptions to the one-year limitation period, the notice exception and the payment exception. The Supreme Court noted that the statute specified that an action for no-fault benefits could be filed more than a year after an accident if the insurer previously paid PIP benefits. The Supreme Court concluded that the Legislature's use of the disjunctive term "or" indicated an alternative, requiring treatment of the notice and payment exceptions as independent alternatives. *Id*. at 34-35. The Supreme Court concluded that the payment exception's use of the term "previously" meant "something different from 'within 1 year after the accident.' " *Id*. at 35. The Supreme Court concluded that the payment exception "is satisfied by any prior payment." *Id*. The Supreme Court explained that giving full effect to the Legislature's intent required interpreting the language of the statute so that it did not render the payment exception mere surplusage. *Id*. at 36-37. Accordingly, the payment exception, when properly understood, extends the action-filing limitations period beyond one year from the accident when an insurer had made no-fault benefits payments. *Id*. at 37-38. The Supreme Court

concluded "that the payment exception to the one-year statute of limitations in § 3145(1) applies when the insurer makes a payment prior to the commencement of an action for no-fault benefits." *Id*. at 38. Therefore, the Supreme Court held

> that the first sentence of MCL 500.3145(1) allows for an action for no-fault benefits to be filed more than one year after the date of the accident causing the injury if the insurer has either received notice of the injury within one year of the accident or has made a payment of no-fault benefits for the injury at any time before the action is commenced. [*Id*. at 39 (emphasis added).]

Our Supreme Court's explanation of the interplay between MCL 500.3174 and MCL 500.3145 and its holding in *Jesperson* establish that the payment exception extends the one-year notice limitation period to beyond one year after the injury accident and does not elapse until one year after the most recent allowable expense, work loss, or survivor's loss has been incurred. We conclude that, if an insurer has made any payment of PIP benefits, the payment exception is triggered and the one-year notice limitation period commences upon the date that the most recent allowable expense, work loss, or survivor's loss was incurred.

In this case, the MAIPF moved for summary disposition on the ground that Devore did not provide any notice of his claim to it until September 19, 2016, more than one year and three months after he suffered injury in his accident, when the MAIPF received a copy of the complaint in this lawsuit. The MAIPF asserted that Devore failed to comply with the claim notice requirements of MCL 500.3174. Devore opposed the MAIPF's motion on the ground that he met the notice requirement because he brought his action against the MAIPF within one year of the last pay-

ment of PIP benefits by Everest. Devore supported his opposition by attaching to his opposition brief a comprehensive account statement of the payments made by Everest's claims management company of PIP benefits to Mendelson for medical services rendered to Devore in relation to his June 2, 2015 accident. The last date on which Everest made a payment was January 22, 2016, for medical services rendered on December 11, 2015. The record, therefore, reflects that the most recent allowable expense, work loss, or survivor's loss incurred by Devore occurred on December 11, 2015. Devore filed his intervening complaint against the MACP and the MAIPF on September 23, 2016. The MAIPF conceded in its motion for summary disposition that it received a copy of Devore's complaint on September 19, 2016. The record reflects that the MAIPF had notice of Devore's claims for PIP benefits well within the one-year notice limitation period extended by the payment exception that applied in this case. Therefore, Devore's notice to the MAIPF fell within the time that would have been allowed for filing an action for PIP benefits as prescribed by MCL 500.3174.

Because Devore complied with the notice requirements under MCL 500.3174 and MCL 500.3145, the trial court erred by granting summary disposition to the MAIPF. We find no merit to the MAIPF's arguments because they contradict our Supreme Court's analysis and holding articulated in *Jesperson*. Accordingly, we reverse the trial court's order granting summary disposition to the MAIPF.

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

REDFORD, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

RICHARDSON v ALLSTATE INSURANCE COMPANY

Docket No. 341439. Submitted May 2, 2019, at Detroit. Decided May 28, 2019, at 9:05 a.m.

Stephanie L. Richardson brought an action in the Wayne Circuit Court against Allstate Insurance Company, claiming that she was entitled to personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., following a motor vehicle accident that allegedly injured her. Plaintiff went to the hospital for neck pain and dizziness. After being released from the hospital, plaintiff's attorney's office, Michigan Accident Associates, PLLC, referred plaintiff to Ortho, PC, for medical treatment. Plaintiff's claims for PIP benefits were assigned to defendant through the Michigan Assigned Claims Plan, and defendant denied plaintiff's claims. Plaintiff brought the instant action, and defendant moved for summary disposition, alleging that plaintiff was improperly solicited by an attorney with Michigan Accident Associates. The motion was based on plaintiff's deposition testimony that the attorney was at plaintiff's home on the day that she was released from the hospital, which was only days after the accident had occurred. Following a hearing, the court, David J. Allen, J., granted summary disposition to defendant, holding that plaintiff was improperly solicited by her attorney and that the improper solicitation rendered plaintiff's medical treatment unlawful. Plaintiff moved to reinstate the case, and the court denied plaintiff's motion. Plaintiff appealed, and defendant moved to dismiss the appeal for failure to settle the record. The Court of Appeals, CAMERON, P.J., and FORD HOOD and LETICA, JJ., denied the motion to dismiss and remanded the case, ordering plaintiff to obtain a settled record of the hearing. The Court of Appeals retained jurisdiction. The trial court granted plaintiff's motion to settle the record and adopted the proposed record submitted by defendant. Plaintiff then moved to reinstate oral argument, and the Court of Appeals granted the motion.

The Court of Appeals *held*:

1. Under MCL 500.3105(1) of the no-fault act, an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a

motor vehicle. MCL 500.3107(1)(a) provides that PIP benefits are payable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. As part of the Michigan Penal Code, MCL 750.1 *et seq.*, MCL 750.410b prohibits improper solicitation of motor vehicle accident victims, and a person in violation of MCL 750.410b is guilty of a misdemeanor. MCL 750.410 also provides that it is a criminal misdemeanor to solicit an individual with a personal-injury claim. The Legislature did not intend for a violation of MCL 750.410 to be a bar to a no-fault action; had it so intended, the Legislature could have added it to the list of fraudulent conduct within MCL 500.3173a and MCL 500.4503 of the no-fault act. Accordingly, the trial court erred when it granted defendant's motion for summary disposition of plaintiff's claims for no-fault benefits on the basis of solicitation in violation of the criminal statutes.

2. MCL 500.3157 allows recovery of PIP benefits for lawfully rendered treatment. In this case, MCL 500.3157 did not apply to the actions of plaintiff's counsel; MCL 500.3157 is expressly limited to a physician, hospital, clinic, or other person or institution rendering treatment to an injured person, and attorneys do not render treatment to injured persons. Furthermore, the connection between the alleged solicitation and the services rendered to plaintiff by Ortho, PC, was too attenuated to render the services provided to plaintiff unlawful. Accordingly, the trial court erred by determining that plaintiff was unlawfully rendered treatment.

Trial court order granting defendant summary disposition reversed; trial court order denying plaintiff's motion for reconsideration vacated; case remanded for further proceedings.

Puzio Law, PC (by *Ronald C. Puzio, Jr.*, and *Mishelle Khan*) for plaintiff.

Smith & Brink (by *Matthew A. Brooks*, *Sawyer N. Thorp*, and *Jane Kent Mills*) for defendant.

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court order granting defendant summary disposition

and the trial court order denying plaintiff's motion to "reinstate the case" in this no-fault matter. We reverse the order granting defendant summary disposition, vacate the order denying plaintiff's motion to reinstate, and remand for further proceedings.

I. BACKGROUND

This matter arises from plaintiff's claims for personal protection insurance (PIP) benefits pursuant to the no-fault act, MCL 500.3101 *et seq*., for injuries she sustained in a car accident in December 2015. Plaintiff was driving with two others in the vehicle and stopped at an intersection. A vehicle two cars behind plaintiff was unable to stop, and it hit the vehicle directly behind plaintiff's car, which caused that vehicle to hit plaintiff's car, allegedly resulting in her injuries. Later that day, plaintiff went to Oakwood Annapolis Hospital for neck pain and dizziness. After being released from the hospital, plaintiff was referred for medical treatment at Ortho, PC, by her attorney's office, Michigan Accident Associates, PLLC. Plaintiff's claims for PIP benefits then were assigned to defendant through the Michigan Assigned Claims Plan (MACP), and defendant denied plaintiff's claims.

Defendant moved for summary disposition in the trial court based on improper solicitation of plaintiff by Thomas Quartz, an attorney with Michigan Accident Associates. The motion was based on plaintiff's deposition testimony that Quartz was at her home the day that she was released from the hospital, only days after the accident occurred. The trial court granted defendant summary disposition because plaintiff failed to create a genuine issue of material fact regarding defendant's assertion that she was improperly solicited by her attorney. The court further held that the im-

proper solicitation rendered plaintiff's medical treatment unlawful. Plaintiff moved to reinstate the case, arguing that she was not solicited by counsel and that the criminal statutes at issue that prohibit solicitation, MCL 750.410 and MCL 750.410b, do not apply in this civil matter. The trial court later denied plaintiff's motion to reinstate, which was essentially a motion for reconsideration.

II. ANALYSIS

This Court reviews a motion for summary disposition de novo. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When reviewing a motion brought under this subrule, the court must examine all documentary evidence presented to it, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Dextrom v Wexford Co*, 287 Mich App 406, 430; 789 NW2d 211 (2010). Summary disposition is proper when the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

Under the no-fault act, an insurer "is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). PIP

benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

As part of the Michigan Penal Code, MCL 750.1 *et seq*., MCL 750.410b prohibits improper solicitation of motor vehicle accident victims:

> (1) A person shall not intentionally contact any individual that the person knows has sustained a personal injury as a direct result of a motor vehicle accident, or an immediate family member of that individual, with a direct solicitation to provide a service until the expiration of 30 days after the date of that motor vehicle accident. This subsection does not apply if either of the following circumstances exists:
>
> (a) The individual or his or her immediate family member has requested the contact from that person.
>
> (b) The person is an employee or agent of an insurance company and the person is contacting the individual or his or her family member on behalf of that insurance company to adjust a claim. This subdivision does not apply to a referral of the individual or his or her immediate family member to an attorney or to any other person for representation by an attorney. [MCL 750.410b(1)(a) and (b).]

"Direct solicitation to provide a service" is statutorily defined as:

> [A] verbal or written solicitation or offer, including by electronic means, made to the injured individual or a family member seeking to provide a service for a fee or other remuneration that is based upon the knowledge or belief that the individual has sustained a personal injury as a direct result of a motor vehicle accident and that is directed toward that individual or a family member. [MCL 750.410b(2)(a).]

A person in violation of the statute is guilty of a misdemeanor. MCL 750.410b(3). See also MCL 750.410(1) (a person or firm who directly or indirectly solicits a person injured as a result of a motor vehicle accident for the purpose of representing the victim in making a claim for damages is guilty of a misdemeanor).

MCL 750.410 is a criminal statute and provides no civil remedy or cause of action for its enforcement. That precludes the use of any public-policy reasoning underlying the statute as a means to extend the statute beyond its limits to provide relief in this civil matter. " 'It is well settled that criminal statutes are to be strictly construed, absent a legislative statement to the contrary.' " *People v Robar*, 321 Mich App 106, 120; 910 NW2d 328 (2017), quoting *People v Boscaglia*, 419 Mich 556, 563; 357 NW2d 648 (1984). Statutory language is assessed in context and construed according to its plain and ordinary meaning. *Robar*, 321 Mich App at 120. When statutory language is unambiguous, it is applied as written and further construction by the Court is not required or permitted. *Id*. The clear statutory language of MCL 750.410 and MCL 750.410b provides that it is a criminal misdemeanor to solicit an individual with a personal-injury claim. Punishment for violation of either statute includes imprisonment or payment of a fine, or both. MCL 750.410(2); MCL 750.410b(3). If the Legislature intended a violation of MCL 750.410 to be a bar to a no-fault action, it could have added it to the list of fraudulent conduct within MCL 500.3173a and MCL 500.4503.[1] It, however, chose

[1] Defendant does not argue that application of the test set forth in *Gardner v Wood*, 429 Mich 290, 301-302; 414 NW2d 706 (1987), would require judicial imposition of a civil remedy for violation of MCL 750.410. And given the criminal remedies contained in the statute, had

not to do so. "This Court will not read into a statute anything that is not within the manifest intention of the Legislature as gathered from the act itself." *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000).

Giving defendant the benefit of its misplaced contention, under MCL 750.410, the only prohibited solicitation is that which is substantially motivated by pecuniary gain. *Keliin v Petrucelli*, 198 Mich App 426, 433; 499 NW2d 360 (1993). "This construction was put on the criminal statute to avoid a conflict with the First Amendment." *Id*. We have defined "solicitation" as "a situation where the solicitor's position or relation to a prospective client is such that his request may force the recipient into acquiescing to the plea. In defining solicitation in this manner, the statute could best prevent those aspects of solicitation that involve fraud, undue influence, intimidation, and overreaching." *Woll v Attorney General (On Remand)*, 116 Mich App 791, 805-806; 323 NW2d 560 (1982). This is because there is a greater likelihood of harm to the client as a result of solicitation of personal-injury claims:

> Personal injury claims, in contrast with general civil litigation and personal injury defense, are almost universally handled on a contingent fee basis and there is no fixed dollar value for the claimant's injuries. The combination of these factors creates opportunities for taking

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defendant made the argument, it likely would have failed. See generally *Lash v Traverse City*, 479 Mich 180, 191-193; 735 NW2d 628 (2007), and specifically *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998) (holding that "the trial court properly concluded that plaintiff had no private cause of action based on the alleged violations of the child care organizations act" because, in part, the statute contained criminal penalties), and *Fisher v W A Foote Mem Hosp*, 261 Mich App 727, 730; 683 NW2d 248 (2004) (concluding that a provision of the Public Health Code, MCL 333.1101 *et seq*., did not provide civil relief because it contained adequate enforcement measures, including criminal penalties).

> advantage of the client. [*Woll v Attorney General*, 409 Mich 500, 528; 297 NW2d 578 (1980), clarified 300 NW2d 171 (1980).]

Defendant fails to provide authority for the proposition that criminal solicitation may bar a plaintiff's claims for no-fault benefits. Although this matter was remanded for a settled record of the hearing on defendant's motion for summary disposition,[2] the trial court failed to provide its reasoning for holding plaintiff to the standard of the criminal statutes and thereby dismissing her claims. Despite the trial court's complete lack of analysis, it is clear that the Legislature intended the consequence for solicitation to be a criminal misdemeanor punishable by imprisonment or fine, or both. MCL 750.410(2); MCL 750.410b(3). Moreover, the wrongful-conduct rule has no application to these proceedings because that rule only applies when a *plaintiff* engages in wrongful conduct. See *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995); *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005). In this case, there is no suggestion that plaintiff engaged in unlawful solicitation, and to the extent that her initial counsel might have, he is not a plaintiff. How plaintiff contracted with her attorney is irrelevant to her claim for no-fault benefits.

Next, because the trial court erroneously determined that there was no genuine issue of material fact regarding defendant's assertion that plaintiff was improperly solicited, it compounded that error by concluding that all treatment rendered to plaintiff was unlawful. MCL 500.3157 allows recovery of PIP benefits for lawfully rendered treatment:

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[2] *Richardson v Allstate Ins Co*, unpublished order of the Court of Appeals, entered July 20, 2018 (Docket No. 341439).

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

First, MCL 500.3157 is inapplicable because it is expressly limited to "[a] physician, hospital, clinic or other person or institution lawfully *rendering treatment* to an injured person . . . ." Although attorneys help people in many different and important ways, they do not, as part of their profession, render treatment to injured persons. Therefore, MCL 500.3157 simply does not apply to the actions of plaintiff's counsel.

Even so, once again giving defendant the benefit of another misplaced contention, the caselaw defendant cited on appeal regarding unlawful treatment is wholly distinguishable from the circumstances of this matter. Only treatment that is lawfully rendered is subject to payment as a no-fault benefit. *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649, 655; 739 NW2d 675 (2007), aff'd 481 Mich 601 (2008). If treatment is not lawfully rendered, it is not a no-fault benefit and therefore not subject to reimbursement. *Miller*, 275 Mich App at 655. This Court determined that the plain and unambiguous language of MCL 500.3157 requires that "the *treatment* itself" be lawfully rendered because the statute "places the focus on the act of actually engaging in the performance of services . . . ." *Id.* at 656 (quotation marks and citation omitted). In *Miller*, the services performed were physical-therapy sessions.

Id. The focus was not on the "underlying corporate formation issues" of the entity providing the physical therapy. *Id*. (quotation marks and citation omitted). "A clinic or institution is lawfully rendering treatment when licensed employees are caring for and providing services and treatment to patients despite the possible existence of corporate defects irrelevant to treatment." *Id*. (quotation marks and citation omitted). The connection between the service actually rendered and the manner in which the entity was formed was " 'too attenuated' " to render the physical therapy provided unlawful. *Id*. (citation omitted). The *Miller* Court distinguished the matter from *Cherry v State Farm Mut Auto Ins Co*, 195 Mich App 316; 489 NW2d 788 (1992), in which acupuncture services provided by an unlicensed physician were not lawfully rendered. *Miller*, 275 Mich App at 656.

Therefore, the trial court erred by determining that plaintiff was unlawfully rendered treatment. Based on *Miller*, *id*. at 655-656, the connection between the alleged solicitation and the services rendered to plaintiff by Ortho, PC, is too attenuated to render the services provided to plaintiff unlawful. There is no indication that plaintiff received services by unlicensed physicians at Ortho, PC, or by any other provider. The *Miller* decision does not stand for the proposition that any claim submitted by a plaintiff must be rejected due to the improper act of a third party unrelated to the provision of the plaintiff's care. Rather, the relationship between plaintiff and Quartz is unrelated to plaintiff's medical treatment.

The no-fault act provides a list of fraudulent behavior that bars a claim for no-fault benefits to the MACP. See MCL 500.3173a; MCL 500.4503. Wrongful solicitation is not included. Plaintiff relies on *Bahri v IDS*

Prop Cas Ins Co, 308 Mich App 420; 864 NW2d 609 (2014), for the proposition that a single act of fraud in a claim for PIP benefits can preclude an entire claim. However, *Bahri* also is distinguishable from the matter at hand. In *Bahri*, the plaintiff claimed replacement services following a car accident, but surveillance video during the same time frame depicted plaintiff bending, lifting, driving, and running errands. *Id*. at 422. The no-fault insurance policy at issue had a fraud exclusion; the exclusion provided that there would be no coverage for any insured person who made fraudulent statements or engaged in fraudulent conduct in connection with the accident or loss. *Id*. at 423-424. This Court affirmed the trial court's determination that the fraud exclusion applied and that the evidence contradicted the plaintiff's representations that she needed replacement services. *Id*. at 425-426. There was no genuine issue regarding the plaintiff's fraud; therefore, her PIP claim was precluded, and the intervening plaintiff medical providers' claims for PIP benefits were also barred. *Id*. at 426.

In this case, there is no insurance contract containing a fraud-exclusion provision. Plaintiff's claim was assigned to defendant through the MACP. As provided in *Miller*, 275 Mich App at 656, the alleged solicitation was too attenuated from the services provided to render the services unlawful.

III. CONCLUSION

The trial court erred when it granted defendant summary disposition of plaintiff's claims for no-fault benefits on the basis of solicitation in violation of the criminal statutes.

Our conclusion that the trial court improperly granted defendant summary disposition effectively re-

solves the remainder of plaintiff's arguments on appeal related to summary disposition as well as her argument that the trial court erred by denying her motion for reconsideration; therefore, we decline to address those arguments.

The trial court order granting defendant summary disposition is reversed, the order denying plaintiff's motion for reconsideration is vacated, and this matter is remanded to the trial court for further proceedings. We do not retain jurisdiction.

MURRAY, C.J., and JANSEN and RIORDAN, JJ., concurred.

PEOPLE v HAVEMAN

Docket No. 344825. Submitted May 1, 2019, at Grand Rapids. Decided May 30, 2019, at 9:00 a.m.

Terra L. Haveman was charged in the 56-B District Court with two counts of leaving a child unattended in a vehicle for a period of time that posed an unreasonable risk of harm or injury to the child or under circumstances that posed an unreasonable risk of harm or injury to the child, MCL 750.135a(1). In July 2017, defendant walked into a store, leaving her three-year-old child, her five-year-old child, and two dogs in a vehicle with one window open for about one hour. An employee noticed the children in the car and called the police. Defendant initially told the police officers that she had only been in the store for 10 to 15 minutes but later stated that because of the medication she had been taking, she had not realized she had been in the store for a longer period. Defendant argued in the district court that MCL 750.135a is a general-intent offense; in the alternative, defendant requested a special jury instruction that her medication rendered her incapable of forming the requisite intent—that is, an instruction on the voluntariness defense—if the court ruled that the statute is a specific-intent offense. The district court, Michael L. Schipper, J., denied both requests, reasoning that MCL 750.135a is a strict-liability offense and that the voluntariness defense could not be used in Michigan to negate intent. The district court stayed the proceedings, and defendant filed an interlocutory application for leave to appeal in the Barry Circuit Court. The circuit court, Amy L. McDowell, J., affirmed in part the district court's order, concluding that MCL 750.135a was a strict-liability offense, that defendant could present evidence in the district court that her actions were not voluntary, and that the district court could then determine whether there was sufficient evidence to present a voluntariness defense to the jury. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. A specific-intent offense requires a particular criminal intent beyond the act done, while a general-intent offense requires only the intent to do the physical act. In other words, a strict-liability

offense requires only that the prosecution prove beyond a reasonable doubt that the defendant committed the prohibited act regardless of the defendant's intent and what the defendant knew or did not know. A strict-liability statute regulates conduct under the state's police power to promote social good or public welfare, including narcotics laws, traffic laws, adulterated food or drug laws, criminal nuisances, and liquor-control laws. When a criminal statute is a codification of the common law and *mens rea* was a necessary element of the crime at common law, courts will interpret the statute as including knowledge as a necessary element even when the Legislature did not include such language. In contrast, when the statute does not codify a common-law offense, courts examine the Legislature's intent to determine whether it intended knowledge to be an element of the offense or whether it intended the offender to be liable regardless of what he or she knew. To determine whether the Legislature intended to impose strict liability for an offense, which is disfavored, courts must consider: (1) whether the statute is a codification of common law; (2) the statute's legislative history or its title, especially when the subject offense is a statutory creation that is *malum prohibitum* not *malum in se*; (3) any guidance to interpretation provided by other statutes; (4) the severity of the punishment provided; (5) whether the statute defines a public-welfare defense and the severity of potential harm to the public; (6) the opportunity of the defendant to find out the true facts; and (7) the difficulty encountered by prosecuting officials in proving a mental state.

2. MCL 750.135a(1) provides that a person who is responsible for the care or welfare of a child shall not leave that child unattended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child. In this case, the Court had to examine the Legislature's intent because the statute did not codify a common-law offense and does not include language regarding the element of knowledge or intent. From the language of the statute and its legislative history, it was not clear or plain whether the Legislature sought to impose liability regardless of intent. However, while neighboring child-protective statutes contain specific-intent language, MCL 750.135a does not, suggesting that the Legislature intended for it to be a general-intent crime. Further, the severity of the potential penalty —that is, up to a 15-year prison term depending on the level of harm caused to the child—suggested that MCL 750.135a contains a general-intent element. While the statute does not proscribe a public-welfare offense, the Legislature may have intended to protect children who cannot protect themselves from their parents'

intentionally or accidentally leaving them alone in cars. However, a parent charged with leaving a child unattended in a vehicle has the opportunity to know the true facts and to avoid leaving the child unattended in the vehicle by simply looking in the back before exiting. Finally, it would not be any more difficult for the prosecution to prove a defendant's state of mind under MCL 750.135a than under any other statute. Given these factors, although the statute does not contain express language regarding intent, general intent could be inferred because strict-liability offenses are disfavored and the statute primarily bears the hallmark of an offense requiring some level of intent. Accordingly, a defendant must have a general intent to do the proscribed physical act to be convicted under MCL 750.135a of leaving a child unattended in a vehicle and posing an unreasonable risk of harm. The district court and circuit court erred by concluding that MCL 750.135a was a strict-liability offense.

Reversed and remanded to the district court.

CRIMINAL LAW — LEAVING A CHILD UNATTENDED IN A VEHICLE — GENERAL-INTENT CRIME.

MCL 750.135a(1) provides that a person who is responsible for the care or welfare of a child shall not leave that child unattended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child; MCL 750.135a is a general-intent crime, and a defendant must have a general intent to do the proscribed physical act to be convicted under the statute.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Julie A. Nakfoor Pratt*, Prosecuting Attorney, and *Joshua Carter*, Assistant Prosecuting Attorney, for the people.

The Maul Law Group, PLLC (by *Gabriel S. Sanchez* and *Kristen S. Wolfram*) for defendant.

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

PER CURIAM. At issue in this case is whether MCL 750.135a(1), which proscribes leaving children "unat-

tended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child," is a strict-liability or general-intent offense. The absence of specific language identifying the intent necessary to violate the statute does not relegate the offense to the realm of strict liability. Rather, considering the language of the statute in context, MCL 750.135a(1) describes a general-intent offense. We reverse the circuit court's order to the contrary and remand to the district court for further proceedings under the correct legal principles.

I. BACKGROUND

On July 31, 2017, defendant allegedly parked her car in a Walmart parking lot and went inside to shop for one hour, leaving her three- and five-year-old children and two dogs inside the vehicle with one window rolled down. An employee noticed the children in the vehicle and called 911. The children were unharmed. Defendant told the responding officers that she had been inside the store for only 10 to 15 minutes; she later claimed that she did not realize that she had remained inside the store for an hour because of the effects of medication she had taken.

The Barry County Prosecutor charged defendant with two misdemeanor counts of leaving a "child unattended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child." MCL 750.135a(1) and (2)(a). Before trial in the district court, defendant argued that MCL 750.135a is a general-intent offense and that she should be permitted to defend against the

charges with evidence of lack of criminal intent. In the event that the court deemed the offense to sound in strict liability, defendant requested a special jury instruction that her medication rendered her incapable of voluntarily leaving her children in the car for an extended period—the "voluntariness" defense. The district court denied both requests, reasoning that the statute created a strict-liability offense and that defendant's voluntariness defense was no different than diminished capacity, a defense no longer recognized in Michigan to negate intent. See *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008).

Defendant filed an interlocutory application for leave to appeal the district court's order to the circuit court. Although the circuit court took some procedural twists and turns, it ultimately affirmed the district court's conclusion that MCL 750.135a is a strict-liability statute. The circuit court ruled that defendant could present evidence before the district court to support that her actions were not voluntary and that the district court could then determine whether there was sufficient evidence to present a voluntariness defense to the jury.

We granted defendant's interlocutory application for leave to appeal these rulings. *People v Haveman*, unpublished order of the Court of Appeals, entered December 13, 2018 (Docket No. 344825). Defendant's trial has been on hold in the meantime.

II. GUIDING LEGAL PRINCIPLES

"Whether the Legislature intended a statute to impose strict liability or intended it to require proof of criminal intent is a matter of statutory interpretation," which we review de novo. *People v Janes*, 302 Mich App 34, 41; 836 NW2d 883 (2013). As described in *Janes*, 302 Mich App at 41:

> Under Michigan's common law, every conviction for an offense required proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*). Criminal intent can be one of two types: the intent to do the illegal act alone (general criminal intent) or an act done with some intent beyond the doing of the act itself (specific criminal intent). Thus, when a statute prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result the statute seeks to prohibit. [Cleaned up.][1]

Stated differently, "the distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983).

> In contrast, a strict-liability offense is one 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. . . . [W]hether the Legislature intended to enact a strict-liability offense is generally a matter of statutory interpretation. In determining whether the Legislature intended to dispense with criminal intent, our Supreme Court has adopted the analytical framework first stated by the United States Supreme Court in *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). [*Janes*, 302 Mich App at 41-42 (cleaned up).]

The Michigan Supreme Court adopted the *Morissette* analysis in *People v Quinn*, 440 Mich 178; 487

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[1] This opinion uses the parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Prac & Process 143 (2017).

NW2d 194 (1992). Under this framework, "where the criminal statute is a codification of the common law, and where mens rea was a necessary element of the crime at common law," courts will interpret the statute as including "knowledge as a necessary element," even when the Legislature failed to include such language. *Id*. at 185-186. On the other hand,

> where the offense in question does not codify a common-law offense and the statute omits the element of knowledge or intent, the United States Supreme Court examines the intent of the Legislature to determine whether it intended that knowledge be proven as an element of the offense, or whether it intended to hold the offender liable regardless of what he knew or did not know. [*Id*. at 186.]

Strict liability is a necessary basis for sanction because "public policy requires that certain acts or omissions to act be punished regardless of the actor's intent." *Id*. at 186-187. A strict-liability statute "regulates conduct under the state's police power to promote the social good, a course the Legislature may elect without requiring mens rea." *Id*. at 187. Dispensing with *mens rea* "also comports with the purpose of public welfare regulation to protect those who are otherwise unable to protect themselves by placing 'the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' " *Id*., quoting *United States v Dotterweich*, 320 US 277, 281; 64 S Ct 134; 88 L Ed 48 (1943). Ultimately,

> the United States Supreme Court, in interpreting legislative intent regarding the element of fault, has applied an analytical framework that considers each separate element of the statute. Statutes creating strict liability regarding all their elements are not favored. However, where a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability . . . . In

> such a case, the Legislature is not imposing liability without any fault at all; instead, it has determined that regarding that element, responsibility for the protection of the public should be placed on the person who can best avoid the harm sought to be prevented—the actor himself. [*Quinn*, 440 Mich at 187-188 (cleaned up).]

Strict liability for a criminal offense is disfavored, however, based on the axiom that "wrongdoing must be conscious to be criminal." *People v Tombs*, 472 Mich 446, 454; 697 NW2d 494 (2005) (opinion by KELLY, J.) (citation and quotation marks omitted). See also *Rambin v Allstate Ins Co*, 495 Mich 316, 327; 852 NW2d 34 (2014); *Quinn*, 440 Mich at 185. That principle explains why "courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed." *People v Kowalski*, 489 Mich 488, 499 n 12; 803 NW2d 200 (2011).

But "true strict liability crimes are proper under some circumstances . . . ." *Quinn*, 440 Mich at 188. "Examples of strict liability offenses include narcotics laws, traffic laws, adulterated food or drug laws, criminal nuisances, and liquor control laws." *People v Pace*, 311 Mich App 1, 8; 874 NW2d 164 (2015). MCL 750.165, proscribing failure to financially support one's child when required by court order, has been declared a strict-liability offense, *People v Likine*, 492 Mich 367, 392; 823 NW2d 50 (2012), as has Michigan's statutory-rape statute, MCL 750.520d(1)(a), *People v Cash*, 419 Mich 230, 242; 351 NW2d 822 (1984). The following considerations are relevant to determining whether the Legislature intended to impose strict liability for an offense:

> (1) whether the statute is a codification of common law; (2) the statute's legislative history or its title; (3) guidance to interpretation provided by other statutes; (4) the severity of the punishment provided; (5) whether the statute defines a public-welfare offense, and the severity of potential harm to the public; (6) the opportunity to ascertain the true facts; and (7) the difficulty encountered by prosecuting officials in proving a mental state. [*People v Adams*, 262 Mich App 89, 93-94; 683 NW2d 729 (2004).]

III. ANALYSIS

The statute at issue in this case, MCL 750.135a, provides, in relevant part:

> (1) A person who is responsible for the care or welfare of a child shall not leave that child unattended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child.

MCL 750.135a was enacted by 2008 PA 519, effective April 1, 2009. It did not codify a common-law offense. It does not include language regarding "the element of knowledge or intent[.]" *Quinn*, 440 Mich at 186. Accordingly, we must "examine[] the intent of the Legislature to determine" the intent necessary to be criminally liable. *Id*.

"The primary goal of statutory construction is to give effect to the Legislature's intent," and the first step in achieving that goal is to examine the statutory language. *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). Looking solely at the language of the statute, it is not plain and clear that the Legislature sought to impose liability regardless of intent. Subsection (1) directs what an individual "shall not" do. "The word 'shall' is generally used to designate a mandatory provision. Conversely, then, the term 'shall not' may be reasonably construed as a prohibition." *1031 Lapeer*

LLC v Rice, 290 Mich App 225, 231; 810 NW2d 293 (2010) (citation omitted). The mere fact that a certain act is prohibited, however, does not mean that the offense is strict liability. As noted, strict liability is disfavored, and we "will infer an element of criminal intent" even when the Legislature omits such language "unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed." *Kowalski*, 489 Mich at 499 n 12. See also *People v Lardie*, 452 Mich 231, 239; 551 NW2d 656 (1996) ("In interpreting a statute in which the Legislature has not expressly included language indicating that fault is a necessary element of a crime, this Court must focus on whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt."), overruled in part on other grounds by *People v Schaefer*, 473 Mich 418 (2005).

Adams, 262 Mich App at 94, directs that the second factor to consider is "the statute's legislative history or title[.]" "[W]e generally do not rely on legislative history . . . ." *People v Arnold*, 502 Mich 438, 453 n 9; 918 NW2d 164 (2018). However, the Supreme Court in *Quinn*, 440 Mich at 190, found it proper to examine legislative history where, as here, the subject offense "is a statutory creation, not *mal*[*um*] *in se* but, rather, *mal*[*um*] *prohibitum*."

MCL 750.135a was enacted by 2008 PA 519, and it was introduced as 2007 HB 4872. The bill was considered along with 2007 SB 158, which was ultimately enacted as 2008 PA 577, amending MCL 750.136b, the child-abuse statute. The bills were intended to address situations in which a child is left alone in a vehicle, especially on a hot day, but avoids injury. Senate Legislative Analysis, SB 158 & 760, HB 4872 & 4873 (February 13, 2009), p 1; House Legislative Analysis,

HB 4872 & 4873 (February 3, 2009), p 1. The then-existing child-abuse statute did not "address situations in which a person knowingly and intentionally places a child in a situation that is likely to cause physical harm to a child," such as by leaving the child alone in a hot vehicle, but the child is rescued before he or she is injured. Senate Legislative Analysis, p 1. PA 519 and PA 577 were designed to address those incidents "in which an intentionally abandoned child is discovered before suffering harm . . . ." House Legislative Analysis, p 2. Senate Legislative Analysis, p 4, addressed the concern that the acts "might be enforced too broadly"—for example, against "a parent or other adult [who] might leave a child in a warm car on a cold day while the adult runs into a store for just a couple of minutes,"—by noting:

> To be charged, prosecuted, and convicted, a person knowingly or intentionally will have to commit an act that, under the circumstances, poses an unreasonable risk of harm or injury. In all criminal cases, police, prosecutors, the judge, and jurors apply their discretion and judgment throughout the criminal justice process. If any of those individuals determines that the defendant did not knowingly or intentionally commit an act that, under the circumstances, posed an unreasonable risk of harm or injury to a child, the person will not be held criminally liable. It stands to reason that the conditions under which a child was left in a car . . . and the reasonableness of the person's actions will be factors to consider at each stage of a criminal case.

House Legislative Analysis, p 5, addressed the concern that "busy parents who, when overwhelmed, forget that their child is in the car" will be punished because HB 4872 "doesn't restrict the application of the penalties to those cases in which the parent knowingly and intentionally" leaves the child. The House Analysis indicated that the element requiring "the

adult [to] meet a level of posing ‘unreasonable risk of harm or injury’ . . . should suffice in distinguishing between unwise actions from those that are harmful or potentially harmful.” *Id*. Moreover, the House Analysis opined, the prosecutor “would have discretion” whether to levy charges when the adult’s actions were “truly . . . accidental.” *Id*. The fiscal agencies for the Michigan Senate and House thereby seemed to disagree regarding the level of intent the Legislature proposed as necessary to commit this crime.

The third factor, “guidance to interpretation provided by other statutes,” *Adams*, 262 Mich App at 94, leads us to review MCL 750.135a’s parent statute, MCL 750.135. Subsection (1) of that statute provides:

> Except as provided in subsection (3), a father or mother of a child under the age of 6 years, or another individual, who exposes the child in any street, field, house, or other place, *with intent* to injure or wholly to abandon the child, is guilty of a felony, punishable by imprisonment for not more than 10 years. [Emphasis added.]

The statutes following MCL 750.135a similarly provide for the protection of children. MCL 750.136(1) provides that “[a] person shall not *knowingly*” mutilate a minor female’s genitalia. (Emphasis added.) MCL 750.136a(1) and (2) proscribe “*knowingly* transport[ing]” a minor across state lines for a female genital mutilation procedure, or “*knowingly* facilitat[ing]” such transport. (Emphasis added.) MCL 750.136b proscribes child abuse in general: “A person is guilty of child abuse in the first degree if the person *knowingly or intentionally* causes serious physical or serious mental harm to a child.” MCL 750.136b(2) (emphasis added).

The child protective statutes surrounding MCL 750.135a include descriptive intent elements. They are specific-intent offenses. As described in *People v Culp*,

108 Mich App 452, 455; 310 NW2d 421 (1981), quoting *Roberts v People*, 19 Mich 401, 414 (1870): "Specific intent is a nebulous concept," and " '[w]hen a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had.' " This Court has determined that MCL 750.135 represents a specific-intent crime. See *People v Schaub*, 254 Mich App 110, 115-116; 656 NW2d 824 (2002) (noting that a parent must have the specific intent to abandon his or her child in order to meet the elements of the offense). We have also found first-degree child abuse as proscribed by MCL 750.136b(2) requires specific intent. See *People v Maynor*, 256 Mich App 238, 241; 662 NW2d 468 (2003).

When compared to its neighboring child protective statutes, the absence of intent language in MCL 750.135a does not indicate a strict-liability offense, but, rather, suggests the Legislature's intent to create a general-intent crime.[2]

The next consideration is "the severity of the punishment provided[.]" *Adams*, 262 Mich App at 94. MCL 750.135a(2) provides for varying levels of punishment depending on the harm caused to the child:

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[2] An examination of the laws of our sister states uncovered 15 other states that permit charges when a caregiver leaves a child unattended in a vehicle without fatality: California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maryland, Nebraska, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Washington. Eight of those statutes include language of intent, and caselaw in a ninth state implies an intent element. See Conn Gen Stat 53-21a; 720 Ill Comp Stat 5/12C-5; Neb Rev Stat 28-710; Nev Rev Stat 202.575; Tenn Code Ann 55-10-803; Tex Penal Code Ann 22.10; Utah Code Ann 76-10-2202; Wash Rev Code 46.61.685. See also *Commonwealth v Bryant*, 57 A3d 191, 197; 2012 PA Super 257 (2012).

> (a) Except as otherwise provided in subdivisions (b) to (d), the 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.
>
> (b) If the violation results in physical harm other than serious physical harm to the child, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
>
> (c) If the violation results in serious physical harm to the child, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both.
>
> (d) If the violation results in the death of the child, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

Although defendant was charged with a 93-day misdemeanor offense under Subsection (2)(a) as no harm befell her children, the offense could carry a 15-year prison term. This also tends to suggest that MCL 750.135a has an element of general intent.

MCL 750.135a does not proscribe a public-welfare offense. See *Adams*, 262 Mich App at 94. A public-welfare offense is one that "punish[es] conduct contrary to the interest of public safety . . . ." *People v Trotter*, 209 Mich App 244, 247; 530 NW2d 516 (1995). As described in *Morissette*, 342 US at 252-255, public-welfare regulations are intended to control dangers caused by "the industrial revolution, increased traffic, the congestion of cities, and the wide distribution of goods." *Pace*, 311 Mich App at 7. Leaving a child unattended in a car does not fit within the parameters of a public-welfare offense, leaning in favor of implying a general-intent requirement.

However, as noted in *People v Schumacher*, 276 Mich App 165, 169; 740 NW2d 534 (2007), *Morissette*,

342 US at 251 n 8, "recognized exceptions to this rule of statutory construction: for example, sex offenses, such as rape, and offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty." (Cleaned up.) Under this exception, statutory rape is a strict-liability crime in Michigan even though it is not a public-welfare offense and carries stiff penalties. *Lardie*, 452 Mich at 255 n 40. The denial of a mistake-of-age defense "has been upheld as a matter of public policy because of the need to protect children below a specified age from sexual intercourse on the presumption that their immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct." *Cash*, 419 Mich at 242. The Legislature may have intended to protect in the same manner young children who cannot protect themselves from their parents' intentional decisions or accidental mishaps of leaving them alone in hot cars.

The sixth factor is the *defendant's* "opportunity to ascertain the true facts[.]" *Adams*, 262 Mich App at 94. See also *Quinn*, 440 Mich at 198; *Schumacher*, 276 Mich App at 174. In this case, defendant could have easily ascertained "the true facts" and avoided committing this act. Defendant need only have looked in her backseat to realize that her children were in the car, stepped outside to perceive the temperature on that July day, and looked at her watch to determine how long she had left her children unattended. The sixth factor is considered in conjunction with the seventh and final factor—"the difficulty encountered by prosecuting officials in proving a mental state." *Adams*, 262 Mich App at 94. This factor weighs in favor of imposing an element of general intent. "Proving an actor's state of mind is difficult in virtually all criminal prosecutions. Indeed, this recognized difficulty has led to the

rule that minimal circumstantial evidence is sufficient to establish a defendant's state of mind." *People v Nasir*, 255 Mich App 38, 45; 662 NW2d 29 (2003) (cleaned up). It would be no more difficult for the prosecutor to establish a defendant's state of mind in violating MCL 750.135a as any other statute. We discern no special consideration in this regard requiring the imposition of strict liability.

Considering the totality of the factors outlined in *Adams*, we believe the Legislature intended to make MCL 750.135a a general-intent crime. This intent can be implied despite the absence of language in the statute because strict-liability offenses are disfavored and MCL 750.135a primarily bears the hallmarks of an offense requiring some level of intent. Therefore, in order to be convicted of leaving a child unattended in a vehicle and posing an unreasonable risk of harm, a defendant must have a general intent to do the proscribed physical act. The district and circuit courts erred by treating the offense as sounding in strict liability.[3]

We reverse and remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ., concurred.

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[3] Given our resolution of the statutory-interpretation issue, we need not consider defendant's second claim—that the lower courts erroneously considered the applicability of the voluntariness defense. That defense applies only to strict-liability offenses. See *Likine*, 492 Mich at 393-394.

COMPOSTO v ALBRECHT

Docket No. 340485. Submitted April 12, 2019, at Detroit. Decided May 30, 2019, at 9:05 a.m. Leave to appeal sought.

Thomas Composto filed a negligence action in the Macomb Circuit Court against Michalina Albrecht, Piotr Albrecht, and their then nine-year-old son Philip Albrecht (collectively, defendants), seeking to recover damages for injuries he sustained when Philip ran into him with his bicycle. In August 2015, defendants rode their bicycles at the Hike-Bike Trail at Stony Creek Metropark; the trails were used for hiking, bicycling, running, and in-line skating. Philip braked when he saw plaintiff walking down a hill ahead of him, but Philip was unable to avoid running into plaintiff because of people using the other side of the trail. Plaintiff filed a motion before trial, seeking to establish that the applicable standard of care owed was ordinary negligence, not reckless misconduct. Defendants moved for summary disposition, arguing that Philip's actions did not constitute ordinary negligence or reckless misconduct. The court, James M. Maceroni, J., granted plaintiff's motion, concluding that the ordinary-negligence standard of care applied. The court thereafter denied defendants' motion for reconsideration of that determination and denied their motion for summary disposition without prejudice. Defendants appealed by leave granted.

The Court of Appeals *held*:

In a negligence action, a defendant typically owes a plaintiff a duty to use ordinary care. However, when people engage in a recreational activity, they subject themselves to certain risks inherent in that activity. For that reason, coparticipants in a recreational activity only owe each other a duty not to act recklessly. To determine which standard of care applies, a court must consider whether the parties were coparticipants in a recreational activity; if the parties were coparticipants in the activity, the court must then consider whether the plaintiff's injuries arose from risks inherent in that activity. Whether a risk is inherent in a recreational activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to the injury, which is a question of fact for a fact-finder. If a

reasonable person could have foreseen the particular risk, then the risk is inherent, and the reckless-misconduct standard applies. The risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the mechanism it resulted from. In this case, although plaintiff and Philip were not engaged in precisely the same recreational act, they were both engaged in using a shared, multiuse trail and were therefore coparticipants in the activity of using the trail. Plaintiff voluntarily subjected himself to the inherent, readily apparent, and foreseeable risks of using a shared multiuse recreational trail together with other trail users. Accordingly, the reckless-misconduct standard would apply if plaintiff's injuries resulted from an inherent risk in using the trail. Because the foreseeability of the risk of harm is a factual question, the case had to be remanded to the trial court for that court to determine whether there was a genuine issue of material fact as to whether a participant using the hike-bike trail would, under the circumstances, have reasonably foreseen the risk of plaintiff's injury.

Reversed and remanded.

ACTIONS — PERSONAL INJURY — WORDS AND PHRASES — "RECREATIONAL ACTIVITIES."

When people engage in a recreational activity, they subject themselves to certain risks inherent in that activity; coparticipants in a recreational activity owe each other a duty not to act recklessly; the term "recreational activity" encompasses participants sharing the use of a multiuse trail that was specifically designated for those recreational uses.

Richard E. Shaw and *Macomb Law Group, PLC* (by *James L. Spagnuolo, Jr.*, and *Zachary Morgan*) for plaintiff.

Cardelli Lanfear, PC (by *Anthony F. Caffrey III*, *R. Carl Lanfear, Jr.*, and *Paul Kittinger*) for defendants.

Before: MARKEY, P.J., and FORT HOOD and GADOLA, JJ.

GADOLA, J. In this interlocutory appeal, defendants Michalina Albrecht and Piotr Albrecht, individually

and as next friend of Philip Albrecht, appeal by leave granted the trial court's orders granting a motion in limine establishing the standard of care applicable in this negligence suit and denying defendants' motion for summary disposition. We reverse and remand to the trial court for proceedings consistent with this opinion.

I. FACTS

The facts underlying this case are essentially undisputed. On August 2, 2015, plaintiff, Thomas Composto, was walking on the Hike-Bike Trail at Stony Creek Metropark. The Hike-Bike Trail, as its name implies, is used for both walking and bicycling, as well as for running and in-line skating. On that day, then nine-year-old Philip was riding his bicycle on the trail with his parents, Michalina and Piotr. Philip was riding down a hill and saw plaintiff walking ahead of him. Philip braked and tried to swerve to avoid striking plaintiff, but because there were oncoming trail users, he failed to avoid plaintiff and struck him from behind. Plaintiff tore his quadriceps and suffered other lacerations and contusions.

Plaintiff initiated this action, alleging that Philip had caused the collision by riding his bicycle negligently, resulting in plaintiff's injuries. Before the trial court, plaintiff filed a motion in limine, seeking to establish that the applicable standard of care Philip owed in this case was that of ordinary negligence. Plaintiff argued that the reckless-misconduct standard, usually applied when parties are engaged in recreational activities, did not apply in this case because plaintiff and Philip were engaged in different activities at the time of their collision. Defendants moved for summary disposition

under MCR 2.116(C)(8) and (10), arguing that Philip's conduct did not amount to either ordinary negligence or reckless misconduct.

After a hearing, the trial court granted plaintiff's motion in limine, determining that the applicable standard of care was that of ordinary negligence. The trial court denied defendants' motion seeking reconsideration of the determination and, after a further hearing, denied without prejudice defendants' motion for summary disposition as premature. This Court thereafter granted defendants' application for leave to appeal.[1]

II. DISCUSSION

Defendants contend that the trial court erred by determining that the applicable standard of care in this case is that of ordinary negligence. The issue of the applicable standard of care is a question of law that we review de novo. *Sherry v East Suburban Football League*, 292 Mich App 23, 27; 807 NW2d 859 (2011).

Generally, to establish a prima facie case of negligence, a plaintiff must establish (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty by the defendant, (3) damages suffered by the plaintiff, and (4) that the damages were caused by the defendant's breach of duty. *Finazzo v Fire Equip Co*, 323 Mich App 620, 635; 918 NW2d 200 (2018). Duty is the legal obligation to conform one's conduct to a particular standard to avoid subjecting others to an unreasonable risk of harm. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). The duty a defendant typically owes to a plaintiff often is described as an ordinary-

[1] *Co[m]posto v Albrecht*, unpublished order of the Court of Appeals, entered March 15, 2018 (Docket No. 340485).

negligence standard of care. See *Sherry*, 292 Mich App at 28. Under ordinary-negligence principles, a defendant owes a plaintiff a duty to exercise ordinary care under the circumstances. See *id*. at 29-30.

However, "[w]hen people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 87; 597 NW2d 517 (1999). As a result, "coparticipants in a recreational activity owe each other a duty not to act recklessly." *Id*. at 95. This recklessness standard of care, however, extends only to "injuries that arise from risks inherent to the activity." *Bertin v Mann*, 502 Mich 603, 609; 918 NW2d 707 (2018). Therefore, to determine the standard of care applicable when an injury arises involving coparticipants in a recreational activity, a court must consider whether the injuries arose from risks inherent in that recreational activity.

To determine the applicable standard of care in this case, the first inquiry is whether plaintiff and Philip were coparticipants in a recreational activity. Both plaintiff and Philip were engaging in recreational activity at the time of the accident: Philip was biking while plaintiff was walking. In doing so, both were using a trail specifically designated for the mixed uses of walking and biking, among other recreational activities. We compare the circumstances of this case to those of *Ritchie-Gamester*, in which both parties were ice skating during an "open skate" at a public ice rink when they collided. In adopting the reckless-misconduct standard, the *Ritchie-Gamester* Court recognized "the everyday reality of participation in recreational activities," in which "[a] person who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime or sport."

Ritchie-Gamester, 461 Mich at 86. Ultimately, the Court stressed that coparticipants engaging in a recreational activity have "voluntarily subjected themselves to certain risks inherent in that activity." *Id*. at 87. Applying these principles in the context of ice skaters participating in an open skate at a public ice arena, the Court in *Ritchie-Gamester* explained:

> The risks on an ice rink are no less obvious than those on a golf course. One cannot ice skate without ice, and the very nature of ice—that it is both hard and slippery—builds some risk into skating. In addition, an "open skate" invites those of various ages and abilities onto the ice to learn, to practice, to exercise, or simply to enjoy skating. When one combines the nature of ice with the relative proximity of skaters of various abilities, a degree of risk is readily apparent: Some skaters will be unable to control their progress and will either bump into other skaters, or fall. All skaters thus take the chance that they will fall themselves, that they will be bumped by another skater, or that they will trip over a skater who has fallen. [*Id*. at 89.]

Significantly, the Court "stated this standard broadly as applying to all 'recreational activities' " and further noted that "the precise scope of this rule is best established by allowing it to emerge on a case-by-case basis, so that we might carefully consider the application of the recklessness standard in various factual contexts." *Id*. at 89 n 9.

In this case, plaintiff, who was walking, and Philip, who was biking, were not engaged with each other in precisely the same recreational act or sport at the time of their collision. As the trial court observed, walking is an inherently different activity than biking. However, both plaintiff and Philip were engaged in using a shared, multiuse trail, and thus were "coparticipants"

in the activity of using the trail.[2] In this factual context, by choosing to use the Hike-Bike Trail for recreational purposes, plaintiff voluntarily subjected himself to the inherent, readily apparent, and foreseeable risks, not just of walking, but of using a shared, multiuse recreational trail together with other trail users. Mindful of *Ritchie-Gamester*, we consider "recreational activity" to encompass the parties' shared use of the multiuse trail specifically designated for recreational purposes, such that the reckless-misconduct standard of care applies if plaintiff's injuries resulted from an inherent risk of using the trail. See *Bertin*, 502 Mich at 609.

The next inquiry is whether getting hit by a bicycle is an inherent risk of using a hike-bike trail. In *Bertin*, our Supreme Court held that to determine whether a risk is inherent in a recreational activity, "the analysis must focus on whether the risk was reasonably foreseeable under the circumstances." *Id.* at 613. The Court reasoned that "because the rationale for the limited duty [of the reckless-misconduct standard] is that the participants have voluntarily elected to par-

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[2] To conclude otherwise would subject the trail users to various standards of care depending upon with whom they interacted. If a bicyclist collided with another bicyclist, the defendant bicyclist would be held to a reckless-misconduct standard of care, but if the bicyclist collided with an in-line skater, he would be held to a standard of care for ordinary negligence. What if an in-line skater collided with a skate boarder, or a runner with a walker? We decline to indulge the fiction of different standards of care created by ever-more finely drawn distinctions in the precise activity engaged in and instead implement the reasoning and spirit of *Ritchie-Gamester*. We find the use of the multiuse trail akin to the "open skate" in *Ritchie-Gamester*. Just as the ice rink during open skate accommodates the speed skater and the ice dancer, the novice and the expert, the multiuse trail accommodates various modes of conveying oneself down the trail by participants with different levels of skill and ability, all engaged in the umbrella activity of "recreational trail use."

ticipate knowing that they might be injured, it makes sense to define the 'inherent risks' in an activity by what is reasonably foreseeable—by what the participants did foresee or should have foreseen . . . ." *Id*. "[T]he assessment of whether a risk is inherent to an activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to injury. If so, then the risk is inherent and the reckless-misconduct standard of care applies." *Id*. at 619.

In Michigan, foreseeability depends upon whether a reasonable person " 'could anticipate that a given event might occur under certain conditions.' " *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 338; 915 NW2d 338 (2018), quoting *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975). Whether a risk was foreseeable is a question of fact; we resolve the question using an objective test, focusing on what risks a reasonable participant would have foreseen under the circumstances. *Bertin*, 502 Mich at 619-620. "The risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the mechanism it resulted from." *Id*. at 620-621 (quotation marks and citation omitted). Relevant facts include the characteristics of the participants, including their experience with the activity and their relationship to each other and to the activity. *Id*. at 621.

Because the determination of the foreseeability of the risk of harm is a factual question, the Court in *Bertin* remanded the case to the trial court "to determine whether there is a genuine issue of material fact as to whether a participant in the activity in question

would, under the circumstances, have reasonably foreseen the risk of this particular injury." *Id*. at 622. As in *Bertin*, we remand to the trial court in this case to address whether a genuine issue of material fact exists as to whether a participant in the activity of using a multiuse trail, under the circumstances, reasonably would have foreseen the risk of being struck by a bicyclist. The trial court should focus on "what risks a reasonable participant, under the circumstances, would have foreseen." *Id*. at 620.

In summary, under the reasoning of *Ritchie-Gamester*, plaintiff and Philip were coparticipants in the recreational activity of using the shared, multiuse trail for its intended recreational purposes. The trial court therefore erred by finding that the reckless-misconduct standard of care did not apply because the parties were not engaged in precisely the same recreational activity. However, the reckless-misconduct standard only applies to injuries that arise from risks inherent in the activity. Whether a risk is inherent in a recreational activity for purposes of establishing the applicable standard of conduct is determined by asking whether the risk was reasonably foreseeable, which is a question of fact for the fact-finder. Consistently with *Bertin*, we remand to the trial court to determine the foreseeability of the risk of harm without prejudice to defendants thereafter renewing their motion for summary disposition before the trial court.

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

MARKEY, P.J., and FORT HOOD, J., concurred with GADOLA, J.

WILSON v BRK, INC

Docket No. 342449. Submitted May 8, 2019, at Detroit. Decided May 30, 2019, at 9:10 a.m. Leave to appeal denied 505 Mich 1015 (2020).

Kristopher W. R. Wilson filed an action in the Wayne Circuit Court against BRK, Inc., and R & C Land, Inc., in connection with injuries he suffered when he exited the Diamondback Saloon owned by defendants. Plaintiff, who has partial quadriplegia and uses a wheelchair, entered the bar by using the cement ramp that ran from the bar's parking lot, up the side of the building, to the common entrance for both the ramp and the stairway that met outside the entranceway; there was a 3½-inch-tall step that all patrons had to navigate to enter through the door. A friend pushed plaintiff's wheelchair for him as they were leaving the bar; plaintiff's wheelchair tipped forward as he went through the doorway and over the step; plaintiff fell to the ground, resulting in injuries. Plaintiff asserted that (1) the entranceway step constituted a barrier in violation of federal, state, and local laws that protect individuals with disabilities; (2) defendants were negligent and grossly negligent for failing to warn customers of the defect or hazard, failing to replace the entranceway with a ramp, and failing to maintain the premises in a reasonably safe condition; and (3) defendants had created a nuisance by allowing an inherently dangerous condition to exist. Defendants moved for summary disposition, arguing, in part, that plaintiff's complaint sounded in premises liability, not ordinary negligence or nuisance; that the step was open and obvious with no special aspects; that the open and obvious danger doctrine applied regardless of any regulatory or code violation; and that the step did not violate any code or regulation. Plaintiff argued in response (1) that the entranceway did not comply with the MCL 125.1351 *et seq*. barrier-free access requirements for public facilities; (2) that the open and obvious danger doctrine did not negate liability for violating a statutory duty, specifically, those set forth in the Single State Construction Code Act (the SCCA), MCL 125.1501 *et seq*., which incorporated specific building-code regulations that required, at the time the bar was built, that at least one entranceway to a public facility be accessible; and (3) that the entranceway violated the Persons with Disabilities Civil Rights

Act (the PDCRA), MCL 37.1101 *et seq*.; plaintiff also asserted that some of his claims sounded in ordinary negligence and nuisance and that the open and obvious danger doctrine did not apply to those claims. The court, Margaret P. Bamonte, J., granted defendants' motion, concluding that the case sounded in premises liability, not ordinary negligence; that the step was open and obvious with no special aspects to avoid application of the doctrine; and that any alleged building-code violation would not negate application of the open and obvious danger doctrine. Plaintiff appealed.

The Court of Appeals *held*:

1. If a plaintiff's injury occurs because of an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence. A plaintiff cannot avoid the open and obvious danger doctrine by asserting ordinary negligence when the facts only support a premises-liability claim. In this case, plaintiff's injuries arose from an allegedly dangerous condition on the land—that is, the entranceway step that physically limited patrons had to traverse to enter and exit the bar. Accordingly, the trial court did not err by concluding that plaintiff's asserted claims of negligence were actually premises-liability claims.

2. MCL 125.1352(1) provides that a public facility or a facility used by the public the contract for construction of which or the first contract for construction of a portion of which is made after July 2, 1974, shall meet the barrier-free design requirements contained in the SCCA. MCL 125.1352(1) and MCL 125.1351(b) generally require a barrier-free design to eliminate hindrances that deter physically limited persons from having access and free mobility to buildings. The 1975 building-code regulations in turn required that at least one primary entrance at each grade floor level of a building or structure be accessible from the parking lot or the nearest street by means of a walk uninterrupted by steps or abrupt changes in grade and have certain width and gradient requirements.

3. A possessor of land does not owe a duty to protect or warn an invitee of dangers that are open and obvious. An exception to the open and obvious danger doctrine exists when special aspects of a condition make even an open and obvious risk unreasonable. Special aspects exist when an open and obvious hazard remains unreasonably dangerous or when it is effectively unavoidable; exceptions to the doctrine are narrow and designed to permit liability for such dangers only in limited, extreme situations. To be effectively unavoidable, a hazard must truly be, for all practi-

cal purposes, one that a person is required or compelled to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services does not equate with a requirement or a compulsion to confront a hazard and does not rise to the level of a special aspect characterized by its unreasonable risk of harm. However, the open and obvious danger doctrine cannot be used to avoid a specific statutory duty or obligation that is plainly and directly intended to benefit and protect the injured plaintiff. Even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous. In that regard, when a defendant has a statutory duty under MCL 554.139(1)(a) or (b) to maintain the premises, the defendant cannot use the doctrine to avoid liability; the statutory-duty exception to the open and obvious danger doctrine is not limited to duties created under MCL 554.139.

4. In this case, there was no dispute that plaintiff was an invitee and that the hazard—i.e., the entranceway step—was open and obvious. However, the entranceway step was avoidable because plaintiff was not compelled to patronize the bar and confront the step. Accordingly, the trial court correctly concluded that there were no special aspects with regard to the entranceway step and that plaintiff could not avoid application of the open and obvious danger doctrine on that basis. However, the trial court erred by concluding that the open and obvious danger doctrine applied regardless of whether the entranceway violated statutory duties related to providing accessible, barrier-free entranceways open to the public; the statutory requirements, which incorporated the building-code regulations, were plainly and directly intended to benefit and protect physically limited persons like plaintiff. The trial court also erred by concluding that defendant must have been in compliance with the relevant statutory barrier-free requirements because the bar had never received violations or citations relative to the step. In addition, the testimony of the township's building inspector created an issue of material fact regarding whether the entranceway step violated a statutory duty with respect to access for persons with physical limitations. Because the issue was not addressed in the trial court, the case had to be remanded to that court to address whether a remedy or cause of action for money damages may arise from a violation of the MCL 125.1352(1) barrier-free requirements.

5. The PDCRA provides, in part, that it is unlawful for a person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of

a place of public accommodation or public service because of a disability. Plaintiff did not have a claim under the PDCRA because he was not denied equal enjoyment of the bar because of his disability; specifically, he enjoyed an evening that included drinking and playing pool at the bar. Instead, his complaint requested money damages related to a physical injury caused by an allegedly hazardous step that did not comply with the barrier-free requirements set forth in MCL 125.1351 *et seq*., the SCCA, and the statutorily incorporated building-code regulations.

Reversed and remanded.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGER DOCTRINE — STATUTORY-DUTY EXCEPTION.

In premises-liability cases, the open and obvious danger doctrine cannot be used to avoid a specific statutory duty or obligation that is plainly and directly intended to benefit and protect the injured plaintiff; the statutory-duty exception to the open and obvious danger doctrine is not limited to duties created under only certain statutes.

Sachs Waldman, PC (by *Brian A. McKenna*) for plaintiff.

Bredell & Bredell (by *John H. Bredell*) for defendants.

Before: REDFORD, P.J., and MARKEY and K. F. KELLY, JJ.

MARKEY, J. Plaintiff, Kristopher Wilson, appeals by right the trial court's order granting summary disposition in favor of defendants, BRK, Inc., and R & C Land, Inc. (both doing business as Diamondback Saloon), under MCR 2.116(C)(10) in this action arising out of plaintiff's fall from a wheelchair when exiting defendants' bar. We reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendants' bar has a cement ramp that starts near handicapped parking spots, runs along the side of the

building, and gradually slopes upward to a doorway, allowing access for physically limited patrons. The top of the ramp meets the top of a separate stairwell, both leading to a single set of doors into the bar. At the door's threshold is a 3½-inch-tall, yellow-painted step that must be navigated by disabled and nondisabled customers alike. Plaintiff, who has partial quadriplegia, uses a wheelchair. After a visit to the bar one evening, he began to exit the establishment with a friend, who was pushing the wheelchair. As plaintiff went through the doorway and over the step, the wheelchair tipped forward, throwing plaintiff to the ground and causing injuries. Plaintiff had patronized the bar on three or four previous occasions, negotiating the step without incident with the assistance of friends.

Plaintiff filed suit against defendants. Plaintiff alleged that the entranceway step constituted a barrier in violation of federal, state, and local laws protecting individuals with disabilities. He further asserted that defendants were negligent and grossly negligent for failing to maintain the premises in a reasonably safe condition, failing to warn customers about the defect or hazard, and failing to replace the entranceway step with a ramp. Finally, plaintiff claimed that defendants had created a nuisance by allowing an inherently dangerous condition to exist, placing "those on the premises in a position of peril." Subsequently, defendants moved for summary disposition, arguing, in relevant part, that plaintiff's action sounded in premises liability, not ordinary negligence or nuisance, that the entranceway step was open and obvious with no special aspects, that there was no code or regulatory violation, and that the open and obvious danger doctrine applied regardless of any regulatory or code violation.

In his responsive brief, plaintiff argued that the bar's entranceway as constructed with the step was not in compliance with MCL 125.1351 *et seq*., which provides for the use of public facilities by the physically limited and requires barrier-free access. Plaintiff claimed that the open and obvious danger doctrine does not apply to a violation of a statutory duty and further maintained that the Stille-DeRossett-Hale Single State Construction Code Act (the SCCA), MCL 125.1501 *et seq*., incorporated the Building Officials and Code Administrators International, Inc., Basic Building Code (the BOCA code) pursuant to MCL 125.1504(2) and that the BOCA code required, before the bar's construction in 1977, that at least one entranceway to a public facility be accessible to individuals with disabilities. Additionally, plaintiff claimed that the Persons with Disabilities Civil Rights Act (the PDCRA), MCL 37.1101 *et seq*., was implicated and violated.[1] Plaintiff also contended that the step was effectively unavoidable because it was located at the only entrance/exit point available to a wheelchair-bound patron. Finally, plaintiff argued that some of his claims sounded in ordinary negligence and nuisance, not premises liability, and that the open and obvious danger doctrine does not apply to ordinary negligence and nuisance claims.

The trial court heard defendants' motion for summary disposition and took the matter under advisement. The court later issued a written opinion and order granting defendants summary disposition. The trial court ruled that the case sounded in premises liability, not ordinary negligence, that the step was open and

[1] Specifically, plaintiff cited MCL 37.1102(1), which provides that "[t]he opportunity to obtain . . . full and equal utilization of public accommodations . . . without discrimination because of a disability is guaranteed by this act and is a civil right."

obvious, that there were no special aspects of the step that would avoid application of the open and obvious danger doctrine, and that "[a]ny alleged violation of the building code . . . does not negate the application of the open and obvious doctrine." The court also noted that there was no evidence that the entranceway step had ever been found to be in violation of a statute or building code. Indeed, the trial court explained that defendants presented undisputed evidence that the building had been inspected and approved by state and local authorities several times since its construction in 1977 and that it had never been cited for a violation. Plaintiff appeals by right.

II. ANALYSIS

A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). We also review de novo issues of statutory construction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. ORDINARY NEGLIGENCE VERSUS PREMISES LIABILITY

Plaintiff maintains that defendants engaged in ordinary negligence by directing physically limited invitees to use the entrance where a customer would be forced to encounter the 3½-inch step or threshold. Plaintiff states that the ramp, which defendants knew would be used for access to the business by individuals with physical limitations, leads directly to the problematic entranceway.[2]

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[2] We note that plaintiff does not present any appellate argument attempting to resurrect his nuisance claim.

"It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*.; see also *Compau v Pioneer Resource Co, LLC*, 498 Mich 928 (2015). The open and obvious danger doctrine is inapplicable to a claim of ordinary negligence. *Laier v Kitchen*, 266 Mich App 482, 484; 702 NW2d 199 (2005). "A plaintiff cannot avoid the open and obvious danger doctrine by claiming ordinary negligence, when the facts only support a premises liability claim[.]" *Jahnke v Allen*, 308 Mich App 472, 476; 865 NW2d 49 (2014).

Plaintiff's lawsuit ultimately concerns an injury arising from an allegedly dangerous condition on the land, i.e., a step that must be navigated by physically limited patrons in order to enter and exit the bar. Plaintiff's effort to frame a portion of his complaint as alleging ordinary negligence is strained. Plaintiff is essentially arguing that defendants created the dangerous condition by directing customers with disabilities to use the step. This characterization, however, does not suffice to defeat the fact that this is a premises-liability action. See *Buhalis*, 296 Mich App at 692. The trial court did not err by ruling that the portions of the complaint that

plaintiff asserts sound in ordinary negligence actually sound in premises liability.

C. SPECIAL ASPECTS—"EFFECTIVELY UNAVOIDABLE" PRONG

Plaintiff next contends that the entranceway step, which constituted a barrier to invitees using a wheelchair, was effectively unavoidable because the doorway was the only one that a wheelchair user could use to exit the establishment.

An exception to the circumscribed duty owed for open and obvious dangers arises when special aspects of a condition make even an open and obvious risk unreasonable. *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012).[3] Special aspects exist when an open and obvious hazard remains unreasonably dangerous or when it is effectively unavoidable. *Id*. at 461-463. The *Hoffner* Court further explained:

> [W]hen confronted with an issue concerning an open and obvious hazard, Michigan courts should hew closely to the principles previously discussed. It bears repeating that exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations. Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard, but one that is *unreasonably* so. And it must be

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[3] Considering whether a danger or defect is open and obvious is an integral aspect of defining the duty owed by an invitor to an invitee. *Hoffner*, 492 Mich at 460. A possessor of land does not owe a duty to protect or warn an invitee of dangers that are open and obvious. *Id*. This is "because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 461. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. The required analysis involves examination of the objective nature of the condition of the premises. *Id*. There is no dispute that plaintiff was an invitee and that the step was open and obvious.

> *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances. An "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a "special aspect" characterized by its *unreasonable risk of harm*. [*Id*. at 472-473 (citations omitted).]

Plaintiff analogizes his case to the hypothetical "special aspect" situation given in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001), wherein the Supreme Court stated:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.

Wheelchair users entering and exiting the bar are forced to encounter the step. This fact necessarily narrows our focus, leaving only one pertinent question: was the hazard effectively avoidable because plaintiff could have chosen not to patronize the bar in the first place? Our Supreme Court in *Hoffner*, 492 Mich 450, held that ice on a sidewalk in front of the only entrance to a fitness center was an avoidable danger even though the plaintiff had a paid membership to use the center. The Court concluded that "[a] general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a 'special aspect . . . .' " *Id*. at 472-473. The *Hoffner* Court

noted that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id*. at 469. In *Hoffner*, the Supreme Court expressly abrogated this Court's decision in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 594; 708 NW2d 749 (2005), in which the panel had held:

> Finally, and more significantly, plaintiff was a *paying customer* who was on defendant's premises for defendant's commercial purposes, and thus he was an *invitee* of defendant. As our Supreme Court noted, invitee status necessarily turns on the existence of an invitation. Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those customers for hazardous conditions as long as the customers even technically had the option of declining the invitation. [Quotation marks and citations omitted.]

The Court in *Hoffner* ruled that "we reject the *Robertson* majority's analysis of the 'effectively unavoidable' doctrine." *Hoffner*, 492 Mich at 468 n 31. *Robertson* would have supported plaintiff's position in the instant action, but that holding is no longer viable given *Hoffner*.

We conclude that *Hoffner* dictates that we conclude that the entranceway step was avoidable because plaintiff was not compelled to patronize the bar and confront the step. And with respect to *Lugo*, we note that there was no indication in the Court's hypothetical that the water in the building had been confronted by customers when they first entered the building.[4]

[4] To view or construe the hypothetical in *Lugo* to the contrary would necessarily create tension between *Lugo* and *Hoffner*.

Therefore, *Lugo* does not support plaintiff's argument. In sum, we affirm the trial court's determination that as a matter of law, no special aspects existed.

D. STATUTORY VIOLATION

In a third and final attempt to avoid application of the open and obvious danger doctrine, plaintiff argues that the statutory duty to provide access for physically limited persons requires constructing at least one barrier-free entrance/exit and that this statutory duty takes precedence over common-law defenses such as the open and obvious danger doctrine. Plaintiff initially cites MCL 125.1352(1), which provides:

> A public facility or facility used by the public the contract for construction of which or the first contract for construction of a portion of which is made after July 2, 1974, shall meet the barrier free design requirements contained in the state construction code.[5]

Thus, with respect to the particular design requirements that a facility must meet to qualify as barrier-free, MCL 125.1352(1) incorporates by reference those requirements contained in the "state construction code." And that code—the SCCA—provides, in part, as follows:

> The code shall consist of the international residential code, the international building code, the international mechanical code, the international plumbing code, the international existing building code, and the international energy conservation code published by the international code council and the national electrical code published by the national fire prevention association, with amend-

[5] MCL 125.1351(b) defines "barrier free design" as "those architectural designs which eliminate the type of barriers and hindrances that deter physically limited persons from having access to and free mobility in and around a building, structure, or improved area."

> ments, additions, or deletions as the director determines appropriate. The director may adopt all or any part of these codes or the standards contained within these codes by reference. [MCL 125.1504(2).]

Thus, according to plaintiff, the BOCA code is ultimately incorporated into the statutory scheme. In the trial court, plaintiff submitted part of the 1975 BOCA code covering portions of Section 316.0, which concerned those with physical disabilities and the aged. Section 316.3 addressed building entrances, providing as follows:

> At least one (1) primary entrance at each grade floor level of a building or structure shall be accessible from the parking lot or the nearest street by means of a walk uninterrupted by steps or abrupt changes in grade and shall have width of not less than five (5) feet and a gradient of not more than one (1) foot in twenty (20) feet or a ramp meeting the requirements of Section 615.0. This entrance shall comply with requirements of Section 612.0.

"The open and obvious danger doctrine cannot be used to avoid a specific statutory duty." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 720-721; 737 NW2d 179 (2007); see also *Woodbury v Bruckner*, 467 Mich 922 (2002) (remanding the case because the open and obvious danger doctrine could not be employed to avoid the application of a duty established by statute), and *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (rejecting the defendant municipality's argument that the open and obvious danger doctrine could be employed to avoid its statutory duty to maintain sidewalks in reasonable repair[6]). To the extent that the trial court was of the

[6] We note that the Legislature has since inserted language into the statute addressing a municipality's duty to keep sidewalks in reasonable repair, providing that a municipal corporation may now assert

view that the statutory-duty exception to the open and obvious danger doctrine is only implicated in regard to a lessor's statutory obligations under MCL 554.139, we conclude that the court was mistaken. It is true that a lessor or landlord cannot rely on the open and obvious danger doctrine if a duty was violated under MCL 554.139. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 n 2; 751 NW2d 8 (2008) ("[A] defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) or (b)."). There is no indication in the caselaw, however, that the statutory-duty exception to the open and obvious danger doctrine is limited to duties created under MCL 554.139. Indeed, as noted earlier, the statutory-duty exception was recognized in *Jones*, 467 Mich at 270, in relation to a governmental agency's duty to maintain sidewalks in reasonable repair.

In support of its position that the open and obvious danger doctrine applied regardless of plaintiff's argument that a statutory duty existed to provide a barrier-free entranceway, the trial court relied on *Schollenberger v Sears, Roebuck & Co*, 925 F Supp 1239 (ED Mich, 1996), and *Kennedy*, 274 Mich App 710. The trial court's reliance on these cases was misplaced.

As a federal district court decision, *Schollenberger* has no binding precedential value to this Court. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts."). Furthermore, *Schollenberger* predated the

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common-law defenses, "including, but not limited to, a defense that [a] condition was open and obvious." MCL 691.1402a(5), as amended by 2016 PA 419, effective January 4, 2017.

development in Michigan law of the principle that the open and obvious danger doctrine cannot be employed to avoid a statutory duty or obligation. *Jones*, 467 Mich at 270; *Woodbury*, 467 Mich at 922; *Kennedy*, 274 Mich App at 720-721. It appears from our research that this principle was first clearly expressed in Michigan jurisprudence in 2002 in our Supreme Court's *Jones* decision. In fact, the federal court in *Schollenberger* did not even examine the specific issue of whether a statutory violation obviates application of the open and obvious danger doctrine. Accordingly, we do not find *Schollenberger* relevant.

In *Kennedy*, 274 Mich App at 712, the plaintiff was injured when he slipped on crushed grapes or grape residue on the floor of the defendants' grocery store. After rejecting the plaintiff's various arguments that the hazard was not open and obvious, this Court turned its attention to his assertion "that the open and obvious danger doctrine cannot bar recovery because defendants breached a separate and independent duty created by the International Property Maintenance Code." *Id*. at 719. The *Kennedy* panel first noted:

> Neither the record nor the briefs contain any indication that the International Property Maintenance Code had been adopted by the municipality where plaintiff's accident occurred. Likewise, we find no support for plaintiff's assertion that a violation of the International Property Maintenance Code is equivalent to a violation of state statute. Nonetheless, we will address plaintiff's code-based arguments for purposes of this appeal. [*Id*. at 719 n 1.]

The Court explained that "even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous." *Id*. at 720. The Court concluded as a matter of law that the grapes on

the supermarket floor did not create an unreasonably high risk of harm. *Id*. Reading somewhat between the lines, the *Kennedy* panel determined that a code violation did not preclude application of the open and obvious danger doctrine. This Court, however, then addressed the plaintiff's additional argument that even if the grapes were open and obvious, the defendants violated a statutory duty to provide a safe workplace as required by the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq*., and administrative regulations promulgated under MIOSHA, rendering the open and obvious danger doctrine inapplicable. *Id*. at 720-721. The panel acknowledged that "[t]he open and obvious danger doctrine cannot be used to avoid a specific statutory duty." *Id*. The Court then ruled:

> MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees and therefore do not create duties that run in favor of third parties. Accordingly, MIOSHA does not impose a statutory duty in favor of third parties in the negligence context. Nor do administrative regulations enacted under MIOSHA impose duties in favor of third parties in the negligence context. Neither MIOSHA nor the administrative regulations enacted under it imposed a duty on defendants running in favor of plaintiff. Plaintiff may not rely on MIOSHA and the MIOSHA regulations to escape application of the open and obvious danger doctrine in this premises liability case. [*Id*. at 721 (citations omitted).]

Contrary to the circumstances presented in *Kennedy*, the instant case entails statutory requirements to provide accessible, barrier-free entranceways to facilities open to the public. These requirements are plainly and directly intended to benefit and protect physically limited persons such as plaintiff. A barrier-

free design that eliminates hindrances that deter physically limited persons from having access and free mobility to buildings is generally required under MCL 125.1352(1) and MCL 125.1351(b).[7] Accordingly, the trial court erred by determining that the open and obvious danger doctrine applied to plaintiff's allegations that defendants' entranceway step violated a statutory duty owed to persons with physical limitations.

With respect to whether there was a statutory violation, the trial court appeared to accept defendants' contention that the entranceway step did not constitute a violation, as reflected in the fact that despite numerous inspections over the years by state and federal authorities, no violations were documented. Defendants argue that plaintiff presented no evidence showing a statutory or code violation regarding the entranceway or step. Moreover, according to defen-

[7] With respect to the PDCRA, plaintiff merely cites the act for the proposition that it is the public policy of this state to encourage the fullest participation possible in all areas of life by persons who are physically handicapped. The PDCRA makes it unlawful for a person to "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids." MCL 37.1302(a). A person who alleges a violation of the PDCRA "may bring a civil action for . . . damages[.]" MCL 37.1606(1). And the PDCRA "shall not diminish the right of a person to seek direct and immediate legal or equitable remedies in the courts of this state." MCL 37.1607. Here, plaintiff's case is not about being denied equal enjoyment of the bar because of his disability; he enjoyed an evening of drinking and pool at the bar. Rather, his suit encompasses a request for money damages related to a physical injury caused by an allegedly hazardous step that was not in compliance with barrier-free statutory mandates under MCL 125.1351 *et seq*., the SCCA, and the statutorily incorporated BOCA code.

dants, construction plans had been reviewed by the Barrier Free Design Board and the premises had been inspected over the years, by Van Buren Township and Wayne County. Defendants were never issued any violations or citations associated with the entranceway and provided supporting documentation to that effect below.

Plaintiff, however, submitted an unsigned and undated "Field Correction Notice" (FCN) pertaining to the bar with the insignia of Van Buren Township at the top of the document; the FCN ostensibly indicated a need for a correction in regard to "B/F STEP FRONT DR."

A building inspector for Van Buren Township testified in her deposition that the bar fell under the barrier-free requirements of MCL 125.1351 and MCL 125.1352. In reference to the FCN, the inspector acknowledged that it came from the township's files, but she could not tell who authored the notice or when it was prepared. She additionally testified:

> *Q*. [W]hat does the first line [of the FCN] say?
>
> *A*. "BF step front door."
>
> *Q*. What does that mean to you?
>
> *A*. I'm going to say barrier-free step front door.
>
> *Q*. Does the [bar] have a barrier-free step at the front door?
>
> *A*. From the pictures you showed me, I'm going to say no.
>
> *Q*. And so it didn't comply with the [FCN]?
>
> *A*. Correct.
>
> *Q*. And it didn't comply with the code that we already talked about, correct?
>
> *A*. Correct.

The inspector could not say whether defendants ever received the FCN, and other evidence suggests that the FCN was not sent to defendants and that defendants never received it.

Although the inspector recalled having inspected the bar in the past, she did not remember the step. She indicated that had she noticed the step, she probably would have made a note of it. In testifying about a walk-through of the bar in 2014, which was focused mostly on alterations in the kitchen area, the inspector stated that no code violations were issued and that the permits were approved. This had also been the case earlier in 2014 in regard to a new deck for the bar and a corresponding inspection. But the inspector also testified, "[T]he barrier-free might have got missed . . . ." With respect to an inspection of the bar in 2003 relative to a liquor license, the township inspector testified that no mention was made of any code violation in connection with the entranceway. Aside from the FCN, the inspector's examination of the files pertaining to the bar did not reveal any citations or violations in regard to the entranceway step.

Defendants presented documentation showing that in 1977–1978, the Barrier Free Design Board had granted certain exceptions based on the submitted architectural plans for the facility unrelated to the main entranceway; the Board ultimately approved the plans. Defendants also submitted a 1978 letter from the Wayne County Sheriff's Department to the Liquor Control Commission. The letter provided, "We toured the facility at the above address, made the necessary observations, found the building to conform to all rules, regulations and qualifications necessary to complete the inspection and give approval." Additionally, defendants presented a plethora of documentation regard-

ing building inspections that had been conducted over the years for various reasons, none of which showed any statutory or code violations arising from the entranceway step. It is unnecessary for us to delve into the details of those documents.

We cannot accept the trial court's or defendants' logic that simply because the bar was never issued any violations or citations relative to the step, defendants must have been in compliance with the statutory barrier-free requirements. In response to defendants' summary disposition motion under MCR 2.116(C)(10), which was supported by appropriate documentation, plaintiff, of course, was obligated to submit evidence sufficient to create a genuine issue of material fact. MCR 2.116(G)(4). Even if we reject consideration of the FCN, as defendants adamantly argue we must because of its multiple inadequacies, we note that the testimony of the township's building inspector was sufficient to create a genuine issue of material fact regarding whether the entranceway step violates a statutory duty with respect to access for persons with physical limitations. She testified that as revealed in the photographs, the entranceway was not barrier-free in light of the presence of the step.

The next issue that we address, but ultimately do not resolve, concerns whether a remedy is available for the alleged statutory violation. Defendants argue that the statutory provisions relied on by plaintiff do not provide independent tort remedies for his alleged physical injuries arising from the fall; therefore, the action must be dismissed. In *Allison*, 481 Mich at 426 n 3, our Supreme Court stated:

> Although the nature and extent of plaintiff's remedy are not at issue in this case, we note that, typically, a plaintiff's remedy for breach of contract is limited to

> damages that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. The purpose of this remedy is to place the nonbreaching party in as good a position as if the contract had been fully performed. [Quotation marks and citations omitted.]

As mentioned earlier, *Allison* concerned a lessor's duties under MCL 554.139, which create implied covenants in leases, thereby explaining the Supreme Court's reference to remedies for breach of contract.

On this issue, defendants rely on *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358; 561 NW2d 500 (1997), and plaintiff relies on *Cebreco v Music Hall Ctr for the Performing Arts, Inc*, 219 Mich App 353; 555 NW2d 862 (1996). We find neither case particularly helpful. Contrary to plaintiff's suggestion, this Court in *Cebreco* did not address a claim for physical injury under the PDCRA. Rather, the issue of the plaintiff's alleged physical injury was examined solely in the context of a claim against police officers and the question of governmental immunity. *Cebreco*, 219 Mich App at 355-356, 361-362.

In *Spagnuolo*, the plaintiff, a wheelchair user, brought suit against a restaurant owner, alleging claims of negligence and violation of the Handicappers' Civil Rights Act (HCRA), 1976 PA 220, now known as the PDCRA. She sought damages for the physical injuries that she suffered while exiting the restaurant when her wheelchair slipped off a sidewalk and flipped over as she tried to maneuver around a trash barrel that was adjacent to the restaurant. *Spagnuolo*, 221 Mich App at 359-360. The plaintiff asserted that she was forced to take the route involving the sidewalk because the door designated for use by physically limited individuals on the other side of the restaurant was either locked or stuck, in violation of the HCRA.

Id. at 362-363. This Court, in affirming summary disposition of the plaintiff's lawsuit, held:

> In short, plaintiff was fully accommodated during her visit to defendant's restaurant. Because the HCRA requires no more, plaintiff could not state a valid claim based on the HCRA. Specifically, no language in the HCRA provides an independent tort remedy for persons injured at a place of public accommodation because they are handicapped. Accordingly, plaintiff's HCRA claim is so clearly unenforceable as a matter of law that no factual development could provide a basis for recovery, and the trial court properly granted summary disposition of plaintiff's HCRA claim for defendant pursuant to MCR 2.116(C)(8). [*Id*. at 363 (citations omitted).]

At most, *Spagnuolo* might support a determination that plaintiff does not have a cause of action under the PDCRA, which we have already alluded to in note 7 of this opinion; the PDCRA does not fit the contours of this case that entails a physical injury. The question becomes whether a violation of the barrier-free requirements of MCL 125.1352(1) allows or provides for a tort remedy to compensate a party for physical injuries sustained as a result of the violation. Because the trial court never reached the issue regarding whether a remedy is available assuming a statutory violation, we conclude it appropriate to remand this case to allow the parties to better develop their arguments and for the trial court to initially address that additional issue. On remand, we direct the trial court to consider any relevant statutory provisions and the Michigan Supreme Court's decisions in *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007), *Gardner v Wood*, 429 Mich 290; 414 NW2d 706 (1987), and *Pompey v Gen Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971), which address the issue of whether

a remedy or cause of action for money damages arises from a statutory violation.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No party having fully prevailed on the issues presented in this appeal, we award no taxable costs under MCR 7.219.

REDFORD, P.J., and K. F. KELLY, J., concurred with MARKEY, J.

REGISTERED NURSES, REGISTERED PHARMACISTS
UNION v HURLEY MEDICAL CENTER

Docket No. 343473. Submitted April 9, 2019, at Detroit. Decided April 18, 2019. Approved for publication June 4, 2019, at 9:00 a.m.

Registered Nurses, Registered Pharmacists Union; Billie Jo Busby; and LeaAnn Frank (collectively, plaintiffs) filed an action in the Genesee Circuit Court against Hurley Medical Center, seeking to compel arbitration of their claims. In May 2017, Busby and Frank, who were members of the union and employed by defendant, called in sick to work on the same day. In June 2017, defendant terminated Busby's and Frank's employment, asserting that they had abstained from work in support of a job action similar to a one-day strike in violation of Article 36 of the existing collective-bargaining agreement (the CBA) between the union and defendant. The union filed grievances challenging the discharges and requesting arbitration of the grievances under the terms of the CBA. Defendant denied the grievances and denied the arbitration request. Plaintiffs filed the instant action and moved for summary disposition; defendant opposed the motion, arguing that the trial court lacked subject-matter jurisdiction because a public employee could only challenge strike-related discipline under MCL 423.206 of the public employment relations act (PERA), MCL 423.201 *et seq*. The court, Judith A. Fullerton, J., granted plaintiffs' motion and ordered arbitration of the dispute. Defendant appealed.

The Court of Appeals *held*:

1. The trial court had subject-matter jurisdiction over the claims in this case because the existence of the arbitration contract and the enforceability of its terms involved issues of law for the court to decide.

2. Under MCL 423.206(1), a public employee will be considered to be on strike if the employee willfully absents himself or herself from his or her position for the purpose of inducing, influencing, or coercing a change in employment condition, compensation, or the rights, privileges, or obligations of employment. MCL 423.206(2), in turn, provides that before a public employer may discipline or discharge a public employee for engaging in a

strike, the public employee, upon request, is entitled to a determination under this section as to whether he or she violated the act. The Court's decision in *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104 (1977)—holding that the statutorily permitted discipline or discharge permitted by MCL 423.206 is the unitary and exclusive remedy available to public employers when dealing with illegal strikes by public employees who violate PERA's prohibition against strikes—applies only to the remedies available to public employers. *Lamphere* did not address the remedies available to employees or unions, and in relation to public employees, MCL 423.206 clearly provides only that an employee is entitled to a determination under the section; the statutory section does not limit the remedies available to employees or unions. In this case, because MCL 423.206 does not limit Busby's and Frank's remedies, the trial court correctly concluded that PERA did not prohibit arbitration of the matter. Defendant abandoned its argument that PERA was the exclusive remedy in this case because plaintiffs' claims involved an unfair-labor-practice charge; plaintiffs' complaint did not expressly allege an unfair labor practice, and defendant did not assert in the trial court or on appeal that plaintiffs had alleged an unfair labor practice.

3. The trial court did not err by granting summary disposition in favor of plaintiffs because whether Busby and Frank were striking or were sick was a matter of fact that had to be resolved by an arbitrator under the terms of the CBA.

Affirmed.

LABOR RELATIONS — PUBLIC EMPLOYMENT RELATIONS ACT — PUBLIC EMPLOYEES — REMEDIES NOT LIMITED BY MCL 423.206.

The statutorily permitted discipline or discharge under MCL 423.206 are the unitary and exclusive remedies available to public employers when dealing with illegal strikes by public employees in violation of the public employment relations act's prohibition against strikes, but that statute does not limit the remedies available to employees or unions (MCL 423.201 *et seq*.).

Miller Cohen, PLC (by *Richard G. Mack, Jr.*, and *Jeremy F. Fisher*) for plaintiffs.

Giarmarco, Mullins & Horton, PC (by *John C. Clark*, *Geoffrey S. Wagner*, and *Anthony K. Chubb*) for defendant.

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

PER CURIAM. Defendant appeals as of right an order granting summary disposition in favor of plaintiffs in this action to compel arbitration. We affirm.

I. RELEVANT FACTUAL BACKGROUND

Billie Jo Busby and LeaAnn Frank are members of the Registered Nurses, Registered Pharmacists Union (RNRPh) and were employed by defendant. On May 11, 2017, they were both absent from work. In June 2017, defendant terminated Busby and Frank for allegedly striking on May 11, 2017, in violation of Article 36 of the collective-bargaining agreement (the CBA) between RNRPh and defendant. Thereafter, RNRPh filed grievances challenging the discharges and requesting arbitration of the grievances pursuant to the CBA. Defendant denied the grievances as well as the request for arbitration. Plaintiffs filed this action, seeking to compel arbitration of the grievances and alleging breach of the CBA. The trial court granted summary disposition in favor of plaintiffs, ordering arbitration of the dispute. This appeal followed.

II. SUBJECT-MATTER JURISDICTION

Defendant first argues that the trial court lacked subject-matter jurisdiction because a public employee's exclusive mechanism to challenge strike-related discipline is to request a hearing under § 6 of the public employment relations act (PERA), MCL 423.201 *et seq*. We disagree.

The issue of subject-matter jurisdiction may be raised at any point in the proceedings. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*,

264 Mich App 523, 527-528; 695 NW2d 508 (2004). Whether the trial court had subject-matter jurisdiction is a question of law that we review de novo. *Id*. at 527.

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Id*. at 528 (quotation marks and citation omitted). "Jurisdiction always depends on the allegations and never upon the facts." *Workers' Compensation Agency Dir v MacDonald's Indus Prods, Inc (On Reconsideration)*, 305 Mich App 460, 478; 853 NW2d 467 (2014) (quotation marks and citation omitted).

In this case, plaintiffs' complaint sought to compel arbitration and alleged breach of the CBA. The arbitrability of an issue is a question for the court to decide. As stated by this Court in *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995):

> The existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator. To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. [Citation omitted.]

This was precisely the issue addressed by the trial court in this case.[1] Similarly, the issue of whether a party breached a CBA involves the interpretation of a contract, which is a question of law that is decided by a court. See *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010). Accordingly, given the allegations

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[1] In its response to plaintiffs' motion, defendant even acknowledged that whether an issue is subject to arbitration is an issue of law for the court.

in plaintiffs' complaint, the circuit court had subject-matter jurisdiction over this case.

Given that the trial court had the right to exercise judicial power over this case, defendant's claim that PERA prohibits arbitration in this case is not a question of subject-matter jurisdiction. Rather, it is a question of statutory interpretation, which is also a question of law that could be decided by a trial court and that we review de novo. *McNeil v Charlevoix Co*, 275 Mich App 686, 691; 741 NW2d 27 (2007). "When interpreting a statute, this Court's goal is to ascertain and give effect to the intent of the Legislature by applying the plain language of the statute." *Id*.[2]

Section 6 of PERA provides:

> (1) Notwithstanding the provisions of any other law, a public employee who, by concerted action with others and without the lawful approval of his or her superior, willfully absents himself or herself from his or her position, or abstains in whole or in part from the full, faithful and proper performance of his or her duties for the purpose of inducing, influencing or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment, or a public employee employed by a public school employer who engages in an action described in this subsection for the purpose of protesting or responding to an act alleged or determined to be an unfair labor practice committed by the public school employer, shall be considered to be on strike.

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[2] In its response to plaintiffs' motion for summary disposition, defendant asserted that this case is not subject to arbitration because "it involves a legal dispute within the exclusive jurisdiction of PERA[.]" Therefore, defendant's argument was raised in the trial court; however, it was not expressly decided by the trial court. Nonetheless, defendant's claim that PERA prohibits arbitration in this case is a question of law, and because the relevant facts are available, we may review this issue. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

> (2) *Before a public employer may discipline or discharge a public employee for engaging in a strike, the public employee, upon request, is entitled to a determination under this section as to whether he or she violated this act*. The request shall be filed in writing, with the officer or body having power to remove or discipline the employee, within 10 days after regular compensation of the employee has ceased or other discipline has been imposed. If a request is filed, the officer or body, within 5 days after receipt of the request, shall commence a proceeding for the determination of whether the public employee has violated this act. The proceedings shall be held in accordance with the law and regulations appropriate to a proceeding to remove the public employee and shall be held without unnecessary delay. The decision of the officer or body shall be made within 2 days after the conclusion of the proceeding. If the employee involved is found to have violated this act and his or her employment is terminated or other discipline is imposed, the employee has the right of review to the circuit court having jurisdiction of the parties, within 30 days from the date of the decision, for a determination as to whether the decision is supported by competent, material, and substantial evidence on the whole record. A public employer may consolidate employee hearings under this subsection unless the employee demonstrates manifest injustice from the consolidation. This subsection does not apply to a penalty imposed under section 2a. [MCL 423.206 (emphasis added).]

In support of its argument, defendant relies on the Michigan Supreme Court's decision in *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 114; 252 NW2d 818 (1977), in which the Court held that under § 6, "the statutorily permitted discipline-discharge should be the unitary and exclusive remedies available to public employers in dealing with illegal strikes by public employees in violation of the PERA's Section 2 strike prohibition." For that reason, the Court concluded that the plaintiff school district

was barred from suing the defendant teachers' union for damages under traditional common-law tort theories. *Id*. at 107.

Contrary to defendant's claim that *Lamphere* stands for the proposition that "a public employee's 'exclusive' mechanism to challenge strike-related discipline is to request a § 6 hearing under PERA," *Lamphere* addressed and expressly referred to the exclusive remedy available to *public employers*. *Lamphere*, 400 Mich at 114. The Court did not discuss the remedies available to employees or unions, and, therefore, that decision does not bar plaintiffs' request for arbitration in this case. Similarly, the plain language of § 6 provides only that an employee is entitled to a determination under that section; it does not limit the remedies available to employees or unions. See MCL 423.206(2).

Defendant also relies on *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 628; 227 NW2d 736 (1975), but that case similarly stated that § 6 provides "a specific, unitary procedure for the discipline of public employees . . . ." It did not discuss the remedies available to public employees . . . . Accordingly, defendant fails to support its claim that PERA prohibits arbitration of this matter.

Finally, defendant cites *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 325; 605 NW2d 363 (1999), in which this Court stated that "PERA is the exclusive remedy for any unfair labor practice charge, and the [Michigan Employment Relations Commission] has exclusive jurisdiction to adjudicate such charges. A plaintiff cannot obtain another remedy by framing the unfair labor practice as a different species of common-law or statutory claim

invoking the jurisdiction of a different tribunal."[3] Plaintiffs' complaint, however, did not expressly allege an unfair labor practice. Nor has defendant asserted, either below or on appeal, that plaintiffs have alleged an unfair labor practice. Because defendant has failed to provide any support for its suggestion that this case involves an unfair-labor-practice charge, this argument is abandoned. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

III. SUMMARY DISPOSITION

Defendant also argues that the trial court erred by granting plaintiffs' motion for summary disposition because plaintiffs failed to state an arbitrable claim under the CBA and failed to proffer any admissible evidence in support of their motion. Again, we disagree.

The trial court granted plaintiffs' motion for summary disposition under MCR 2.116(C)(7), (8), and (10), ruling that the matter was required to go to arbitration. Summary disposition under MCR 2.116(C)(7) is appropriate when the parties have "entered a valid and enforceable arbitration agreement." *Galea v FCA US LLC*, 323 Mich App 360, 365; 917 NW2d 694 (2018). Therefore, MCR 2.116(C)(7) was the correct ground for granting summary disposition in this case. "We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7)." *Id*. at 368. "Whether a dispute is arbitrable represents a question of law for the courts that

[3] Although the Supreme Court criticized this Court's decision in *Kent Co Deputy Sheriffs' Ass'n*, it agreed that the commission has exclusive jurisdiction over claims of unfair labor practices, and it ultimately affirmed on other grounds. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 463 Mich 353; 616 NW2d 677 (2000).

we review de novo." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001).

In *Madison Dist Pub Sch*, 247 Mich App at 595, this Court stated:

> To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. Any doubts regarding the arbitrability of an issue should be resolved in favor of arbitration. [Citation omitted.]

See also *AFSCME, Council 25, AFL-CIO v Hamtramck Housing Comm*, 290 Mich App 672, 674; 804 NW2d 120 (2010) ("Where an employer and a union have contractually agreed to arbitration, in the absence of explicit contractual direction to the contrary, all doubts regarding the proper forum should be resolved in favor of arbitration[.]").

In this case, the relevant provision of the CBA is Article 36(C), titled "No Strike, No Lockout," which provides, in relevant part:

> The Employer shall have the right to discipline or discharge any Employee participating in such interferences, and the Organization agrees not to oppose such action. *It is understood, however, that the Organization shall have recourse to the grievance procedure as to matters of fact in the alleged actions of such Employees*. [Emphasis added.]

Defendant argues that there is no disputed matter of fact for the arbitrator to resolve, while plaintiffs argue that there is a question of fact regarding whether Busby and Frank called off work on May 11, 2017, for an illness or to engage in a strike. Contrary to defendant's assertion, however, Article 36(C) does not re-

quire a *disputed* matter of fact; rather, it provides that the grievance procedure is available regarding "matters of fact." Whether Busby and Frank were striking or were sick, as alleged in plaintiffs' complaint, is a matter of fact that must be resolved by the arbitrator under Article 36(C) of the CBA. Although defendant may present to the arbitrator undisputed evidence that plaintiffs were engaged in a strike, the question of fact is for the arbitrator to decide. Moreover, any doubt regarding whether this question is arbitrable must be resolved in favor of arbitration. See *AFSCME*, 290 Mich App at 674; *Madison Dist Pub Sch*, 247 Mich App at 595. Accordingly, the trial court did not err by granting summary disposition in favor of plaintiffs on the basis that the CBA required arbitration of the issue.

Affirmed.

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

PEOPLE v ALI

Docket No. 341121. Submitted March 13, 2019, at Detroit. Decided June 4, 2019, at 9:05 a.m.

Shelton Ali was charged in the Wayne Circuit Court with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*ii*), following allegations that defendant had sexually assaulted his minor daughter. However, before defendant was charged with these offenses, proceedings to terminate defendant's parental rights to the child had taken place in the juvenile court; the court found that the Department of Health and Human Services had failed to establish by clear and convincing evidence that the child had been sexually assaulted and therefore entered an order denying the request to terminate defendant's parental rights and terminating its jurisdiction over the case. Three months after the final order was entered in the child protective proceeding, the prosecution charged defendant with the CSC counts. The child was the only witness at the preliminary examination, and the district court bound defendant over as charged. In the circuit court, defendant moved to dismiss all criminal charges on the basis of collateral estoppel, arguing that the circuit court's findings in the previous child protective proceedings precluded the state from criminally prosecuting him. The circuit court, Thomas M. J. Hathaway, J., entered an order dismissing the criminal charges, holding that collateral estoppel applied because the same issue was litigated between the same parties in the child protective proceeding. The prosecution appealed.

The Court of Appeals *held*:

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. Although in most cases parties seek to apply collateral estoppel in the context of two civil proceedings, the Michigan Supreme Court has recognized the application of collateral estoppel in the civil-to-criminal context, which is

sometimes referred to as "cross-over" collateral estoppel. However, in *People v Gates*, 434 Mich 146 (1990), the Supreme Court strongly discouraged the use of collateral estoppel between child protective proceedings and criminal proceedings in light of significant public-policy concerns. The purpose and focus of a child protective proceeding in the juvenile division of the probate court is the protection of children, whereas the focus of criminal proceedings is on the guilt or innocence of the accused; because of these divergent interests, cross-over collateral estoppel should not apply between child protective proceedings and criminal proceedings. Permitting the use of cross-over collateral estoppel in this context would invite the risk that the proper function of the two proceedings would be compromised. Therefore, under the rationale in *Gates*, it is improper for a court in a criminal case to give preclusive effect to findings made in a child protective proceeding. Courts in other jurisdictions, including Illinois, Vermont, Washington, and Kentucky, have also come to the same conclusion. Accordingly, because the circuit court should not have applied collateral estoppel to the trial court's findings in the child protective proceedings, the circuit court abused its discretion by granting defendant's motion to dismiss the criminal charges.

Reversed and remanded for further proceedings.

CRIMINAL LAW — PROBATE COURT — CHILD PROTECTIVE PROCEEDINGS — COLLATERAL ESTOPPEL.

A trial court's specific findings of fact in a child protective proceeding conducted under the juvenile code do not have cross-over collateral estoppel effect in a subsequent criminal proceeding against an individual who was a party to the child protective proceeding.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

Michael S. Cafferty & Associates, PC (by *Michael S. Cafferty*) and *Leslie E. Posner* for defendant.

Before: MURRAY, C.J., and GADOLA and TUKEL, JJ.

MURRAY, C.J. The dispositive issue in this appeal is whether a trial court's specific findings of fact in a child protective proceeding conducted under the juvenile code have "cross-over" collateral estoppel effect in a subsequent criminal proceeding against an individual who was a party to the child protective proceeding. Although the Supreme Court strongly discouraged the use of collateral estoppel between these types of proceedings, it did so in dicta, *People v Gates*, 434 Mich 146, 157, 161-162; 452 NW2d 627 (1990), and since then no Michigan court has made a definitive holding on the issue. We do so now and hold that factual findings made by a court in a child protective proceeding do not have collateral estoppel effect in a subsequent criminal proceeding. As a result, we reverse and remand for further proceedings.

I. BACKGROUND

Defendant's daughter came to the attention of the Department of Health and Human Services (DHHS) after a Child Protective Services (CPA) referral was made alleging that defendant had sexually assaulted her in a motel room. Proceedings to terminate defendant's parental rights to the child subsequently commenced in the juvenile court. At the termination hearing, defendant's attorney argued that the child "concoct[ed]" the allegations against defendant to avoid being sent to boot camp for prior misbehavior. Both the child and her mother testified at the termination hearing. Defendant did not testify, but a letter he had written was admitted as an exhibit.

The trial court found that a preponderance of the evidence supported its exercise of jurisdiction over the child because defendant had engaged in conduct that exceeded the normal bounds of discipline, but the court

found that petitioner failed to establish by clear and convincing evidence that the child was sexually assaulted. Therefore, the court denied the request to terminate defendant's parental rights. The court then entered a dispositional order finding that the child was not at risk of harm, releasing the child to the custody of her mother, and terminating its jurisdiction over the case.

Approximately three months after the final order was entered in the child protective proceeding, the prosecution charged defendant with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*ii*). The child was the only witness at the preliminary examination, and the district court bound defendant over as charged. In the circuit court,[1] defendant filed a motion to dismiss all criminal charges based on collateral estoppel, arguing that the circuit court's findings in the previous child protective proceedings precluded the state from criminally prosecuting him. The circuit court, properly focusing on *Gates*, nevertheless held that collateral estoppel applied because the same issue was litigated between the same parties in the child protective proceeding. It therefore entered an order dismissing the criminal charges.

II. COLLATERAL ESTOPPEL

This Court reviews "a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion." *People v Nicholson*, 297 Mich App

[1] For clarity's sake, we refer to the court that handled the child protective proceeding as the "trial court," and the court handling the criminal proceeding as the "circuit court," even though both are circuit courts.

191, 196; 822 NW2d 284 (2012). We review de novo the application of the doctrine of collateral estoppel. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). "Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529; 866 NW2d 817 (2014). Although in most cases parties seek to apply collateral estoppel in the context of two civil proceedings, our Supreme Court has recognized "the application of collateral estoppel in the civil-to-criminal context." *People v Zitka*, 325 Mich App 38, 44-45; 922 NW2d 696 (2018) (quotation marks and citation omitted). That recognition of what is sometimes referred to as "cross-over" collateral estoppel has not been much more than that; there has never been anything close to a ringing endorsement of the concept by any Michigan court. Instead, the Supreme Court has cautioned *against* its use. See *id*. and the cases cited therein.

Gates provides the most recent and relevant discussion of the issue by the Supreme Court and supports the proposition that collateral estoppel should not be applied *in this context* in light of significant public-policy concerns.[2] In *Gates*, 434 Mich at 150-151, the

[2] *This* question of public policy falls within the province of the courts because collateral estoppel is a common-law doctrine. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998),

defendant alleged that collateral estoppel barred a criminal prosecution for sexual misconduct involving his three-year-old child, because a child protective proceeding based on the same conduct resulted in a general jury verdict of "no jurisdiction." Thereafter, a circuit court dismissed criminal charges against the defendant on grounds that the jury verdict in probate court determined " 'that the prosecution had not proved a case of sexual abuse by a preponderance of the evidence.' " *Id*. at 154. The Supreme Court, however, held that collateral estoppel did not bar the subsequent criminal prosecution because the verdict of "no jurisdiction" did not " 'necessarily determine[]' " the guilt or innocence of the defendant, *id*. at 150-151, 158, as there were other possible reasons the jury could have returned its verdict of no jurisdiction, *id*. at 160.

Despite its ruling that collateral estoppel was *factually* inapplicable, the *Gates* Court went on to determine whether *as a policy matter* cross-over collateral estoppel should be applied between child protective proceedings and criminal cases. The Court warned against it, stating that "the purposes of a child protective proceeding and a criminal proceeding are so fundamentally different that application in this instance of collateral estoppel would be contrary to sound public policy." *Gates*, 434 Mich at 161. Specifically, the Court pointed out that "[t]he purpose and focus of a neglect or abuse proceeding in the juvenile division of the probate court is the protection of children," while "the focus of a criminal proceeding is on the guilt or innocence of the accused." *Id*. at 161-162. Because of these divergent interests, the Court concluded that cross-over collat-

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and *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2005). In other words, we are not supplanting legislative policy judgments with ours.

eral estoppel should not apply between child protective proceedings and criminal proceedings, as permitting its use "would invite the risk that the proper functions of the two proceedings would be compromised." *Id*. at 162.

The *Gates* Court was also concerned with how use of the doctrine would impact the bringing of criminal charges:

> To avoid the effect of collateral estoppel, if it were to be made applicable, a prosecutor would be required to develop criminal charges indicated by the petition and bring them to trial before a determination concerning jurisdiction could be reached in the probate proceeding. However, the burden of proving criminal charges beyond a reasonable doubt, added to problems presented by conflicting procedural and scheduling requirements of the two courts, would make it extremely difficult, and often impossible, for the criminal charges to be brought to trial in circuit court in advance of the jurisdiction determination in probate court.
>
> Thus, the petitioner or the prosecutor would face an unfortunate choice that is not in the public interest: whether to proceed on the petition in probate court because of concern for the child, or to delay the probate proceeding because of concern that a verdict of nonjurisdiction would preclude criminal prosecution of the accused. [*Id*. at 163.]

As a result, the Court was "persuaded by public policy considerations that such an election between criminal and child protective proceedings should not be judicially imposed through the application of collateral estoppel." *Id*. Although the Court had already concluded that as a matter of fact collateral estoppel was inapplicable to the case, the *Gates* Court labeled its discussion about the policy implications as a "*conclusion* that collateral estoppel should not apply . . . ." *Id*.

at 163-164 (emphasis added). Perhaps this phraseology was an attempt to negate any concern that the policy discussion was merely dictum, but given its previous conclusions regarding the inapplicability of the doctrine under the facts, any additional reasoning to reject its application seems to have been unnecessary. See *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014) ("Dictum is a judicial comment that is not necessary to the decision in the case.").

But even if it is dictum, and we think it is, it is *persuasive* dictum given that (1) it is from the Supreme Court, and (2) it is thorough, definitive, and convincing. See *Mount Pleasant Pub Sch v Mich AFSCME Council 25*, 302 Mich App 600, 610 n 2; 840 NW2d 750 (2013). The concerns outlined in *Gates* are just as significant and applicable today, and those concerns counsel against giving factual findings made by a court in a child protective proceeding "cross-over" collateral estoppel effect in a criminal proceeding. Hence, under the rationale in *Gates*, it is improper for a court in a criminal case to give preclusive effect to findings made in a child protective proceeding.

Courts from other jurisdictions have come to the same conclusion, and most of them rely at least in part on *Gates*.[3] For example, in *People v Moreno*, 319 Ill App 3d 445, 452-453; 744 NE2d 906 (2001), the Illinois Court of Appeals held, for many of the same sound policy reasons articulated in *Gates*, that the trial court in a criminal proceeding was precluded from giving

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[3] *Gates*, 434 Mich at 163, looked to at least one sister-state jurisdiction in its public-policy discussion. Given the dearth of Michigan law on the issue, we think it prudent to consider how other states address the issue in a similar context. *Outdoor Sys Advertising, Inc v Korth*, 238 Mich App 664, 669-670; 607 NW2d 729 (1999).

collateral estoppel effect to the facts found by the court in an abuse and neglect proceeding:

> In the present case, important public policy reasons exist to prevent the application of collateral estoppel and its application would be inappropriate. In the juvenile proceeding, the ultimate litigated issue was whether the minor children of defendant were abused due to defendant's involvement with the injuries of G.M.; in the subsequent criminal proceeding, the ultimate litigated issue will be whether the defendant is criminally culpable for the injuries to G.M. In the juvenile proceeding, the State's purpose is protection of defendant's minor children; in the criminal proceeding, the State's purpose is discovering if defendant injured G.M. and punishing her if found guilty. The differences of purpose and goal in the civil and criminal procedures are "very real." A criminal trial is the exclusive forum for determining guilt or innocence, and of the public's right to have criminal culpability assessed at a trial. [Citations omitted.]

These same policy concerns were echoed by the Vermont Supreme Court in *State v Nutbrown-Covey*, 204 Vt 363, 370-371; 2017 VT 26; 169 A3d 216 (2017), where the court emphasized the significantly different purposes of the two proceedings:

> [T]he kinds of proceedings at issue here—a CHINS [Child In Need of Care or Supervision] proceeding in the family division and a criminal case—require the courts to consider and apply different rules of law. See Restatement (Second) of Judgments § 27 cmt. c (explaining that determining whether issue was necessary to first judgment requires court to consider whether any new evidence involves application of different rule of law). A criminal case is concerned with a defendant's conduct in some specified instance and therefore requires the State to prove particular elements of a crime at the time and place alleged, while a CHINS case is concerned with the well-being of the child in question and therefore considers the course of the parent-child relationship. Put differently, a

> criminal case seeks to identify any misconduct on the part of a defendant; a CHINS case seeks to identify how to best protect the child, regardless of whether or not the child's parent has engaged in misconduct. [Citation omitted.]

The resources typically utilized by the state in these different proceedings have also been recognized as a reason not to apply collateral estoppel between them. Because of the disparate issues, the level of proof, the more adversarial nature of criminal proceedings, timing issues, and other like concerns, in many states more resources are devoted to criminal prosecution than to child protective proceedings. Thus, as the Washington Court of Appeals concluded in *State v Cleveland*, 58 Wash App 634, 643-644; 794 P2d 546 (1990), it makes little sense to bind the prosecution to factual findings made in a civil proceeding where, more likely than not, fewer resources and less time were devoted to the proofs:

> As noted above, we find overall considerations of public policy are determinative of the question before us. Dependency proceedings are often attended with a sense of urgency, are held as promptly as reasonably possible, and the entire focus of the proceeding is the welfare of the child. The focus being more narrow than in a typical felony trial, the State normally does not need, nor does it perform, the extensive preparation typically required for felony trials.
>
> Furthermore, the prosecutor uses many more resources in developing a felony prosecution than those available and used in the typical dependency hearing. Dependency is decided by a judge, while felony trials are usually tried to a jury. In addition, if the State was faced with application of the doctrine of collateral estoppel to findings in dependency proceedings, there could well be a reluctance to conduct dependency proceedings in cases where one or more of the same issues would arise in subsequent criminal prosecutions. While the welfare of minor children is

> undeniably important, we are influenced by the desirability of not impeding enforcement of the criminal law when no overriding consideration requires it.

See also *Gregory v Kentucky*, 610 SW2d 598, 600 (Ky, 1980), and *Criner v State*, 138 So 3d 557, 559 (Fla App, 2014) ("We are persuaded by public policy considerations that such an election between criminal and child-protective proceedings should not be judicially imposed through the application of collateral estoppel.").

In concluding that collateral estoppel should not be applied in these circumstances, we are not ignoring the undeniable truth that fundamental constitutional rights are at stake in both proceedings. See *Crosby-Garbotz v Fell*, 246 Ariz 54, 58-59; 434 P3d 143 (2019). Although varying individual constitutional interests are at stake in both proceedings, it nevertheless remains true that these proceedings are fundamentally different: one is civil, the other criminal; they both serve different purposes and implicate different state interests (enforcement of the criminal laws and the safety and security of the child); each involves different burdens of proof[4] and different procedural requirements;[5] and criminal proceedings tend to be more adversarial in nature. And, as we have pointed out, it is

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[4] Compare MCR 3.977(E)(3), stating that clear and convincing evidence is required to terminate parental rights, with *People v Wright*, 477 Mich 1121, 1122 (2007), recognizing the constitutionally required beyond-a-reasonable-doubt standard.

[5] Child protective proceedings involving the termination of parental rights are not decided by juries, MCR 3.977(A)(3), whereas criminal cases typically are, see *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002) (noting the state and federal constitutional rights to a jury trial in criminal proceedings). Juries are permitted in the adjudicative phase of child protective proceedings, but there, the burden of proof is a preponderance of the evidence. See *In re AMAC*, 269 Mich App 533, 536;

these same differences and concerns that drove the *Gates* Court to express its disagreement with applying cross-over collateral estoppel between child protective proceedings and criminal proceedings. Additionally, *Gates* recognized that if cross-over collateral estoppel applied in these circumstances, it would encourage the prosecution to race to complete the criminal proceedings to avoid being bound by the findings in a child protective proceeding. *Gates*, 434 Mich at 163.

We also recognize that some courts, like the Arizona Supreme Court in *Crosby-Garbotz*, have taken a more flexible approach to deciding whether cross-over collateral estoppel applies in these circumstances. But like the other state courts we have referenced,[6] we believe these policy concerns are overarching, are not fact dependent, and apply with equal force in these "cross-over" circumstances between child protective proceedings and criminal proceedings.

Because collateral estoppel should not have been applied by the circuit court to the findings made by the trial court in the child protective proceedings, the circuit court abused its discretion by granting defendant's motion to dismiss the criminal charges.

The circuit court's order is reversed, and this matter is remanded for further proceedings. We do not retain jurisdiction.

GADOLA and TUKEL, JJ., concurred with MURRAY, C.J.

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711 NW2d 426 (2006). Also, unlike criminal trials, in most child protective proceedings the rules of evidence do not apply. MCR 3.901(A)(3).

[6] And the persuasive dissent in *Crosby-Garbotz*, which cited *Gates*. See *Crosby-Garbotz*, 246 Ariz at 62 (Timmer, J., dissenting).

BERDY v BUFFA

Docket No. 349171. Submitted June 5, 2019, at Detroit. Decided June 6, 2019, at 9:00 a.m. Reversed and Macomb Circuit Court order granting mandamus reinstated 504 Mich 876 (2019).

Connor Berdy brought an action for mandamus in the Macomb Circuit Court, alleging that Warren City Clerk Sonya Buffa and the Warren City Election Commission had a clear legal duty to strike from the city's 2019 primary-election ballot the names of four individuals running for Warren City Council. The Warren City Charter provided that a person was not eligible to hold the position of city council, city clerk, or city treasurer for more than the greater of three complete terms or 12 years in that particular office. The council was composed of seven members, two elected at-large and five elected to represent one each of the five districts within the city. In 2014, the city's attorney concluded that separate term limits applied to those councilmembers elected to at-large positions versus those elected to represent a single district and that the charter therefore permitted persons to exhaust their term limits in one type of city council office and then run for the other type of office. In 2015, in a separate case, the Macomb Circuit Court affirmed the city attorney's interpretation regarding the application of term limits to councilmembers; in an unpublished order, the Court of Appeals denied leave to appeal for lack of merit in the grounds presented (Docket No. 327779). In this case, plaintiff asserted that four candidates were ineligible to run for city council in the 2019 primary election because they had each already served at least three terms or a total of 12 years on the council as either at-large or single-district members. The court, James M. Maceroni, J., granted plaintiff mandamus relief, concluding that the term limits were not intended to be cumulative with regard to the different councilmember positions, that plaintiff was entitled under the charter to have the four candidates excluded from the primary ballot, that the election commission had a clear statutory duty to strike the four candidates' names from the ballot, that the action was a ministerial act, and that plaintiff had no other viable remedy at law. Defendants appealed.

The Court of Appeals *held*:

A writ of mandamus is an extraordinary remedy that may be granted only when the plaintiff shows that (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. A clear legal right is one clearly founded in, or granted by, law; it is a right that is inferable as a matter of law from uncontroverted facts regardless of the legal question to be decided. In this case, the city attorney's interpretation of the charter's term-limit provision was not clearly wrong, and plaintiff failed to establish that he had a clear legal right to have the four incumbent candidates' names removed from the primary ballot. Given that the charter did not grant the election commission or the city clerk the power to decide whether candidates are eligible or to strike them for being ineligible, plaintiff also failed to establish that either defendant had a clear legal duty to strike the names from the ballot as requested. Plaintiff also failed to establish that the requested action was purely ministerial; instead, choosing between competing interpretations of city-charter language regarding term limits required analysis and discretionary decision-making. Therefore, the trial court abused its discretion by granting plaintiff's complaint for mandamus.

Reversed.

TUKEL, J., dissenting, disagreed with the majority's interpretation of the term-limit language in the charter and its conclusion that plaintiff did not have a legal right to have the four candidates' names removed from the primary ballot. The ruling in the earlier, unrelated circuit court case and the city attorney's interpretation of the term-limit language were not binding precedent. Applying the rules of grammar to the charter's term-limit language, the charter clearly provided for a single class of city councilmembers subject to the specific term limits that applied to those members; there were not two different classes of city councilmembers to whom the maximum-term provisions applied separately. Plaintiff had a clear legal right to have the four candidates' names removed from the primary ballot because it was undisputed that each candidate had served or would have served by the time of the election three complete terms or 12 years as councilmembers. Under *Barrow v Detroit Election Comm*, 301 Mich App 404 (2013), and the language of the charter, defendants had a clear legal duty to remove the names from the ballot; the act was ministerial because defendants had no discretion once it became clear that the

candidates were term-limited and ineligible to be on the primary ballot. Judge TUKEL would have affirmed the trial court's order of mandamus.

Jim Kelly Law, PC (by *James J. Kelly*) for Connor Berdy.

Kirk, Huth, Lange & Badalamenti, PLC (by *Robert S. Huth, Jr.*, and *Raechel M. Badalamenti*) for Warren City Clerk Sonya Buffa and the Warren City Election Commission.

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

GLEICHER, J. Defendants-appellants, Warren City Clerk Sonya Buffa and the Warren City Election Commission, appeal as of right the circuit court's opinion and order granting plaintiff Conner Berdy's complaint for mandamus and ordering defendants to strike the names of four candidates for Warren City Council from the list of candidates for the upcoming primary election. We reverse.

I

Plaintiff, a candidate for Warren City Council, sued defendants seeking to bar four other candidates from appearing on the primary ballot for city council, arguing that those candidates[1] were term-limited under §§ 4.3(d) and 4.4(d) of the Warren City Charter. Plaintiff's argument relied upon an interpretation of §§ 4.3(d) and 4.4(d) that was inconsistent with a 2014 opinion of the Warren city attorney. In 2014, the city attorney concluded that separate term limits applied to city council members elected at-large versus those

[1] Those candidates were incumbent city council members Cecil St. Pierre, Scott Stevens, Steve Warner, and Robert Boccomino.

elected to represent a single district. The city attorney concluded that by approving those charter amendments, the voters created a "bicameral" legislature of two separate and distinct legislative groups: district city council members and at-large city council members. The city attorney noted that the two groups had different election rules and responsibilities, such as different residency requirements and separate campaigning and fundraising rules, and that only an at-large city council member may serve as mayor pro tem. The city attorney noted that with regard to term limits, the language of § 4.4(d) referred to three terms or 12 years " '*in that particular office*.' " Because "At-Large City Council members and District City Council members hold separate and distinct offices," he concluded that the charter permitted persons to exhaust their term limits in one type of city council office, then run for the other type of office.

The city attorney's opinion regarding the application of the term limits was upheld by a 2015 circuit court decision, *Olejniczak v City of Warren Elections Comm*, unpublished order of the Macomb Circuit Court, entered May 11, 2015 (Docket No. 2015-001304-AW). In *Olejniczak*, the circuit court upheld the city attorney's interpretation of §§ 4.3 and 4.4 of the charter as "an arguably sound position" and expressed "severe reservations whether defendants can reject the City of Warren Attorney's opinion, let alone [had] a clear legal duty to do so." The plaintiff in *Olejniczak* sought leave to appeal the circuit court's decision, and this Court denied leave to appeal for lack of merit in the grounds presented. *Olejniczak v Warren Elections Comm*, unpublished order of the Court of Appeals, entered June 11, 2015 (Docket No. 327779).

As previously noted, plaintiff argued in this case that the four candidates at issue were ineligible because they

had each served at least three terms or a total of 12 years on the Warren City Council and so were barred from running again despite that none had exhausted the term limits for the particular offices they seek. The trial court agreed with plaintiff, finding "that the term limits were not intended to be cumulative in the way Defendants argue" and that "a plain reading of the charter shows that there is no differentiation between at-large councilmembers and district councilmembers in the term-limit definition[.]" The trial court concluded that plaintiff was entitled to have the four candidates excluded from the primary ballot on the basis of the term limitations contained in §§ 4.3 and 4.4 of the city charter, that the election commission had a clear statutory duty to strike the four candidates' names from the ballot, that doing so was a ministerial act, and that plaintiff had no other viable remedy at law.

Defendants appealed in this Court, arguing that the trial court erred by simply ignoring the 2015 circuit court decision, that the trial court erroneously found a clear legal duty based upon a contested interpretation of the charter, and that it erred by exercising jurisdiction to determine the candidate's eligibility under §§ 4.3 and 4.4 of the charter. We granted defendants' motion to expedite their appeal and for immediate consideration. *Berdy v Buffa*, unpublished order of the Court of Appeals, entered June 5, 2019 (Docket No. 349171). We now reverse the trial court's grant of mandamus relief.

II

A writ of mandamus is an extraordinary remedy that may be granted only when the plaintiff shows that " '(1) the plaintiff has a clear, legal right to performance of the

specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result.' " *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016), quoting *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 829 (2014). A trial court's decision whether to grant mandamus is reviewed for an abuse of discretion. *Berry*, 316 Mich App at 41. However, whether the defendants have a clear legal right to perform a duty and whether the plaintiff has a clear legal right to the performance of that duty present questions of law to be reviewed de novo by this Court. *Id*.

Plaintiff failed to show that he had a clear legal right to have the subject candidates disqualified from running for city council, failed to show that defendants had a clear legal duty to strike the names from the ballot, and failed to show that the action demanded was purely ministerial. Because plaintiff failed to make those showings, the trial court abused its discretion by granting plaintiff's complaint for mandamus.

With regard to seeking mandamus relief, " 'a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Id*., quoting *Rental Props*, 308 Mich App at 519. The rules of statutory construction apply to the interpretation of city ordinances, including city charters. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998); *Barrow v Detroit Election Comm*, 301 Mich App 404, 413; 836 NW2d 498 (2013).

Plaintiff did not show that the four candidates at issue were term-limited under the plain language of

the charter or that the city government was misinterpreting or misapplying the relevant charter provisions. The specific language of § 4.4(d) states that "[a] person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years *in that particular office*." (Emphasis added.) While the words "that particular office" in § 4.4 could be interpreted to distinguish between terms served as city council member, clerk, or treasurer, there is room for reasonable disagreement with regard to whether there should also be a distinction between council members elected by district and at-large. While the Warren City Council may not be a true bicameral legislature with an upper and lower house like the United States Senate and House of Representatives, the city charter does distinguish between council members elected by district and at-large with regard to their election, fundraising, constituencies, and abilities to serve as mayor pro tem. Contrary to the trial court's ruling, the city's interpretation of its term-limit provisions under §§ 4.3 and 4.4 of the city charter was not clearly wrong. Accordingly, plaintiff has not shown a clear legal right to have the four incumbents' names removed from the primary ballots.[2]

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[2] The dissent, which has designated this case for publication, contends that the "general election laws of the state" must guide us, rather than the language of the charter. In support of this proposition, the dissent relies heavily on *Barrow*, 301 Mich App 404. The dissent misreads *Barrow*. That decision flowed directly and solely from the language of Detroit's charter, which defined the residency requirements for mayoral candidates. This Court stressed, "Michigan statutory law provides that a city's charter governs qualifications for persons running for office[.]" *Id*. at 413. In *Barrow*, the pertinent language of the charter provided that a person seeking elective office must be a "registered voter of the City of Detroit for one (1) year at the time of filing for office . . . ." *Id*. (emphasis omitted). We determined that the relevant section of the

Nor has plaintiff shown that either defendant has a clear legal duty to strike the names from the ballot as requested. Warren City Charter § 13.15(1) through (8) grants the election commission purely administrative duties such as arranging and staffing polling places and supervising the conduct of elections. The charter does not grant the election commission the power to decide whether candidates are eligible or to strike them from the ballot for ineligibility. While MCL 168.323 and MCL 168.719 grant city election commissions the power and duty to prepare and deliver primary ballots, neither statute gives those commissions the power to assess whether a candidate is ineligible for a particular office on the basis of term limits. In fact, the language of MCL 168.323 limits a city election commission's functions to the purely ministerial tasks of preparing and furnishing ballots on the basis of the results certified by the board of county canvassers.

Section 4.2 of the Warren City Charter states that the city council "shall be the judge of the election and qualifications of its members, subject to the general election laws of the state and review by the courts, upon appeal." Neither the election commission nor the city clerk has the power to apply the terms of the charter and determine whether candidates are ineli-

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charter was clear and unambiguous, prohibiting a candidate from seeking office unless the candidate had been a registered voter for one year at the time he or she filed a nominating petition. The candidate, (now Mayor) Michael Duggan, conceded that he was not registered to vote in Detroit one year before he filed his nominating petitions. *Id*. at 415.

The language of the Warren City Charter is not so easily parsed and is legitimately subject to differing interpretations. The Warren city attorney concluded that the charter permits the four candidates to run for positions on the city council. This determination may prove incorrect, but it is not unreasonable. Accordingly, *Barrow* is inapposite.

gible to run for office. The charter gives that power solely to the city council, subject to state election law and review by the courts. When a city charter makes the city council the sole judge of the election and qualifications of its own members, the final decision on those issues rests in the city council, and the courts cannot decide the matter unless and until the council reaches its final decision on the matter. *McLeod v State Bd of Canvassers*, 304 Mich 120, 129; 7 NW2d 240 (1942); *Grand Rapids v Harper*, 32 Mich App 324, 327; 188 NW2d 668 (1971); *Houston v McKinlay*, 4 Mich App 94, 98; 143 NW2d 781 (1966). Because only the city council had the power to determine the candidates' eligibility, defendants did not have authority to determine their eligibility under the charter and could not strike their names from the ballot.

Additionally, plaintiff failed to show that the action requested was purely ministerial. In *Berry*, this Court defined a ministerial act as " 'one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.' " *Berry*, 316 Mich App at 42, quoting *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013). While striking the names of clearly ineligible candidates who have not submitted facially adequate petitions or who have neglected to comply with other clear statutory requirements is a ministerial act, *Barrow*, 301 Mich App at 412, choosing between competing interpretations of city-charter language regarding term limits is not purely ministerial, but instead requires analysis and discretionary decision-making. Because determining the eligibility of candidates under §§ 4.3 and 4.4 is not within the powers of defendants and was not a ministerial act, plaintiff was

not entitled to mandamus relief to compel defendants to do those acts.[3]

The trial court's opinion and order granting declaratory and mandamus relief to plaintiff is reversed. No costs as this appeal concerned an issue of public importance. MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

CAVANAGH, J., concurred with GLEICHER, J.

TUKEL, P.J. (*dissenting*). I respectfully dissent.

Defendants[1] argue that mandamus is not an available remedy in this case. "Although this Court reviews a trial court's decision to issue or deny a writ of mandamus for an abuse of discretion, this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance." *Wilcoxon v Detroit Election Comm*, 301 Mich App 619, 630; 838 NW2d 183 (2013) (quotation marks and citations omitted).

As a general matter, to justify a writ of mandamus,

[3] Contrary to the dissent, MCL 168.323 has not supplanted, arguably or otherwise, the mandamus principles set forth in *McLeod*, 304 Mich 120. To the contrary, *McLeod*'s central teaching remains relevant. Mandamus is an extraordinary remedy. "Mandamus issues only to compel the recognition of a clear legal right or the performance of a legal duty; it does not issue so long as the right or the duty is disputed or doubtful." *Id*. at 125-126. This is the law. The enactment of MCL 168.323 has not changed it. If any of the four candidates win the election, a challenge to the result is certain. The dissent's position may then prevail. But the cause of action here is for mandamus, and that form of unusual relief is unavailable where, as here, serious and compelling legal questions about a legal duty abound.

[1] Defendant Macomb County Clerk Fred Miller is not a party to this appeal; all references in this opinion to "defendants" are to the Warren City Clerk and the Warren City Election Commission.

> [t]he plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. [*Barrow v Detroit Election Comm*, 301 Mich App 404, 412; 836 NW2d 498 (2013).]

"[T]his Court has held that where the duty of the public official is certain, the Court cannot in its discretion deny the writ." *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 744; 322 NW2d 152 (1982).

Barrow is controlling in this case with regard to the potential availability of mandamus. *Barrow* involved a claim that a candidate was ineligible for the August primary ballot; the plaintiff in *Barrow* argued that then-candidate Michael Duggan was not eligible for the ballot because he had not been a resident and a qualified and registered voter for the period mandated by the city charter. *Barrow*, 301 Mich App at 407. In this case, similarly, plaintiff, Connor Berdy, alleges that four candidates are not eligible for the August primary ballot (for Warren City Council) because they have served the maximum terms permitted by the Warren City Charter (the Charter). In *Barrow*, the defendants were the Detroit Election Commission and the Detroit City Clerk. *Id*. Here, defendants are the Warren City Election Commission and the Warren City Clerk. Moreover, although not mentioned by the *Barrow* Court, "[t]he boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk." MCL 168.567. That section refers to official primary ballots, the election at issue here. Thus, the Warren City Election Commission had a duty to correct any error on

the ballots, which necessarily required that it not list an ineligible candidate.

In *Barrow*, we determined that "mandamus is the proper method of raising [the plaintiff's] legal challenge" to the candidacy. *Barrow*, 301 Mich App at 412. In so doing, we relied on various provisions of the Michigan Election Law, MCL 168.1 *et seq*. Under the Michigan Election Law, "[i]t is the duty of the board of city election commissioners to prepare the primary ballots to be used by the electors." MCL 168.323. In addition, "[t]he election commission of each city and township shall perform those duties relative to the preparation, printing, and delivery of ballots as are required by law of the boards of county election commissioners." MCL 168.719. Thus, the *Barrow* Court held that "[i]t is undisputed that defendants have the statutory duty to submit the names of the *eligible* candidates for the primary election, see MCL 168.323 and MCL 168.719." *Barrow*, 301 Mich App at 412 (emphasis added). Further, "[u]pon review, if we in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would have a clear legal right to have Duggan's name removed from the list of candidates, the Election Commission would have a clear legal duty to remove Duggan's name, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy." *Id*. at 412-413.

I. PLAINTIFF HAS A RIGHT TO THE PERFORMANCE OF THE ACTION SOUGHT

I disagree with the majority's view that plaintiff has failed to show that he had a right to the performance of the duty sought to be compelled.

First, the majority's interpretation of the Charter is contrary to the Charter's plain and unambiguous language. As already noted, we review de novo the interpretation of a city charter. *Trahey v Inkster*, 311 Mich App 582, 593; 876 NW2d 582 (2015). Therefore, we give no deference to any other interpretations, *Buchanan v Flint City Council*, 231 Mich App 536, 542 n 3; 586 NW2d 573 (1998), including those of the city attorney.

> When reviewing the provisions of a home rule city charter, we apply the same rules that we apply to the construction of statutes. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written. [*Barrow*, 301 Mich App at 413-414 (citation omitted).]

The Charter provides for seven council members, two elected at-large and five elected to represent one each of the five districts. Charter, § 5.1(a). There are no differences in the powers or authorities of council members; any combination of five members, irrespective of whether at-large or elected-district members, constitutes a quorum and can conduct all business of the council. Charter, § 5.3(e).

The majority cites the city attorney's conclusion that "the two groups had different election rules and responsibilities, such as different residency requirements and separate campaigning and fundraising rules[.]" But the city attorney's conclusion is actually incorrect. Section 5 of the Charter relates to election matters, which of course are different for an at-large representation as opposed to an elected-district representation. But the provisions draw no distinction regarding the authority of serving council members to

assemble a quorum or to conduct business. Importantly, if there were two different classes of council members, it would not be a legal irrelevancy under the Charter which of those five were present on any given occasion to constitute a quorum to conduct business. See Charter, § 5.3(e).

And while the majority soft-pedals the city attorney's incongruous statement that the council is "bicameral" by stating that it "may not be a true bicameral legislature," there is no doubt on this issue. A bicameral legislature literally means "two houses" and therefore requires two houses. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "bicameral" as "having, consisting of, or based on two legislative chambers").[2] Additionally, if there really were a "bicameral" council, it certainly would be of great significance to spell that out given that a quorum in one house would not constitute a quorum in the other. Nevertheless, the Charter treats the seven council members interchangeably for official purposes and only provides a single mechanism for determining a quorum. Of course, none of what the city attorney opined matters at all, given that our review on this matter, as an issue of law, is de novo; but even under a more deferential standard of review, the city attorney's position would have to be rejected.

Sections 4.3(d) and 4.4(d) of the Charter govern how many terms or how long a person may serve as an elected official. Section 4.3 states:

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[2] The city attorney and the majority also note that only an at-large city council member can serve as mayor pro tem. However, that is an eligibility provision for the position of mayor pro tem, not for city council members; because it only applies to one of the two at-large members in any event, it could not create a separate class for the at-large members as a whole.

> A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

And § 4.4(d) provides:

> A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

The only difference between these two provisions is the addition of the word "particular" toward the end of § 4.4(d).

The only reasonable reading of the Charter provisions providing for three-term or 12-year maximum periods of service is that they each apply separately to anyone elected to "the position of city council." The Charter's use of the definite article "the" and the singular "position" indicate that there is only *one* class of city council members. See *Robinson v City of Lansing*, 486 Mich 1, 14-15; 782 NW2d 171 (2010) (stating that the use of the word "the" indicates a " 'specific or particular' " thing). Any reliance on "that particular office" to somehow indicate that it applies to multiple city council positions is without merit. The clear meaning of the last sentence in § 4.4(d)—"A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office"—is that "particular office" refers to the previously mentioned positions of city council, city clerk, and city treasurer. Indeed, it is likely that no one who voted on

those sections of the Charter, whether for or against, would have fathomed that what was being voted on were not provisions for three complete terms or 12-year maximums, but rather six complete terms and 24-year maximums. That is so for the reason that there is not a single word in the Charter stating that there are two different classes of city council members to whom the maximum-term provisions would apply separately. See, e.g., *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004) ("This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification.").

Defendants argue in their reply brief that the Charter has received a settled judicial construction which cannot be lightly abandoned under the rules for stare decisis. However, as to this issue, no rule set forth by a lower court was previously "settled." As noted, *this Court* reviews de novo whether plaintiff has a clear legal right and whether defendants have a clear legal duty. We owe no deference whatsoever to the previous rulings by the Macomb Circuit Court, either in the 2015 case *Olejniczak v City of Warren Elections Comm* (Case No. 2015-001304-AW) or in this case presently; and the unpublished order of this Court in *Olejniczak*[3] has no precedential value. See MCR 7.215(C). What would be a settled rule would be a definitive construction from this Court of the meaning of the Charter; as we held in *Barrow*, "Upon review, if *we* in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would have a clear legal right to have Duggan's name removed from the list of candidates, the Election Com-

[3] *Olejniczak v Warren Elections Comm*, unpublished order of the Court of Appeals, entered June 11, 2015 (Docket No. 327779).

mission would have a clear legal duty to remove Duggan's name, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy." *Barrow*, 301 Mich App at 412-413 (emphasis added). Thus, even if defendants had simply been relying on the city attorney's interpretation of the Charter and that interpretation could be considered "difficult," "a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts *regardless of the difficulty of the legal question to be decided*." *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (quotation marks and citation omitted; emphasis added). And here, the plain language of the Charter states that a person is limited to serve a total of three terms or 12 years in the position of city council member.

Therefore, I would hold that the trial court did not err by determining that plaintiff had a clear legal right to the performance of the duty sought to be compelled, i.e., the removal of the four individuals on the ballot for city council. See *Barrow*, 301 Mich App at 412 (stating that if the Court determines that a person is not qualified to be a candidate, "plaintiff would have a clear legal right" to have the person's name removed from the list of candidates).

II. DEFENDANTS HAD A CLEAR LEGAL DUTY TO REMOVE THE NAMES FROM THE BALLOT AND THE ACT WAS MINISTERIAL

I also disagree with the majority's view that defendants did not have a clear legal duty to remove the names from the ballot. Defendants argue that under the Charter the duty of determining eligibility for the ballot is vested in the Warren City Council. The Char-

ter provides, in relevant part, that "[t]he council shall be the judge of the election and qualifications of its members, *subject to the general election laws of the state and review by the courts, upon appeal*." Charter, § 4.2 (emphasis added). The Charter thus does not give unlimited discretion to the council; rather, it gives council such discretion as is not limited by the "general election laws of the state . . . ."[4] Such "general election laws of the state" are precisely what we construed in *Barrow* and under which "[i]t is undisputed that defendants have the statutory duty to submit the names of the *eligible* candidates for the primary election[.]" *Barrow*, 301 Mich App at 412 (emphasis added); see also MCL 168.719 ("The election commission of each city and township shall perform those duties relative to the preparation, printing, and delivery of ballots as are required by law of the boards of county election commissioners."). Consequently, and notwithstanding the Charter, the courts have a duty to apply the "general election laws of the state" regarding a candidate's eligibility for office, even when that eligibility is limited by a provision of a city charter. See MCL 168.321(1).

Moreover, as we held in *Barrow*, 301 Mich App at 412, once a court determines that a candidate is legally ineligible to run for office, "the Election Commission would have a clear legal duty to remove [the candidate's] name[.]" This holding is supported by § 13.15(2) of the Charter, which provides that one of the duties of the election commission is "[t]o prepare and print election ballots . . . for all city officers *for whom the electors are entitled to vote* . . . ." (Emphasis added.)

[4] Nor could the charter grant unlimited discretion to the council. "No provision of any city charter shall conflict with or contravene the provisions of any general law of the state." MCL 117.36.

Contrary to the majority, the Election Commission makes that determination in the first instance, not after certification by the County Board of Canvassers. Further, "the act would be ministerial because it would not require the exercise of judgment or discretion"; the law leaves no discretion once a candidate's ineligibility is clear, "and plaintiff would have no other legal or equitable remedy." *Id.* at 412-413; see also *Romulus City Treasurer*, 413 Mich at 744 ("[W]here the duty of the public official is certain, the Court cannot in its discretion deny the writ.").[5]

III. CONCLUSION

Accordingly, none of defendants' arguments is persuasive on the question of whether there is more than one class of council member; rather, there is only a single class of city council member, as to whom the Charter provides for a maximum of three terms in office or a total of 12 years. It is undisputed that the four candidates here are incumbent council members who have served or will have served those maximum terms by the time of the 2019 election; they are thus

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[5] *McLeod v State Bd of Canvassers*, 304 Mich 120; 7 NW2d 240 (1942), and the line of cases the majority cites arguably have been supplanted by MCL 168.323, which imposed on city election commissioners the duty to prepare the primary ballots; that provision was enacted by 1954 PA 116 after *McLeod* had been decided (and was nonsubstantively amended by 2013 PA 51) and therefore may have superseded the caselaw. See *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191 n 32; 880 NW2d 765 (2016) (stating that while the Court of Appeals normally is bound to follow decisions of the Supreme Court, "lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law"). We need not decide that issue here, and I express no opinion as to it because the premise of the majority's citation of *McLeod*, that the Charter makes the council the sole and exclusive judge of the qualifications of its members, is inapplicable.

ineligible under the Charter. Therefore, the Warren City Election Commission was duty-bound to remove the names of those individuals from the ballot. Because the trial court correctly ordered mandamus requiring the Warren City Election Commission to do so, I would affirm the trial court's judgment.

HOME-OWNERS INSURANCE COMPANY v PERKINS

Docket No. 344926. Submitted April 9, 2019, at Grand Rapids. Decided June 11, 2019, at 9:00 a.m.

Home-Owners Insurance Company filed an action in the Cass Circuit Court against Nancy Perkins, claiming that she had breached the homeowner's insurance policy she had with plaintiff by submitting a claim that was knowingly inaccurate and exaggerated, by failing to comply with certain terms of the contract, and by concealing material facts and circumstances. On March 4, 2015, defendant's home and personal possessions were destroyed by a fire; defendant immediately notified plaintiff of her loss and later submitted a proof-of-loss form detailing the personal possessions she had lost and an estimate of their value. On August 28, 2015, plaintiff denied defendant's claim, alleging that defendant had committed arson, had misrepresented facts in her claim of loss, and had failed to comply with other policy terms. Plaintiff sent the denial letter by certified mail to defendant in care of her then attorney. Defendant averred that she never received the notification. On October 5, 2016, plaintiff filed this action against defendant, seeking to recover the amount it had paid Fifth Third Bank—the mortgagee of defendant's house—under the terms of the policy. Defendant denied the allegations and filed a counterclaim against plaintiff, alleging that it had breached the insurance policy by denying her claim and seeking the full benefits due under the policy. Plaintiff moved for summary disposition, asserting that defendant's counterclaim was barred by the policy's limitations period. The policy provided that plaintiff could not be sued unless there was full compliance with all the terms of the policy and that suit must be brought within one year after the loss or damage occurred (the suit-against-us provision); plaintiff asserted that the counterclaim was similarly barred by the one-year limitations period in MCL 500.2833(1)(q). Each limitations period contained specific language that would toll the one-year period. Plaintiff asserted that defendant's claim accrued when it formally denied the claim by letter on August 28, 2015, and that her February 2017 counterclaim should be dismissed because it was not filed within one year of the denial notice. Defendant argued that plaintiff's lawsuit was barred because the statutory one-year limitations period applied to all

actions brought under the policy, not just to actions by the insured; alternatively, defendant asserted that plaintiff had waived the statute-of-limitations defense by filing its claim after the one-year period of limitations had expired and that plaintiff should be estopped from enforcing the one-year limitations period because plaintiff had purposefully waited until the period had expired to sue her, which was prejudicial to her. The court, Susan L. Dobrich, J., dismissed defendant's counterclaim, reasoning that defendant had notified plaintiff of the denial of her claim when it sent the August 28, 2015 letter to her attorney, that defendant failed to file her counterclaim within one year of the denial, and that defendant's waiver and estoppel arguments lacked merit. In an unpublished order entered April 10, 2018, the Court of Appeals denied defendant's delayed application for leave to appeal (Docket No. 340933). In the trial court, defendant moved to submit to the jury proof of her counterclaim as well as the waiver issue; the court denied her motion. The trial court then sua sponte dismissed plaintiff's complaint, concluding that MCL 500.2833(1)(q) applied to actions by insurers as well as insureds and that, therefore, plaintiff had failed to file its claim within the one-year limitations period. Defendant appealed, and plaintiff cross-appealed.

The Court of Appeals *held*:

1. MCL 500.2833(1)(q) provides that (1) an action under a fire insurance policy may be commenced only after compliance with the policy requirements, (2) an action must be commenced within one year after the loss or within the period specified in the policy, whichever is longer, and (3) the time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability. Given the dictionary definitions of the words "an" and "action," the phrase "an action" in MCL 500.2833(1)(q) plainly means any civil proceeding under the policy; the statute does not differentiate between an action brought by either the insured or the insurer. Accordingly, under the provision, any civil action under a fire insurance policy may be commenced only after compliance with the policy's requirements and the action must be commenced within one year after the loss (unless the policy specifies a longer period), taking into consideration any period for which the action is tolled. Under MCL 500.2860, any provision of a fire insurance policy that is contrary to Chapter 28 of the Insurance Code, MCL 500.100 *et seq*., is void; when an insurance policy provision is void, the relevant statutorily mandated provision takes its place. In this case, the fire insurance policy specifically provided that the one-year limitations period applies only to actions brought by an insured. Because the policy

conflicted with the MCL 500.2833(1)(q) mandate that the limitations period applies to any civil proceeding—not just to those brought by an insured—the suit-against-us provision in the policy was void under MCL 500.2860 and the limitations period set forth in MCL 500.2833(1)(q) applied to plaintiff's claim and defendant's counterclaim. Because both parties filed their claims after the one-year period of limitations had expired, the trial court correctly dismissed both claims.

2. A waiver is the intentional and voluntary relinquishment of a known right. A valid waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose, or be an implied waiver, evidenced by a party's decisive, unequivocal conduct reasonably implying the intent to waive. In this case, plaintiff did not waive its right to enforce the limitations period against defendant by filing its own complaint outside the limitations period; the issue of waiver was not a factual question for the jury because defendant presented no record evidence from which a jury could reasonably infer an intent by plaintiff to waive the limitations period. Therefore, the trial court correctly determined that defendant's waiver argument lacked merit.

3. Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time; it is an equitable tool used to provide a remedy for the inconvenience resulting from a plaintiff's delay in asserting a legal right that was practicable to assert. In this case, plaintiff did not deny defendant an opportunity to discover that it had denied her claim; instead, plaintiff sent the denial letter to defendant's attorney. Plaintiff's failure to file its claim against defendant within the one-year limitations period did not prevent defendant from filing her own action within that period, and plaintiff's untimely filing was not evidence of its intent to delay. Accordingly, the trial court correctly rejected defendant's estoppel argument.

Affirmed.

INSURANCE — FIRE INSURANCE POLICIES — CLAIMS — LIMITATION OF ACTIONS — WORDS AND PHRASES — "AN ACTION."

MCL 500.2833(1)(q) provides that (1) an action under a fire insurance policy may be commenced only after compliance with the policy requirements, (2) an action must be commenced within one year after the loss or within the period specified in the policy, whichever is longer, and (3) the time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability; the phrase "an action" in

MCL 500.2833(1)(q) means any civil proceeding under the policy; the statute does not differentiate between actions brought by the insured and those brought by the insurer.

Yeager, Davison & Day, PC (by *Phillip K. Yeager* and *Renee L. Malkowski*) for plaintiff.

Robert W. Mysliwiec for defendant.

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

PER CURIAM. In this insurance dispute, defendant, Nancy Perkins, appeals by right the trial court's order dismissing plaintiff Home-Owners Insurance Company's claim against her and the order dismissing her counterclaim against plaintiff. Plaintiff cross-appeals the trial court's order dismissing its claim against defendant. At issue in this fire-damage case is the proper interpretation of MCL 500.2833(1)(q) and its impact on the viability of each party's claim. For the reasons set forth in this opinion, we affirm.

I. RELEVANT FACTS AND PROCEEDINGS

The underlying facts are not in dispute. Plaintiff issued a homeowner's insurance policy to defendant for accidental loss and damage to property located in Niles, Michigan. The policy term was from December 6, 2014 to December 6, 2015, and included coverage of $129,000 on her dwelling, $90,300 on her personal property, $32,500 for additional living expenses, and further coverages for debris removal at the property location. On March 4, 2015, fire substantially destroyed defendant's home and personal possessions. She immediately notified plaintiff of her loss. Subsequently, she prepared and submitted an inventory of her personal possessions based on her best guess of the age and purchase price of

the items she could recall being in her house, and she submitted a proof-of-loss form based on this inventory. On August 28, 2015, plaintiff wrote a letter to defendant formally denying her insurance claim, alleging that she had committed arson, misrepresented facts in her claim of loss, and failed to comply with other provisions in the fire insurance policy. Plaintiff mailed the letter to defendant in care of her attorney at the time, James Jesse. Plaintiff sent the letter by certified mail, and Jeannette Jesse signed for it on September 11, 2015. Defendant averred in an affidavit submitted to the trial court that she did not receive plaintiff's denial letter.

On October 5, 2016, plaintiff filed suit against defendant, alleging that defendant breached the insurance contract by submitting a claim that was "knowingly inaccurate and grossly exaggerated," by failing to comply with certain terms of the contract, and by concealing material facts and circumstances about her loss "as part of an effort to fraudulently induce" plaintiff to pay her claim. Because of these alleged breaches, plaintiff asserted, it had been obligated to pay $56,750 to Fifth Third Bank, the mortgagee of defendant's house. Plaintiff sought a judgment against defendant for $56,750.

On February 6, 2017, defendant filed an answer denying plaintiff's allegations. Along with her answer, she filed a counterclaim alleging that plaintiff had breached the policy of insurance by wrongfully denying her claim for coverage under the policy after the fire. She sought the full benefits due under the policy, as well as 12% statutory interest under MCL 500.2006.[1]

Plaintiff filed an answer and affirmative defenses to

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[1] MCL 500.2006(4) provides, in relevant part:

> If benefits are not paid on a timely basis, the benefits paid bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the

the counterclaim, and on April 10, 2017, filed a motion for summary disposition under MCR 2.116(C)(7) (statute of limitations). In its supporting brief, plaintiff argued that the applicable limitations period in the policy and in MCL 500.2833(1)(q) barred defendant's counterclaim.[2] MCL 500.2833(1) mandates the contents required in every fire insurance policy issued or delivered in Michigan. Subdivision (q) requires fire insurance policies to contain a provision declaring:

> That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

In purported compliance with this statutory mandate, the fire insurance policy plaintiff issued to defendant contains an amendment to its property-protection section that the parties refer to as the "suit against us" provision and that states:

> **We** may not be sued unless there is full compliance with all the terms of this policy. **Suit** must be brought within one year after the loss or damage occurs. The time for commencing a **suit** is tolled from the time **you** notify **us** of the loss or damage until **we** formally deny liability for the claim.

Plaintiff argued that defendant's claim accrued when it formally denied her claim in the August 28, 2015 letter. Under the terms of the suit-against-us

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claimant is the insured or a person directly entitled to benefits under the insured's insurance contract.

[2] Neither party disputes the applicability of MCL 500.2833 with respect to the insurance policy at issue in this case; rather, they dispute its proper interpretation.

provision, defendant had until August 28, 2016, to file a suit against plaintiff. According to plaintiff, defendant's February 2017 counterclaim was well outside this one-year period and, therefore, it was barred by the suit-against-us provision in the policy and by MCL 500.2833(1)(q).

In her response to plaintiff's motion to dismiss, defendant argued that MCL 500.2833(1)(q) referred to all actions under the policy, not just actions filed by the insured. Thus, to comply with the statute, the one-year period in the suit-against-us provision had to be interpreted to apply to both plaintiff and defendant, and by filing its own suit after the limitations period expired, plaintiff had intentionally waived the statute-of-limitations defense with respect to defendant's claim. Defendant argued in the alternative that even if the suit-against-us provision were interpreted to apply only to insureds, the trial court should estop plaintiff from enforcing the one-year limitations period because plaintiff purposefully waited until the period had expired before suing her. This delay was clearly prejudicial to defendant because it deprived her of the knowledge that plaintiff had denied her claim and, thus, prevented her from filing suit during the one-year period. Defendant contended that estoppel by laches applied regardless of whether plaintiff's delay was intentional or merely dilatory.

In reply, plaintiff asserted that the language in MCL 500.2833(1)(q), as well as that of the suit-against-us provision, applied only to the insured. Plaintiff did not address defendant's waiver argument but contended that defendant could not use the doctrine of estoppel to circumvent the clear and unambiguous language of the fire insurance policy and that the court certainly could not use estoppel to reform a statute. Finally, plaintiff

argued that if the court determined that the language in the statute applied to both the insurer and the insured, then the remedy was to dismiss both actions.

The parties' arguments at the June 5, 2017 hearing on plaintiff's motion for summary disposition were consistent with their briefs. Ruling from the bench, the trial court found that plaintiff had notified defendant of the denial of her claim by sending the August 28, 2015 letter to attorney Jesse and that it was Jesse's responsibility to deliver the denial letter to defendant. No evidence indicated that plaintiff had attempted to lull defendant into thinking it had approved her complaint until the limitations period expired. After determining that waiver and estoppel did not apply as a matter of law, the trial court granted plaintiff's motion for summary disposition of defendant's counterclaim. The court noted that the question remained whether the one-year period in the suit-against-us provision also barred plaintiff's claim but observed that this issue was not before the court because defendant had not filed a motion for summary disposition based on the untimeliness of plaintiff's complaint. The court entered a corresponding order on June 16, 2017.

Subsequently, defendant filed two motions for reconsideration. The trial court denied both motions.[3] Defendant also filed motions seeking permission to present to the jury the evidence supporting her counterclaim or, alternatively, to adjourn the trial so that she could pursue appellate review of the trial court's order granting plaintiff summary disposition of her counterclaim.

[3] In its order denying defendant's second motion for reconsideration, the trial court again noted that plaintiff had filed its complaint after the one-year period and that whether plaintiff could proceed on its complaint was not before the court because defendant had not filed a motion for summary disposition.

The trial court granted defendant's request for alternative relief and adjourned the trial, but defendant's delayed application for leave to appeal in this Court was unsuccessful. *Home-Owners Ins Co v Perkins*, unpublished order of the Court of Appeals, entered April 10, 2018 (Docket No. 340933).

After this Court denied her application, defendant filed a renewed motion to submit to the jury proof of her counterclaim as well as the waiver issue. At the end of the hearing on defendant's motion, the trial court indicated that it had repeatedly encouraged defendant to file a motion for summary disposition to put the question of whether MCL 500.2833(1)(q) applied to insurers as well as insureds squarely before the court, but defendant had not. The trial court denied defendant's renewed motion, but it ruled that MCL 500.2833(1)(q) applies to actions by both insurers and insureds. Because plaintiff had filed its complaint after the one-year limitations period, the court dismissed plaintiff's claim sua sponte.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo questions of statutory interpretation, *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 550; 909 NW2d 495 (2017), as well as the interpretation of clear contractual language, *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). "Waiver is a mixed question of law and fact. The definition of waiver is a matter of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) (citation omitted). "We review for clear error a trial

court's findings of fact and review de novo its conclusions of law." *Reed Estate v Reed*, 293 Mich App 168, 173; 810 NW2d 284 (2011). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id*. at 174-175 (quotation marks and citation omitted). We also review de novo a trial court's decision whether to apply equitable doctrines such as laches. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

B. LIMITATIONS PERIOD

In their respective appeals, the parties dispute the proper interpretation of MCL 500.2833(1)(q) and whether the statute's period for filing claims applies only to actions by insureds, as contended by plaintiff, or whether it applies to all actions under the policy including those by insurers, as contended by defendant. This issue presents a matter of first impression. Given the plain language of the statute, we conclude that defendant is correct.

In relevant part, MCL 500.2833(1) provides that "[e]ach fire insurance policy issued or delivered in this state shall contain the following provisions:"

> That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability. [MCL 500.2833(1)(q).]

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Allstate Ins Co*, 321 Mich App at 551 (quotation marks and citation

omitted). The first criterion in determining intent is the specific language of the statute. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). Courts presume the Legislature to have intended the meaning it plainly expressed. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Allstate Ins Co*, 321 Mich App at 551 (quotation marks and citation omitted). "A court may go beyond the statutory text to ascertain legislative intent only if an ambiguity exists in the language of the statute. But a statutory provision is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *Id*. at 551-552 (citation omitted).

MCL 500.2833(1)(q) provides that "*an action* under the policy may be commenced," that "[*a*]*n action* must be commenced within 1 year after the loss," and that "[t]he time for commencing *an action* is tolled . . . ." (Emphasis added.) The word "an" is an indefinite article, which can signify "any," *Meriam-Webster's Collegiate Dictionary* (11th ed), pp 1, 43, and the word "action" refers generally to "any civil or criminal proceeding," *Black's Law Dictionary* (10th ed), p 35. Accordingly, with respect to the instant dispute, "an action" signifies any civil proceeding brought under the policy. Nothing in the plain language of MCL 500.2833(1)(q) narrows the meaning of "an action" to only those civil proceedings brought by the insured. Further, "an action" is not "equally susceptible" to more than a single meaning, such as "certain actions" or "the action," nor does interpreting "an action" as "any civil proceeding" irreconcilably conflict with other

provisions in the statute. Accordingly, no ambiguity exists in the language of the statute. See *Allstate Ins Co*, 321 Mich App at 551-552. Hence, the statute plainly means that any civil action under a fire insurance policy may be commenced only after compliance with the policy's requirements and that the action must be commenced within one year after the loss (unless the policy specifies a longer period), with due consideration taken for any period of tolling. Given its plain expression, this is presumably the intent of the Legislature. *Joseph*, 491 Mich at 206.

Plaintiff contends that we should interpret MCL 500.2833 to mean the same thing as its predecessor statute, MCL 500.2832.[4] MCL 500.2832, as amended by 1987 PA 168, stated, in relevant part, "No suit or action on this policy *for the recovery of any claim* shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." (Emphasis added.) Plaintiff maintains that only insureds file claims and suits or actions for recovery of their claims, so one should interpret "an action" in MCL 500.2833 as an action "for recovery of any claim." We disagree.

"[T]his Court must assume that an express legislative change denotes either a change in the meaning of the statute itself or a clarification of the original legislative intent of the statute." *Bush v Shabahang*, 484 Mich 156, 169-170; 772 NW2d 272 (2009), citing *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944). Accordingly, this Court cannot assume that the change means nothing at all. *Bush*, 484 Mich at 170. The Legislature repealed

[4] 1990 PA 305 repealed MCL 500.2832 and replaced it with MCL 500.2833. The repeal of § 2832 took effect on January 1, 1992.

MCL 500.2832 and replaced it with MCL 500.2833, changing the relevant language from "suit or action on this policy for the recovery of any claim" to "an action under the policy . . . ." As indicated earlier, applying the principles of statutory construction to the phrase "an action under the policy" results in the meaning of "any civil proceeding under the policy," a phrase that includes, but is broader than, the § 2832 language of a "suit or action . . . for the recovery of any claim . . . ." Assuming that the change in language from § 2832 to § 2833 means something and that the Legislature intends the meaning plainly expressed in § 2833, it cannot then reasonably be maintained that "an action under the policy" means the same thing as a "suit or action on this policy for the recovery of any claim . . . ." See *Bush*, 484 Mich at 170; *Joseph*, 491 Mich at 206.

Plaintiff also contends that allowing a party to bring an action "only after *compliance with the policy requirements*" is another clue that MCL 500.2833(1)(q) refers only to insureds because only insureds have policy requirements with which they must comply before filing an action. (Emphasis added.) This assertion is belied by the case at bar. Plaintiff asserts in its complaint that it was "obligated" to pay $56,750 to Fifth Third Bank, defendant's mortgagee, and that it is bringing this action as a subrogee of the bank. These assertions illustrate that there were policy-based requirements plaintiff had to fulfill before it could file suit against defendant. Specifically, according to the mortgage clause in the fire insurance policy, plaintiff had to "pay the mortgagee any sum for loss under this policy . . . ." Only then would plaintiff meet the requirements set forth in the policy that allowed it to sue defendant as the bank's subrogee. Therefore, plaintiff also had policy requirements to comply with before it could bring this civil proceeding against defendant.

Plaintiff next argues that interpreting the policy and the statute to apply the limitations period to insurers would be illogical for two reasons. The first reason is essentially that such interpretation would contradict the understanding plaintiff has of the statute's meaning. We have already addressed the proper interpretation of MCL 500.2833(1)(q). The second reason is that "there are situations where an insurer's cause of action would accrue outside that time." In light of the tolling period from the time the insured notifies the insurer of the loss until the insurer formally denies liability, it is not clear that plaintiff is correct in this assertion. Even so, this is not a reason to read into the statute a restriction contrary to the language of the statute. The plain language of MCL 500.2833(1)(q) applies to "an action" without distinguishing between whether the insured or the insurer files the action. Where, as here, "the language of the statute is clear, we presume that the Legislature intended the meaning it expressed." *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 87; 610 NW2d 597 (2000). Further, that MCL 500.2832 applied the limitations period to suits "for the recovery of any claim" under the policy signifies that the Legislature knew how to restrict applicability of the limitations period in the current statute to insureds had it elected to do so. See *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 227-228; 668 NW2d 181 (2003) (explaining that the Legislature is presumed to be aware of the principles of statutory construction and to know of existing laws on the same subject when it enacts new laws). It did not, and this Court "may not rewrite the plain language of the statute and substitute [its] own policy decisions for those already made by the Legislature." *McGhee v Helsel*, 262 Mich App 221, 226; 686 NW2d 6 (2004).

In the instant matter, the suit-against-us provision in the fire insurance policy set forth a one-year limitations period applicable only to actions brought by the insured. As defendant correctly argues, this is contrary to the mandate set forth in MCL 500.2833(1)(q). Therefore, the suit-against-us provision is absolutely void. MCL 500.2860.[5] When a provision in a fire insurance policy is absolutely void, the relevant statutorily mandated provision takes its place. *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 105-107; 580 NW2d 903 (1998); see also *Jimenez v Allstate Indemnity Co*, 765 F Supp 2d 986, 994-995 (ED Mich, 2011).[6] Consequently, the one-year period of limitations, with tolling, provided by MCL 500.2833(1)(q) should be read into defendant's fire insurance policy. *Id*. Because both parties filed their actions after the applicable period set forth in MCL 500.2833(1)(q), both of their actions were subject to dismissal under MCR 2.116(C)(7) unless any of defendant's equitable arguments have merit, which we will address in turn.[7]

C. WAIVER

Defendant contends that plaintiff's filing of its complaint beyond the one-year limitations period constituted an offer to waive enforcement of the limitations

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[5] Under MCL 500.2860, "[a]ny provision of a fire insurance policy, which is contrary to the provisions of this chapter, shall be absolutely void, and an insurer issuing a fire insurance policy containing any such provision shall be liable to the insured under the policy in the same manner and to the same extent as if the provision were not contained in the policy."

[6] The decisions of lower federal courts are not binding on this Court, but they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[7] Although plaintiff does not raise it as an issue, given the trial court's interpretation of MCL 500.2833(1)(q), we find no fault in the court's

period and to litigate the insurance policy and that her filing a counterclaim constituted acceptance of plaintiff's offer. Thus, according to defendant, the parties mutually modified the insurance policy to waive the one-year limitations period. Plaintiff denies having waived the one-year limitations period and contends that if MCL 500.2833(1)(q) is interpreted to apply to both parties, the proper result is dismissal of both claims.

An insurance policy is "subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id*. Traditional defenses include waiver and estoppel. *Id*. at 470 n 23.

A waiver is "the intentional and voluntary relinquishment of a known right." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). "[A] valid waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose, or be an implied waiver, evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." *Patel v Patel*, 324 Mich App 631, 634; 922 NW2d 647 (2018) (quotation marks and citations omitted). "[M]utuality is the centerpiece to waiving or modifying a contract," and "a party alleging a waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364, 372; 666 NW2d 251

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decision to summarily dismiss plaintiff's action without a formal motion being filed by defendant. MCR 2.116(I)(1).

(2003). "This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id*. at 364-365. When a party "relies on a course of conduct to establish waiver or modification, the law of waiver directs our inquiry and the significance of written modification and anti-waiver provisions regarding the parties' intent is increased." *Id*. at 365. "Mere knowing silence generally cannot constitute waiver." *Id*. "The party asserting the waiver bears the burden of proof." *Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009).

Defendant does not contend that the parties expressly waived the one-year limitations period in the fire insurance policy. Rather, the gravamen of her argument is that by filing its complaint beyond the limitations period, plaintiff signaled its intent to waive the limitations period and to litigate the fire insurance policy. As support for this position, defendant relies on *Capital Mtg Corp v Coopers & Lybrand*, 142 Mich App 531; 369 NW2d 922 (1985), which entailed a lawsuit arising out of the defendant accounting firm's failure during a routine audit to detect embezzlement perpetrated by employees of the plaintiff mortgage company. Defendant's reliance is misplaced.

During the course of the dispute underlying *Capital Mtg Corp*, the trial court granted the accounting firm's motion to add the mortgage company's insurer to the dispute as a party plaintiff. *Id*. at 533. After a jury returned a verdict in favor of the mortgage company, the accounting firm moved for summary disposition, asserting that it was entitled to arbitrate its liability to the insurer under a decades-old agreement between

the accounting firm and a company whose obligations the insurer had assumed in a merger. *Id*. at 534. The trial court agreed and ordered the matter to arbitration. *Id*. The insurer appealed the trial court's order, and this Court reversed the trial court's order, concluding that the accounting firm's action of moving for summary disposition constituted an implied waiver of the arbitration agreement. *Id*. at 536. The Court stated that a waiver is implied "when a party actively participates in litigation or acts in a manner inconsistent with its right to proceed to arbitration." *Id*. at 535. The Court reasoned that while the stated purpose of the arbitration agreement between the accounting firm and the insurer was to "avoid insurer-accountant lawsuits," the accounting firm had disavowed that purpose by bringing the insurer into its lawsuit with the mortgage company and by filing a motion for summary disposition, "indicat[ing] an election to proceed other than by arbitration." *Id*. at 535-536.

Defendant argues that just as the accounting firm in *Capital Mtg Corp* revoked the arbitration agreement by joining the insurer to the underlying lawsuit, so also plaintiff revoked the one-year limitations period by filing its complaint beyond the limitations period. Defendant's analogy is inapt because plaintiff did not act inconsistently with the rights granted it by its insurance contract with defendant. In *Capital Mtg Corp*, by acting contrary to its right under the arbitration agreement, the accounting firm impliedly rejected the agreement and waived the right to arbitrate. In the case at bar, the suit-against-us provision in the insurance policy did not limit the time in which plaintiff could sue, although in contravention of MCL 500.2833(1)(q). Thus, when plaintiff filed its complaint against defendant, it was not disavowing any clause in the contractual agreement it had with defendant

thereby inviting defendant to do the same. Thus, *Capital Mtg Corp* does not compel us to conclude that by filing a complaint outside the limitations period, plaintiff revoked its right to enforce the limitations period against defendant.

Defendant next argues that whether plaintiff intended to waive the limitations period by filing an untimely complaint should at least be a question of fact for the jury to resolve. However, apart from the fact that plaintiff filed its complaint more than a year after denying defendant's claim, defendant points to no record evidence from which a jury could reasonably infer plaintiff's intent to waive. See *Patel*, 324 Mich App at 634. In fact, copious record evidence clearly indicates plaintiff's intent not to waive, not the least of which is plaintiff's acknowledgment against its own interest that if insurers are subject to the one-year limitations period, then the limitations period bars its complaint and, for that matter, defendant's assertion that plaintiff waited to file its suit in order to sandbag her until after her right to sue expired. In sum, although defendant may be eager to dispense with the one-year limitations period to save her counterclaim, she cannot do so unilaterally and she has not met her burden to establish by clear and convincing evidence a mutual intent to waive the limitations period. See *Quality Prod & Concepts Co*, 469 Mich at 372; *Cadle Co*, 285 Mich App at 255.

D. ESTOPPEL

Finally, defendant contends that plaintiff's delay in filing suit prejudiced her by depriving her of the opportunity to learn that plaintiff had denied her insurance claim and, consequently, of her opportunity to timely file a counterclaim. On that basis, defendant

asserts that plaintiff should be estopped from enforcing the one-year limitations period to bar her counterclaim. We disagree.

"Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847 NW2d 657 (2014) (quotation marks and citation omitted). "To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Id*. at 538 (quotation marks and citation omitted). Typically, "[l]aches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert." *Knight*, 300 Mich App at 115. A party "guilty of laches" is "estopped" from asserting a right it could have and should have asserted earlier. See *Presque Isle Co v Presque Isle Co Savings Bank*, 315 Mich 479, 489; 24 NW2d 186 (1946).

As the trial court found, the record establishes that plaintiff did not deny defendant an opportunity to learn that her insurance claim had been denied in time to file her own suit. Plaintiff sent a denial letter dated August 28, 2015, to defendant in care of her then attorney, whose office signed for the letter on September 11, 2015. At that point, the responsibility fell to defendant's attorney to pass the letter along to defendant. That he apparently did not may give defendant cause to raise concerns about her attorney, but it does not support her laches argument. Even if defendant's attorney did not pass the denial letter along to her, defendant was aware that she had heard nothing from the insurance company and had received no

insurance money; nevertheless, she slept on her right to seek enforcement of the policy for over a year.

Defendant intimates that plaintiff intentionally delayed in filing its lawsuit in order to prevent her from timely filing her own action within the one-year limitations period. However, plaintiff's failure to file its action under the policy in no way prevented defendant from filing her own action under the policy. In any event, it is apparent from the suit-against-us clause in the insurance policy that plaintiff did not deem itself bound by the limitations period set forth in MCL 500.2833(1)(q). Accordingly, the untimely filing of plaintiff's complaint is not evidence of plaintiff's intent to delay.

Finally, assuming for the sake of argument that laches does apply, the remedy would be to estop plaintiff from asserting its subrogee claim against defendant, not to ignore enforcement of the limitations period. See *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982) (stating that laches is "a cut-off measure, interposed as a defense designed to lay to rest claims which are stale as well as prejudicial to the defendant"). Defendant cites no authority for the proposition that when a party sleeps on one right, estoppel by laches operates to prevent that party from asserting a different right, one on which the party has not slept. See MCR 7.212(C)(7); *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626; 750 NW2d 228 (2008) (noting that appellants must support their arguments by citation to appropriate authority).

III. CONCLUSION

The suit-against-us provision in the fire insurance policy does not comply with MCL 500.2833(1)(q) because it purports to apply only to the insured. The

limitations period regarding the commencement of actions set forth in MCL 500.2833(1)(q) applies to both insureds and insurers. Because both parties filed their claims after the limitations period set forth in MCL 500.2833(1)(q), which must be read into the insurance policy, neither party's claim was timely. And because defendant's waiver and estoppel arguments lack merit, the trial court did not err by dismissing both parties' actions.

Affirmed.

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

PEOPLE v ARNOLD (ON REMAND)

Docket No. 325407. Submitted August 21, 2018, at Lansing. Decided June 11, 2019, at 9:05 a.m. Leave to appeal granted 505 Mich 1001 (2020).

Lonnie J. Arnold was convicted in the Monroe Circuit Court, Michael A. Weipert, J., of indecent exposure by a sexually delinquent person in violation of MCL 750.335a(2)(c). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 70 years' imprisonment. Defendant appealed, arguing that MCL 750.335a(2)(c) required that the trial court sentence him to an indeterminate term of one day to life in prison. In an unpublished per curiam opinion issued on April 12, 2016 (*Arnold I*), the Court of Appeals, GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ., held that a court sentencing a defendant convicted under MCL 750.335a(2)(c) must still abide by the sentencing guidelines as directed by *People v Buehler (On Remand)*, 271 Mich App 653 (2006), rev'd in part on other grounds 477 Mich 18 (2007). The Court of Appeals remanded the case for further sentencing proceedings because *People v Lockridge*, 498 Mich 358 (2015), had since rendered the sentencing guidelines advisory. Defendant moved for reconsideration, and the Court of Appeals granted the motion because it had issued a published opinion—*People v Campbell*, 316 Mich App 279 (2016)—that controlled the resolution of the issue; *Campbell* held that the sentence of one day to life in MCL 750.335a(2)(c) was stated in mandatory terms and therefore trial courts must sentence a person convicted of indecent exposure as a sexually delinquent person consistently with the requirements of MCL 750.335a(2)(c). On reconsideration, in an unpublished per curiam opinion issued on September 22, 2016 (*Arnold II*), the Court of Appeals, GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ., concluded that *Campbell* was binding and therefore remanded for the imposition of the mandatory sentence provided in MCL 750.335a(2)(c). The prosecution sought leave to appeal in the Supreme Court. The Supreme Court granted the application and vacated *Arnold II*, holding that, contrary to *Campbell*, the sentence of one day to life in MCL 750.335a(2)(c) was not required but rather was a nonmodifiable sentencing option for a trial court when sentencing a person convicted of indecent

exposure as a sexually delinquent person. 502 Mich 438 (2018) (*Arnold III*). The Supreme Court then remanded the case to the Court of Appeals to consider what effect the adoption of the legislative sentencing guidelines in 1998—and in particular their classification of MCL 750.335a(2)(c) as a Class A felony under MCL 777.16q—had on a trial court's options in sentencing a defendant convicted under MCL 750.335a(2)(c).

On remand, the Court of Appeals *held*:

1. MCL 750.335a(2)(c) provides that indecent exposure by a sexually delinquent person is punishable by imprisonment for an indeterminate term, the minimum of which is one day and the maximum of which is life. MCL 750.335a(2)(c) is a Class A felony under MCL 777.16q, with a statutory maximum of life. The Supreme Court's holdings in *Arnold III* serve to define the sentencing parameters for individuals convicted of indecent exposure as a sexually delinquent person. *Arnold III* held that the sentence of one day to life is an alternative sentencing option that exists alongside other options. Furthermore, *Arnold III* focused on the efforts of the Legislature to create a different sentencing option for individuals identified as sexually delinquent to provide therapeutic and open-ended alternatives for those offenders viewed as having a form of mental illness requiring treatment. Accordingly, the sentence of one day to life comprises a nonmandatory option that a trial court may draw upon should it choose to exercise its discretion to do so. MCL 750.335a did not prescribe anything but rather made an option available. Between the Penal Code and the Code of Criminal Procedure, the judge is afforded options in sentencing, premised on the severity of the behavior and the particular characteristics of the offender, encompassing either a sentence of one day to life for indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), or a sentence premised on a scoring of the guidelines, MCL 777.16q, which in this case could be enhanced under the habitual-offender statute, MCL 777.21. Accordingly, the Penal Code provides judges with certain options, not mandates, when confronted with an individual convicted of indecent exposure as a sexual delinquent. Trial courts may consider sentencing options consistent with the guidelines, particularly when the trial court determines that factors governed by the Code of Criminal Procedure, such as an offender's status as a habitual offender, supply an appropriate mechanism to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts. This approach harmonizes the history of sexual-delinquency sentencing with the more recent recognition that when sentences are imposed they

should be proportional to the seriousness of the circumstances surrounding the offense and the offender and that the proper approach to sentencing is to favor individualized sentencing for every defendant. Because MCL 750.335a and MCL 777.16q must be read *in pari materia*, a trial court has the option to sentence a defendant to one day to life under MCL 750.335a(2)(c) or to a term consistent with the advisory sentencing guidelines.

2. The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear. However, the rule of lenity applies only in the circumstances of an ambiguity or in the absence of any firm indication of legislative intent. A provision of the law is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. In this case, the Legislature clearly intended to include indecent exposure by a sexually delinquent person as an offense within both the Penal Code and the Code of Criminal Procedure. The intent of the Legislature to provide alternative sentencing options for individuals convicted of this offense obviated the existence of any ambiguity, which rendered the rule of lenity inapplicable.

3. Const 1963, art 4, § 25 provides that no law shall be revised, altered, or amended by reference to its title only and that any section of an act that is revised, altered, or amended shall be reenacted and published at length. In this case, the legislative sentencing guidelines did not amend or change the language of the Penal Code, specifically MCL 750.335a. The statutory provisions at issue, MCL 750.335a and MCL 777.16q, are independent and complete and do not necessitate reference to another statute to ascertain their meaning. Accordingly, the inclusion of MCL 750.335a(2)(c) in MCL 777.16q did not violate Const 1963, art 4, § 25.

4. The holdings in *People v Frontczak*, 286 Mich 51 (1938), and *In re Boulanger*, 295 Mich 152 (1940), were not relevant to the resolution of this matter because those cases addressed requests or attempts to impose dual punishments for a defendant or a punishment that was not authorized by law. In this case, defendant received only one of the sentencing options provided by statute; defendant did not face a series of penalties for his single act. When defendant committed his offense, MCL 750.335a and MCL 777.16q provided multiple, but exclusive, sentencing options.

Defendant's sentence vacated; case remanded for further proceedings.

CRIMINAL LAW — SENTENCING — INDECENT EXPOSURE BY A SEXUALLY DELINQUENT PERSON.

MCL 750.335a(2)(c) provides that indecent exposure by a sexually delinquent person is punishable by imprisonment for an indeterminate term, the minimum of which is one day and the maximum of which is life; MCL 750.335a(2)(c) is a Class A felony under MCL 777.16q, with a statutory maximum of life; the sentence of one day to life in MCL 750.335a(2)(c) is a nonmandatory option that a trial court may draw upon should it choose to exercise its discretion to do so; when sentencing an individual convicted of MCL 750.335a(2)(c), a trial court judge is afforded options in sentencing, premised on the severity of the behavior and the particular characteristics of the offender, encompassing either a sentence of one day to life for indecent exposure by a sexually delinquent person under MCL 750.335a(2)(c) or a sentence premised on a scoring of the guidelines under MCL 777.16q.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael G. Roehrig*, Prosecuting Attorney, and *Jonathan A. Jones*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marilena David-Martin*) for defendant.

ON REMAND

Before: GLEICHER, P.J., MURRAY, C.J., and CAVANAGH, J.

PER CURIAM. Violation of the statute proscribing indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), "is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." Before the enactment of the legislative sentencing guidelines, the "1 day to life" sentence was construed as an alternate or optional sentence for sexually delinquent persons. See *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1990). With the 1998 enactment of the

legislative sentencing guidelines, indecent exposure by a sexually delinquent person was classified as a Class A felony, subject to a range of sentences dependent on an offender's variable scores. MCL 777.16q. The Supreme Court has directed us to consider what effect, if any, the adoption of the guidelines "had on a trial court's options in sentencing a defendant convicted of indecent exposure by a sexually delinquent person." *People v Arnold*, 502 Mich 438, 483; 918 NW2d 164 (2018) (*Arnold III*).

We conclude that the sentencing guidelines provide another option or alternative, in addition to the sexual-delinquency scheme, when sentencing an individual convicted of indecent exposure. As the trial court was not aware of its range of sentencing options, or that the legislative sentencing guidelines would be rendered advisory by *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), we vacate defendant's sentence and remand to the trial court for further sentencing proceedings.

I

A jury convicted defendant of indecent exposure by a sexually delinquent person in violation of MCL 750.335a(2)(c)[1] for fondling himself at a public library in front of an employee. Defendant was characterized as a sexually delinquent person because he had committed such acts before and therefore was a "person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others . . . ." MCL

[1] MCL 750.335a was amended after defendant's trial. See 2014 PA 198. However, the relevant sections of MCL 750.335a(1) and (2) have not been altered in any substantive way.

750.10a.[2] Indecent exposure by a sexually delinquent person is a Class A felony under MCL 777.16q, with a statutory maximum of life. Defendant's offense and prior record variable scores placed him in cell F-III of the Class A grid, MCL 777.62, and with consideration of defendant's fourth-offense habitual-offender status, MCL 777.21(3)(c), defendant's minimum guidelines range was calculated at 135 to 450 months. *Arnold III*, 502 Mich at 449-450. The trial court sentenced defendant within the guidelines to 25 to 70 years' imprisonment. *People v Arnold*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325407), p 1 (*Arnold I*).[3]

In *Arnold I*, defendant challenged his sentence, asserting that the trial court was required by MCL 750.335a(2)(c) to sentence him to "1 day to life." *Arnold I*, unpub op at 4. We concluded that a court sentencing a defendant convicted under MCL 750.335a(2)(c) must still "abide by the sentencing guidelines" as directed by *People v Buehler (On Remand)*, 271 Mich App 653, 658-659; 723 NW2d 578 (2006), rev'd in part on other grounds 477 Mich 18 (2007). *Arnold I*, unpub op at 5. However, we remanded for further sentencing proceedings as *Lockridge*, 498 Mich 358, had since rendered the sentencing guidelines advisory. *Arnold I*, unpub op at 5-6.

Defendant sought reconsideration, again urging that a sentence of "1 day to life" was required. We granted the motion because in the interim this Court issued a

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[2] "MCL 750.10a is a definitional statute, and does not carry the possibility of a separate conviction or sentence independent of other charges in the criminal code." *People v Craig*, 488 Mich 861, 861 (2010).

[3] In *Arnold I*, unpub op at 4, we vacated defendant's conviction and sentence for aggravated indecent exposure, MCL 750.335a(2)(b), as violative of double jeopardy. That ruling has not been challenged.

published opinion controlling our resolution of this issue—*People v Campbell*, 316 Mich App 279; 894 NW2d 72 (2016). *Campbell*, 316 Mich App at 299-300, held that although the legislative sentencing guidelines were now only advisory, "the sentence provided under MCL 750.335a(2)(c) is stated in mandatory terms. Consequently, after the decision in *Lockridge*, trial courts must sentence a defendant convicted of indecent exposure as a sexually delinquent person consistently with the requirements of MCL 750.335a(2)(c)." In *People v Arnold (On Reconsideration)*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325407), p 2 (*Arnold II*), we concluded that we were "bound by *Campbell*" to "remand for imposition of the mandatory sentence set forth in MCL 750.335a(2)(c)."

The Supreme Court granted the prosecution's application for leave to appeal this Court's decision in *Arnold II*, "set aside *Campbell*,"[4] and vacated our opinion based upon it. *Arnold III*, 502 Mich at 483. The Supreme Court determined that a " '1 day to life' sentence has never been required by [MCL 750.335a(2)(c)]," contrary to *Campbell*. *Arnold III*, 502 Mich at 444. Rather, "1 day to life" is a nonmodifiable sentencing option for sexual delinquents. *Id*. at 450-451, citing *Kelly*, 186 Mich App at 531.

The Court outlined the development of the sexual-delinquency sentencing scheme. *Arnold III*, 502 Mich at 447-465. The Court described how the first sexual-delinquency acts provided for the indefinite commitment of "sexual psychopaths" until a court determined that they were no longer "a menace to the public

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[4] We note that neither party sought leave to appeal in *Campbell*.

safety." *Id*. at 456-457 (cleaned up).[5] Over time, "the Legislature began chipping away at" the broad application of the sexual-delinquency sentencing scheme. *Id*. at 464. It is now limited in application to five specific offenses: "(1) sodomy, MCL 750.158, (2) indecent exposure, and (3) gross indecency between (a) two males, MCL 750.338, (b) two females, MCL 750.338a, or (c) between a male and a female, MCL 750.338b." *Arnold III*, 502 Mich at 464-465. The Court further noted that prior to the enactment of 2005 PA 300, MCL 750.335a provided that violation of the statute " '*may be* punishable by imprisonment . . . for an indeterminate term, the minimum of which *shall be* 1 day and the maximum of which *shall be life* . . . .' " The 2005 amendments substituted "is" for the emphasized terms. *Arnold III*, 502 Mich at 451-452.

The Court concluded that the "1 day to life" sentence comprises an "alternate sentence" in accordance with MCL 767.61a and that this alternative sentence is optional, not mandatory. *Id*. at 465-469. MCL 767.61a outlines the manner in which an individual charged with an identified predicate offense may commensurately be identified as a sexually delinquent person:

> In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an *alternate* sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. . . .

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[5] This opinion uses the parenthetical "(cleaned up)" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations has been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Prac & Process 143 (2017).

> Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges *the court may impose any punishment provided by law for such offense*. [MCL 767.61a (emphasis added).]

Under this statute, before the enactment of the statutory sentencing guidelines, "a judge faced with an adjudicated sexual delinquent guilty of indecent exposure could choose any legally available sentencing option that the judge deemed appropriate," including a fine and jail sentence of up to 1 year or alternatively "1 day to life" as provided in MCL 750.335a(2)(a) to (c). *Arnold III*, 502 Mich at 468-469. The Supreme Court "conclude[d] that [*Kelly*, 186 Mich App 524,] correctly construed the '1 day to life' alternate sentence as an *option* a sentencing judge could draw upon, alongside and not to the exclusion of other available options," based on "the text of [MCL 750.335a(2)], the Legislature's usual pattern in clearly identifying mandatory sentences, the relation this scheme would have had to the overarching law of sentencing at the time the scheme was adopted, and the history of the scheme[.]" *Arnold III*, 502 Mich at 469.

"Having concluded that *Kelly* correctly construed '1 day to life' as an option," the Supreme Court then considered whether the option of "1 day to life" was modifiable—permitting a sentence within the range identified—or nonmodifiable—requiring the precise sentence of "1 day to life." *Id*. The Court found the "1 day to life" sentence nonmodifiable based on the Legislature's use of the mandatory term "shall." The Court also found the characterization of "1 day to life" as an "alternate sentence" in MCL 767.61a to "indicate[] that [the sentence] ought to function in some distinct way." *Arnold III*, 502 Mich at 470. The Court further relied on the historical purpose of the "sexual-

delinquency scheme, which was clearly intended to be therapeutic and open-ended." *Id*. at 471. The Court emphasized, "The purpose of the scheme was to create a *different* sentencing option, one in which the judge *gave up* control over the amount of time the defendant served to experts who would assess when the defendant was well enough to rejoin society." *Id*.

And viewing the "1 day to life" sentencing scheme in conjunction with MCL 769.9(2), the Supreme Court "agree[d] with *Kelly* that the '1 day to life' sentencing scheme is an exception to the indeterminate sentencing statute's ban on so-called 'life tails.' "[6] *Arnold III*, 502 Mich at 472. Specifically, the Court explained:

> MCL 769.9(2) applies only to "cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years." The phrasing "life or any term of years" is used verbatim in a variety of statutes. When MCL 750.335a was adopted, it spoke of "imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life," 1952 PA 73, and MCL 767.61a speaks of "an indeterminate term, the minimum of which is 1 day and the maximum of which is life." On its own, this difference in wording may be enough to remove sexual-delinquency cases from MCL 769.9(2). Moreover, we agree with *Kelly* that because MCL 769.9(2) is a

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[6] MCL 769.9(2) bans "life tails" as follows:

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

> general indeterminate sentencing statute, while the sexual-delinquency scheme is a specific, integrated scheme, the more specific statute controls. [*Arnold III*, 502 Mich at 472 (cleaned up).]

The Court concluded:

> [W]e construe the "1 day to life" sentence that the Legislature adopted in 1952 as being an alternative sentencing option that existed *alongside* other options, such as a life sentence or a term of years. Much as the sentence concepts "life" and "any term of years" are mutually exclusive and a sentencing judge may (in the appropriate case) opt for either but not both, so "1 day to life" was a mutually exclusive concept that a sentencing judge was free to opt for to the exclusion of a life- or term-of-years sentence. [*Id*. at 472-473 (cleaned up).]

Based on this ruling, the Court overruled or abrogated various cases to the extent they treated the "1 day to life" provision as an exclusive sentence. See *People v Butler*, 465 Mich 940, 941 (2001); *People v Murphy*, 203 Mich App 738; 513 NW2d 451 (1994). See also *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007); *Buehler (On Remand)*, 271 Mich App 653; *People v Buehler*, 268 Mich App 475; 710 NW2d 55 (2005). The Court also determined that the reasoning in *Campbell* "cannot stand" and must be "set aside" as it did not accord with the plain language of MCL 750.335a(2)(c) or its legislative history. *Arnold III*, 502 Mich at 479-481, 483.

In relation to the legislative sentencing guidelines, the Court reasoned:

> [W]e do not believe that *Lockridge* has the significance ascribed to it by the Court of Appeals in *Campbell*. *Lockridge* concluded that the scoring process for the legislative sentencing guidelines violated the Sixth Amendment and, as a remedy for that constitutional violation, directed that henceforth the guidelines would be only advisory. Neither identifying that problem nor crafting that remedy illumi-

> nates whether the adoption of the sentencing guidelines and the classification of indecent exposure by a sexually delinquent person as a Class A felony could make legal a sentence that would not have been legal before the sentencing guidelines were adopted. Whether the sentencing guidelines are mandatory or merely advisory is neither here nor there; the question is what effect the legislative act of adopting the guidelines had on the sexual-delinquency scheme. [*Id*. at 480-481.]

And in relation to the *Buehler* line of cases, the Court continued:

> [W]e no longer believe *Buehler III*[, 477 Mich 18,] fully understood the nature of the sexual-delinquency scheme. Its embrace of a vision of dueling mandates between MCL 750.335a and the sentencing guidelines misconstrued the nature of the "1 day to life" sentencing option provided by MCL 750.335a and MCL 767.61a. It appears that the Court of Appeals in the instant case relied on the series of *Buehler* decisions, in particular their caveat that the 2005 PA 300 amendment of MCL 750.335a may have been meaningful, in reaching its decision. By contrast, we have now concluded that the 2005 PA 300 amendment made no meaningful textual adjustment to the statute. [*Arnold III*, 502 Mich at 481.]

Ultimately, the Supreme Court concluded:

> *Kelly* correctly construed the sexual-delinquency "1 day to life" scheme as an *option* a trial court could use its discretion to consider imposing alongside the other statutory penalties available under the statute (at that time, up to 1 year in jail, which was expanded by 2005 PA 300 to be as much as 2 years in prison for aggravated indecent exposure). We hold that the switch in 2005 PA 300 from "may be punishable" to "is punishable," and "the minimum of which shall be 1 day" to "the minimum of which is 1 day," and "the maximum of which shall be life" to "the maximum of which is life," is merely stylistic. We conclude that *Lockridge*'s constitutional remedy is not pertinent to the outcome of this case. And we disavow *Buehler* as having been premised

> on a misconception of the law of sexual delinquency. [*Arnold III*, 502 Mich at 482-483.]

Our directive, "in light of these rulings," is to determine "what effect the adoption of the legislative sentencing guidelines in 1998—and in particular, their classification of the instant offense as a Class A felony —had on a trial court's options in sentencing a defendant convicted of indecent exposure by a sexually delinquent person." *Id*. at 483.

II

Resolution of this issue requires us to reconcile the optional, alternative sentence of "1 day to life" provided in MCL 750.335a(2) and other statutes with sexual-delinquency provisions in the Penal Code with the classification of indecent exposure (and other designated offenses) by a sexually delinquent person as a Class A felony subject to the sentencing guidelines as provided in MCL 777.16q of the Code of Criminal Procedure.

Although *Kelly* was issued before the enactment of the legislative sentencing guidelines, our Supreme Court reaffirmed its interpretation of MCL 750.335a in *Arnold III*. In *Kelly*, this Court explained:

> Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme.
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> We conclude that the alternate sentence is an indeterminate term of one day to life imprisonment. In interpreting a statute, we apply the rule of ordinary usage and common sense. Applying such a rule, the word "shall" generally denotes a mandatory duty. Because the statute at issue provides that the minimum of the indeterminate term *shall* be one day and the maximum *shall* be life, we conclude that that is the prescribed length of the indeterminate term. [*Kelly*, 186 Mich App at 528-529 (cleaned up).]

In addition, this Court found that the "indeterminate sentence of one day to life" was not invalid under the "indeterminate sentence act, specifically MCL 769.9(2)[.]" *Kelly*, 186 Mich App at 529. The Court distinguished MCL 769.9, which was applicable "only to cases in which the maximum sentence authorized by statute is life imprisonment or any term of years," from MCL 750.335a, wherein "the only maximum sentence authorized is life imprisonment. Moreover, the minimum sentence has been set by statute: one day." *Kelly*, 186 Mich App at 530. This Court construed "the sexually delinquent sentencing scheme as a specific scheme which controls over the general indeterminate sentence act. Sexual delinquency is limited to select criminal provisions and thus is a seldom-used category of alternate sentencing." *Id*. at 531 (cleaned up). This Court continued, "The sexual delinquency legislation was enacted to provide an alternate sentence for certain specific sexual offenses when evidence appeared to justify a more flexible form of confinement." *Id*. Thus, "the sexually delinquent sentencing scheme" was determined to function "as an exception to the indeterminate sentence provision . . . ." *Id*.

In 1998, the Legislature enacted the statutory sentencing guidelines, which were intended to apply to specified enumerated felonies committed on or after January 1, 1999. MCL 777.1 *et seq*.; MCL 769.34(2). "The evident purposes" of the enactment of the "comprehensive sentencing reform" "included reduction of sentencing disparity, elimination of certain inappropriate sentencing considerations, acceptance of [our Supreme] Court's [*People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972)] rule, encouragement of the use of sanctions other than incarceration in the state prison system, and resolution of a potential conflict in the law." *People v Garza*, 469 Mich 431, 434-435; 670

NW2d 662 (2003) (cleaned up). In enacting the legislative sentencing guidelines, it is presumed that the Legislature was aware of the existence of the sexual-delinquency sentencing scheme. *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001) ("The Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws."). In particular, the tie-barring of the amendments to MCL 750.335a and MCL 777.16q reinforces that the inclusion and identification of offenses involving sexually delinquent persons as enumerated felonies under the sentencing guidelines was purposeful and intentional.

> Two statutes that relate to the same subject or share a common purpose are in pari materia and must be read together. The goal of the in pari materia rule is to give effect to the legislative purpose found in the harmonious statutes. When two statutes lend themselves to a construction that avoids conflict, that construction should control. [*Rahilly*, 247 Mich App at 112-113 (cleaned up).]

Specifically:

> The object of the in pari materia rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose. Therefore, if two statutes lend themselves to a construction that avoids conflict, that construction should control. Two statutes that form a part of one regulatory scheme should be read in pari materia. [*People v Butler*, 315 Mich App 546, 550; 892 NW2d 6 (2016) (cleaned up).]

Further, our Supreme Court "has previously recognized that although the Penal Code and the Code of Criminal Procedure 'were separately enacted and have distinct purposes,' the two codes 'relate generally to the same thing and must therefore be read *in pari materia* . . . .' " *People v Washington*, 501 Mich 342, 354 n 29; 916 NW2d

477 (2018), quoting *People v Smith*, 423 Mich 427, 442; 378 NW2d 384 (1985) (opinion by WILLIAMS, C.J.).

In *Smith*, 423 Mich 427, our Supreme Court offered insight for how to reconcile discrepancies between the Penal Code and the Code of Criminal Procedure regarding the definition and distinctions between a misdemeanor and a felony. The Court prefaced its analysis by stating, "Statutes which relate to the same persons or things, or which have a common purpose, are to be read *in pari materia*, and a strict construction will not be given to one statute where doing so would defeat the main purpose of another on the same subject." *Id*. at 441-442 (opinion by WILLIAMS, C.J.). More specifically, the Court recognized, citing the preambles to the relevant codes:

> While the Penal Code and the Code of Criminal Procedure relate generally to the same thing and must therefore be read *in pari materia*, the two codes were separately enacted and have distinct purposes. As concerns this case, the purpose of the Penal Code is to define crimes and prescribe the penalties therefor. The purpose of the Code of Criminal Procedure is to codify the laws relating to criminal procedure.
>
> Included in the Code of Criminal Procedure are provisions for the proper procedures to be followed, for example: upon arrest, at the preliminary examination, at trial, and at judgment and sentencing. The Legislature expressly provided that the Code of Criminal Procedure be deemed "remedial" and be "liberally construed to effectuate the intents and purposes" of the act. MCL 760.2. [*Smith*, 423 Mich at 442 (opinion by WILLIAMS, C.J.) (cleaned up).]

In resolving the distinctions between the definitions in the Penal Code and the Code of Criminal Procedure, the Court opined, "It is obvious that the Penal Code definitions apply only to the Penal Code. Similarly, the definitions of the Code of Criminal Procedure are limited in application to that code." *Id*. at 444.

Significantly, the *Smith* Court stated, "We have previously held that the grade given an offense in the Penal Code is not the controlling consideration in determining the procedural rights afforded an accused outside the Penal Code." *Id*. The Court further explained with regard to the distinction between the definitions of a misdemeanor and a felony in the Penal Code and the Code of Criminal Procedure:

> The label placed upon an offense in the Penal Code is just as irrelevant in determining statutorily mandated post-conviction procedures in the Code of Criminal Procedure as it is in determining constitutionally mandated post-conviction procedures. The three post-conviction statutes at issue here, the habitual-offender statute, the probation statute, and the consecutive sentencing statute, all have the same general purpose: to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts. In order to achieve the Legislature's intended purpose in the Code of Criminal Procedure, we find that the Legislature meant exactly what it said: Offenses punishable by more than one year of imprisonment are "felonies" for purposes of the habitual-offender, probation, and consecutive sentencing statutes. Because misdemeanors punishable by two years of imprisonment fall within the "felony" definition, they may be considered felonies for purposes of these statutes. [*Id*. at 445.]

The Court denied that this analysis or reading of the statutory provisions rendered language either superfluous or redundant, indicating "that the definitions in each code have full meaning for all the purposes of *that* code, but are not simply transferable to the other code." *Id*. at 446 n 2. This analysis is equally applicable to the discrepancy or disconnect in sentencing options between MCL 750.335a of the Penal Code and MCL 777.16q of the Code of Criminal Procedure.

Defendant suggests that sexual delinquency is not an offense, but rather an alternative sentencing scheme that only attaches to specified predicate felony offenses, noting that sexual delinquency is not a felony enumerated in the Penal Code for purposes of MCL 777.16q and falls outside the guidelines. This is either an oversimplification or mischaracterization of the law. Defendant was sentenced for indecent exposure and also was identified as a sexual delinquent. The enumerated predicate felony, which is included in the Penal Code, MCL 750.335a, and the Code of Criminal Procedure, MCL 777.16q, is indecent exposure, with the sexual-delinquency component being construed "as a separate, alternate form of sentencing." *Arnold III*, 502 Mich at 471 (cleaned up). The difficulty is in reconciling the sentencing options available rather than disputing that the predicate felonies are included in both the Penal Code and the Code of Criminal Procedure. That sexual delinquency does not comprise a separate or standalone offense in the Code of Criminal Procedure does not resolve the issue presented.

Given the context, as discussed above, our Supreme Court's holdings in *Arnold III* serve to define the sentencing parameters for individuals convicted of indecent exposure as a sexually delinquent person. In *Arnold III*, 502 Mich at 444-477, the Court expended considerable time and effort tracing the history of sexual delinquency. Focus was placed on the efforts of the Legislature to "create a *different* sentencing option" for individuals identified as sexually delinquent to provide "therapeutic and open-ended" alternatives for those offenders viewed as having "a form of mental illness" requiring "treatment." *Id*. at 471. Premised on our Supreme Court's discussion and findings, the "1 day to life" sentence is "an alternative sentencing option that existed *alongside* other options, such as a

life sentence or a term of years." *Id*. at 472. As explained, the " '1 day to life' [sentence] was a mutually exclusive concept that a sentencing judge was free to opt for to the exclusion of a life- or term-of-years sentence." *Id*. at 473.

The Court's favorable adoption of *Kelly* emphasizes that the sentence of "1 day to life" comprises "a nonmandatory option that a trial court could draw upon should it choose to exercise its discretion to do so." *Id*. Specifically, in finding that "*Kelly* was rightly decided," the Court emphasized "that MCL 750.335a did not *prescribe* anything; instead, it only made an *option* available." *Arnold III*, 502 Mich at 477. This comports with the Court's earlier decision in *Smith*, 423 Mich at 445 (opinion by WILLIAMS, C.J.), recognizing the distinctions between the Penal Code and the Code of Criminal Procedure while simultaneously acknowledging the purpose of the Code of Criminal Procedure "to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts." As is the circumstance here, where defendant is a fourth-offense habitual offender, the sentencing guidelines provide yet another sentencing alternative for individuals convicted of indecent exposure as a sexual delinquent. Between the Penal Code and the Code of Criminal Procedure, the judge in this case would be afforded options in sentencing, premised on the severity of the behavior and the particular characteristics of the offender, encompassing: (a) one day to life for indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), or (b) a sentence premised on a scoring of the guidelines, MCL 777.16q, which in this case could be enhanced under the habitual-offender statute, MCL 777.21. This conforms with the reasoning

of the Court in *Arnold III*, 502 Mich at 479-480, after discussing the wording of MCL 750.335a(2)(c) and recognizing:

> MCL 750.335a(2)(c) still says only that the offense is *punishable* by a "1 day to life" sentence, and "punishable" expresses only the possibility of punishment, not its necessity. Moreover, MCL 767.61a has not been amended, meaning that it still characterizes "1 day to life" as an "alternate" sentence, not a mandatory sentence. Indeed, MCL 767.61a has always phrased the indeterminate sentence option in the same fashion as the postamendment version of MCL 750.335a: "the minimum of which *is* 1 day and the maximum of which *is* life." And MCL 767.61a lays out a procedure common to all five sexual-delinquency crimes, yet each of the other four still uses the former "may be punishable" and "shall be 1 day . . . shall be life" wording. The sexual-delinquency alternative sentence is obviously intended to work the same for all five offenses, so if it is optional for the others, it must still be optional for indecent exposure. All signs point to the 2005 amendment adding only the aggravated indecent-exposure offense [to MCL 750.335a] and making no substantive changes to the "1 day to life" alternative sentence.

The most rational construction is that the Penal Code provides judges with certain options, not mandates, when confronted with an individual convicted of indecent exposure as a sexual delinquent. Trial courts may consider sentencing options consistent with the guidelines, particularly when the trial court determines that factors governed by the Code of Criminal Procedure, such as an offender's status as a habitual offender, supply an appropriate mechanism "to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts." *Smith*, 423 Mich at 445 (opinion by WILLIAMS, C.J.). This approach harmonizes the history of sexual-delinquency sentenc-

ing with the more recent recognition that when sentences are imposed they should be "proportional to the seriousness of the circumstances surrounding the offense and the offender," and that "the proper approach to sentencing is to favor individualized sentencing for every defendant." *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). As recently discussed in *People v Odom*, 327 Mich App 297, 314; 933 NW2d 719 (2019):

> The purpose of the proportionality requirement is to combat unjustified disparity in sentencing, thereby ensuring that offenders with similar offense and offender characteristics receive substantially similar sentences. Under our system of sentencing, this principle of proportionality is first entrusted to the Legislature, which is tasked with grading the seriousness and harmfulness of a given crime and given offender within the legislatively authorized range of punishments. [Cleaned up.]

"Although the Legislature's guidelines are advisory, they remain a highly relevant consideration in a trial court's exercise of its sentencing discretion." *Id*. at 314-315 (cleaned up).

Ultimately, the relevant statutory provisions in the Penal Code and the Code of Criminal Procedure—MCL 750.335a and MCL 777.16q—must be read *in pari materia*. *Kelly*, *Smith*, and the language of the relevant statutes counsel that a trial court has the option to sentence a defendant to "1 day to life" under MCL 750.335a(2)(c) or to a term consistent with the advisory sentencing guidelines.

III

Defendant urges that the "rule of lenity" requires us to declare the legislative sentencing guidelines inapplicable. "The 'rule of lenity' provides that courts

should mitigate punishment when the punishment in a criminal statute is unclear." *People v Johnson*, 302 Mich App 450, 462; 838 NW2d 889 (2013) (cleaned up). The rule, however, "applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418 Mich 95, 113-114, 341 NW2d 68 (1983). "A provision is not ambiguous just because reasonable minds can differ regarding the meaning of the provision. Rather, a provision of the law is ambiguous only if it "irreconcilably conflict[s]" with another provision, or when it is equally susceptible to more than a single meaning." *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008) (cleaned up).

As noted, the Legislature clearly intended to include indecent exposure by a sexually delinquent person as an offense within both the Penal Code and the Code of Criminal Procedure. The intent of the Legislature to provide alternative sentencing options for individuals convicted of this offense obviates the existence of any ambiguity, rendering the rule of lenity inapplicable. See *People v Perry*, 317 Mich App 589, 605-606; 895 NW2d 216 (2016) ("Given the clear indication of legislative intent and the absence of ambiguity, the rule of lenity does not apply.").

IV

Defendant further contends, "If this Court finds that MCL 750.335a(2)(c) is an enumerated felony subject to sentencing under the guidelines by its inclusion in MCL 777.16q, then the sentencing guidelines act [was] a revision, amendment, or repeal of the inconsistent 1 day to life sentencing provision" and "is unconstitutional." "No law shall be revised, altered or amended by reference to its title only. The section or sections of the

act altered or amended shall be re-enacted and published at length." Const 1963, art 4, § 25. Our Supreme Court has explained:

> Section 25 is worded to prevent the revising, altering or amending of an act by merely referring to the title of the act and printing the amendatory language then under consideration. If such a revision, alteration or amendment were allowed, the public and the Legislature would not be given notice and would not be able to observe readily the extent and effect of such revision, alteration or amendment. [*Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973).]

"[I]f an act is complete within itself, it does not fall within the constitutional prohibition." *People v Meeks*, 92 Mich App 433, 444; 285 NW2d 318 (1979). Specifically, § 25 "is directed at preventing undesirable conduct with respect to amendment of a particular act. It does not seek to correct tangential effects which the amendment, revision or alteration may have on those statutes not directly affected." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich at 475. "[A]mendment by implication is not the evil sought to be avoided by [Const 1963, art 4, § 25]." *People v Hughes*, 85 Mich App 674, 681; 272 NW2d 567 (1978) (opinion by BURNS, P.J.).

The legislative sentencing guidelines do not amend or change the language of the Penal Code, specifically MCL 750.335a. The statutory provisions at issue, MCL 750.335a and MCL 777.16q, are independent and complete and do not necessitate reference to another statute to ascertain their meaning. Any inclusion by reference is not violative of Const 1963, art 4, § 25. Despite what might have comprised an illegal sentence for indecent exposure by a sexually delinquent person at the time of enactment of the legislative sentencing guidelines, the

tie-barred amendments to MCL 777.16q and MCL 750.335a remedied any potential conflict.

V

Our Supreme Court also suggested that the holdings in *People v Frontczak*, 286 Mich 51; 281 NW 534 (1938), and *In re Boulanger*, 295 Mich 152; 294 NW 130 (1940), may be relevant in the resolution of this matter. *Arnold III*, 502 Mich at 482 n 20.

In *Frontczak*, 286 Mich at 53, the defendant was convicted of gross indecency and sentenced to 30 days to 5 years in prison. The Legislature subsequently enacted 1937 PA 196, which subjected a criminal defendant to hospitalization before initiation of his criminal sentence and allowed then-incarcerated defendants to be transferred to a hospital until the defendant's purported deviance was cured. *Frontczak*, 286 Mich at 55-58. The state commissioner of pardons and paroles then filed a petition in the local circuit court, invoking the new statutory provision and seeking to have the defendant committed to a state hospital. *Id*. at 53-54. Our Supreme Court determined that this procedure was unconstitutional under Const 1908, art 2, § 19:

> Section 1b, added by the 1937 act, if considered a part of criminal procedure, is void, as subjecting an accused to two trials and convictions in different courts for a single statutory crime, with valid sentence interrupted by supplementary proceeding in another court, with confinement in a non-penal institution and with possible resumption of imprisonment under the original sentence. If not for a single offense, then one trial is for a penalized overt act and the other for having a mental disorder, characterized by marked "sexual deviation." [*Frontczak*, 286 Mich at 58.]

"Hospitalization, with curative treatment and measures may be desirable but, until the law makes a sane

person amenable to compulsory restraint as a sex deviator, it falls short of due process in merely providing procedure." *Id*. at 59.

In *Boulanger*, 259 Mich at 153, the defendant pleaded guilty to gross indecency, with his sentencing deferred pending appointment of a sanity commission, which ultimately did not find the defendant insane, but rather "psychopathic or a sex degenerate or sex pervert and dangerous to public safety." The defendant was sentenced to six months in jail to be followed by commitment to a state hospital " 'until this court shall adjudge you cease to be a menace to public safety.' " *Id*. at 154. The defendant filed a petition for habeas corpus based on his sentencing to dual punishments. *Id*. at 156. Our Supreme Court, relying in part on *Frontczak*, found no authority permitting the Court to commit the defendant to hospitalization arising from his criminal conviction. *Id*.

Neither *Frontczak* nor *Boulanger* is relevant to the issue presented in this remand. There is no request or attempt to impose dual punishments for defendant or a punishment that is not authorized by law. Defendant received only one of the sentencing options provided by statute. When defendant committed his offense, MCL 750.335a and MCL 777.16q provided multiple, but exclusive, sentencing options. Unlike the defendants in *Frontczak* and *Boulanger*, the current defendant did not face a series of penalties for his single act.

We vacate defendant's sentence and remand for further sentencing proceedings. We do not retain jurisdiction.

GLEICHER, P.J., MURRAY, C.J., and CAVANAGH, J., concurred.

POWERS v BROWN

Docket No. 343287. Submitted June 5, 2019, at Grand Rapids. Decided June 18, 2019, at 9:00 a.m.

Mika Powers, doing business as Sweet Rides Auto, brought an action in the Montcalm Circuit Court against Kelly R. Brown, seeking to recover the amount owed on a truck Brown had purchased from and financed through plaintiff in 2014. After defendant allegedly missed a monthly payment on the truck in 2015, plaintiff repossessed the truck, sold it at auction, applied the proceeds from the sale to the loan, and filed this action to recover the remainder owed. Defendant filed a counterclaim, asserting that plaintiff had wrongfully converted his truck. The court, Ronald J. Schafer, J., concluded that plaintiff had wrongfully converted the truck and awarded defendant $10,122; the court also awarded defendant attorney fees under MCL 600.2919a(1). Defendant filed a motion seeking an attorney fee award of $30,347.50, the sum of trial counsel's hourly fee times the hours billed. The trial court found that defense counsel's hourly rate and hours billed were reasonable but that the total bill was too high in relation to the best case outcome for defendant at trial. The court awarded $17,659.23 in attorney fees, concluding that because defense counsel had billed on a contingent basis, the appropriate award was 1/3 of $52,983, the maximum amount that defendant could have recovered in his counterclaim; the court subsequently entered a written order awarding defendant $17,469.54 in attorney fees. Defendant appealed.

The Court of Appeals *held*:

MCL 600.2919a(1)(a) provides that a person may recover three times the amount of actual damages sustained, plus costs and reasonable attorney fees, when the person is damaged by another person's stealing or embezzling property or converting property to the other person's own use. The operative language triggering the calculation of attorney fees under the framework set forth in *Smith v Khouri*, 481 Mich 519 (2008) (opinion by CORRIGAN, J.), and refined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016), is the Legislature's instruction that an attorney is entitled to a reasonable fee. MCL 600.2919a(1)(a) plainly

provides that a person damaged by another person's conversion of their property may recover reasonable attorney fees. For that reason, a trial court must apply the following *Smith/Pirgu* framework in determining a reasonable attorney fee in cases involving an award of attorney fees under MCL 600.2919a. First, the court must create a baseline for determining a reasonable fee by determining the fee customarily charged in the locality for similar legal services and multiplying that number by the reasonable number of hours expended in the case. The court must then decide whether an upward or downward adjustment to the baseline number is appropriate by evaluating that number in light of the following factors: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services; (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (3) the amount in question and the results obtained; (4) the expenses incurred; (5) the nature and length of the professional relationship with the client; (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer; (7) the time limitations imposed by the client or by the circumstances; and (8) whether the fee is fixed or contingent. The factors are not exclusive, and a trial court may consider additional relevant factors. A trial court errs if it does not briefly discuss its views of each factor on the record and justify the relevance and use of any additional factors; a trial court necessarily abuses its discretion and remand is required if the court primarily relies on only one factor and fails to briefly discuss its view of the other factors. In this case, the trial court necessarily abused its discretion when it awarded defense counsel $17,659.23 because the court only discussed Factors (3) and (8) in calculating the award and thereby failed to correctly apply the *Smith/Pirgu* framework.

Order vacated and case remanded.

ATTORNEY FEES — CALCULATION OF REASONABLE FEE UNDER MCL 600.2919a(1) — FACTORS TO CONSIDER.

MCL 600.2919a(1)(a) provides that a person may recover three times the amount of actual damages sustained, plus costs and reasonable attorney fees when the person is damaged by another person's stealing or embezzling property or converting property to the other person's own use; a trial court must apply the framework set forth in *Smith v Khouri*, 481 Mich 519 (2008) (opinion by CORRIGAN, J.), and refined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016), when calculating a reasonable attorney fee under MCL 600.2919a(1).

Westbrook Law PLLC (by *Theodore J. Westbrook*) for defendant.

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

PER CURIAM. Defendant/counterplaintiff, Kelly Ray Brown, appeals as of right the trial court's order awarding him attorney fees in the amount of $17,469.54 after he successfully prevailed on a statutory conversion claim against plaintiff/counterdefendant, Mika Powers, doing business as Sweet Rides Auto. We vacate the trial court order regarding attorney fees and remand for proceedings consistent with this opinion.

I. BACKGROUND

Brown purchased a pickup truck from Sweet Rides Auto in 2014. In 2015, after Sweet Rides Auto claimed that defendant had missed a monthly payment, it repossessed the truck, sold it at auction, and applied the sale proceeds to the loan. Sweet Rides Auto filed suit against Brown in an attempt to recover the remaining loan balance from Brown, but Brown counterclaimed that Sweet Rides Auto had wrongfully converted the truck. At a bench trial, the trial court found that Sweet Rides Auto had wrongfully converted the truck and awarded a judgment in favor of Brown in the amount of $10,122, plus attorney fees and costs.

Brown subsequently filed a motion seeking an attorney fee award of $30,347.50 based on his counsel's hourly rate and hours billed. After hearing Brown's motion, the trial court found that the hourly rate and hours billed were reasonable but that the total amount of fees billed was too high in relation to the "best case"

outcome that had been possible for Brown at trial. The court concluded that because defense counsel had billed on a contingent basis, an appropriate award was 1/3 of the maximum amount that could be recovered ($52,983). By the trial court's calculation, 1/3 of $52,983 was $17,659.23, so the trial court awarded Brown that amount in attorney fees. The trial court later entered an order awarding reasonable attorney fees to Brown in the amount of $17,469.54.[1] Brown now appeals as of right.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's award of attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). "A trial court necessarily abuses its discretion when it makes an error of law." *Id*.

III. ANALYSIS

On appeal, Brown challenges the amount of the attorney fees awarded and criticizes the trial court for not adhering to Michigan Supreme Court precedent in its attorney fee award.

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[1] While the attorney fee order entered by the trial court in the amount of $17,469.54 contained a discrepancy from the trial court's order from the bench granting defendant $17,659.23 in attorney fees, a "court speaks through written judgments and orders rather than oral statements . . . ." *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). Moreover, the difference in the monetary amount is not relevant to our analysis of this issue.

The trial court awarded Brown attorney fees under MCL 600.2919a(1), which provides, in pertinent part:

> A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, *plus costs and reasonable attorney fees*:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [Emphasis added.]

As an initial matter, we take this opportunity to clarify for the bench and bar of this state that the analysis articulated by our Supreme Court in *Smith*, more specifically as set forth in Justice CORRIGAN's concurring opinion[2] and refined in *Pirgu*, is applicable to an award of attorney fees under MCL 600.2919a. In *Pirgu*, our Supreme Court was asked to decide "the proper method for calculating a reasonable attorney fee under MCL 500.3148(1)[.]" *Pirgu*, 499 Mich at 274.[3] As the *Pirgu* Court observed, "[i]n *Smith*, we refined

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[2] Justice CORRIGAN disagreed with the lead opinion that the "results obtained" and "whether a fee is fixed or contingent" should be excluded from the Court's analysis when determining a reasonable attorney fee under MCR 2.403(O). *Smith*, 481 Mich at 538, 543 (CORRIGAN, J., concurring). The *Pirgu* Court concluded that these factors should also be included when determining a reasonable fee under MCL 500.3148(1). *Pirgu*, 499 Mich at 280, 283.

[3] MCL 500.3148(1) provides, in pertinent part, that "[a]n attorney is entitled to *a reasonable fee* for advising and representing a claimant in an action for personal or property protection insurance benefits that are overdue." (Emphasis added.)

the analysis that applies when a fee-shifting statute or rule requires a trial court to determine a reasonable attorney fee." *Id*. at 278. Moreover, our Supreme Court cautioned that whether the *Smith/Pirgu* framework for determining a reasonable attorney fee is applicable will "depend on the plain language of the statute . . . at issue." *Id*. The plain language of MCL 600.2919a(1)(a) clearly provides that a person damaged by another person's conversion of their property may recover "reasonable attorney fees." As our Supreme Court instructed in *Pirgu*, "[t]he operative language triggering the *Smith* analysis is the Legislature's instruction that an attorney is entitled to *a reasonable fee*." *Pirgu*, 499 Mich at 279. Moreover, this Court recently applied the *Smith/Pirgu* framework when calculating reasonable attorney fees under MCL 15.364,[4] a provision of the Whistleblowers' Protection Act, MCL 15.361 *et seq*. *Caldwell v Highland Park*, 324 Mich App 642, 656-657; 922 NW2d 639 (2018). Returning to the plain language of MCL 600.2919a(1)(a), because it clearly speaks to the ability of a person damaged by another's "converting property to the other person's own use," to recover "reasonable attorney fees," the *Smith/Pirgu* framework is applicable in calculating those reasonable attorney fees.

In *Smith*, our Supreme Court instructed that the analysis begins with the trial court "determining the

[4] MCL 15.364 provides:

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, *including reasonable attorney fees* and witness fees, if the court determines that the award is appropriate. [Emphasis added.]

fee customarily charged in the locality for similar legal services[.]" *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.) (quotation marks omitted).[5] Next, "[t]his number should be multiplied by the reasonable number of hours expended in the case . . . ." *Id*. at 531. "The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." *Id*. Then, the trial court should consider a number of factors to determine whether an upward or downward adjustment is appropriate. *Id*. In the context of an attorney fee award under MCL 500.3148(1), our Supreme Court more recently distilled the factors that a trial court is to consider:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,
>
> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
>
> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent. [*Pirgu*, 499 Mich at 282.]

"These factors are not exclusive, and the trial court may consider any additional relevant factors." *Id*. Further, to aid "appellate review, the trial court should

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[5] *Smith* involved attorney fees awarded under MCR 2.403(O)(6). *Smith*, 481 Mich at 527-528 (opinion by TAYLOR, C.J.).

briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id*. When a trial court fails to follow this method, it errs. *Id*. Finally, if a trial court "primarily rel[ies] on only one factor—the amount sought and results achieved—and fail[s] to briefly discuss its view of the other factors," the trial court "necessarily" abuses its discretion and remand is required. *Id*. at 282-283.

In this case, the trial court did not comprehensively apply the *Smith/Pirgu* framework. While the trial court stated that it found the requested hourly rates and total hours billed to be "reasonable and fair," it adjusted the award downward, apparently on the basis of the anticipated projected value of the case to Brown, without considering the other factors set forth in Michigan Supreme Court precedent. Thus, the trial court awarded Brown 1/3 of the maximum amount recoverable and failed to consider the additional factors outlined in *Pirgu*. *Id*. at 282. While we understand the trial court's concern regarding two of the applicable factors—"the amount in question and the results achieved" and "whether the fee is fixed or contingent," *id*. at 280—these are only two of the factors that the trial court should have weighed in its analysis. *Id*. at 281-282. Because the trial court did not comprehensively review and state its findings with respect to all the factors in the *Smith/Pirgu* framework, but rather focused on "the amount in question and the results obtained" as well as on the fact that the fees at issue were contingency fees, it abused its discretion in its award of attorney fees and remand is necessary. See *id*. at 282-283 (recognizing that although the trial court "acknowledged" some of the relevant factors, it abused its discretion by relying mostly on one factor, the amount sought and the results achieved, and by "fail-

ing to briefly discuss its view of the other factors."). On remand, the trial court is instructed to reconsider its attorney fee award as recently instructed by the Michigan Supreme Court in *Pirgu*:

> [W]hen determining the reasonableness of attorney fees awarded . . . , a trial court must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services. The trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure. [*Id*. at 281 (citation omitted).]

The trial court is then directed to consider the factors enumerated by the Supreme Court in *Pirgu*. *Id*. at 281-282. Specifically, the trial court shall briefly discuss its view of each of the factors on the record and justify the relevance and use of any additional factors. *Id*. at 282.

IV. CONCLUSION

The trial court order awarding attorney fees to Brown in the amount of $17,469.54 is vacated. We remand to the trial court to allow it to reconsider its award of attorney fees to Brown in conformity with Michigan Supreme Court precedent. We do not retain jurisdiction. Brown, as the prevailing party, may tax costs.

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

SLOCUM v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN
FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v SLOCUM

Docket Nos. 343333 and 343409. Submitted June 4, 2019, at Lansing. Decided June 18, 2019, at 9:05 a.m.

On August 4, 2016, Robert Slocum was killed while riding his motorcycle. At the time of his death, Robert was married to Rachel Slocum, had adopted Rachel's biological child (Noah), and had two children from his previous marriage to Amber Floyd (Drayke and Dayja); all three children lived with Robert and Rachel, and Rachel and the children depended on Robert for financial support and the medical and dental insurance benefits Robert received through his employer. On August 18, 2016, Rachel submitted a claim to Farm Bureau General Insurance Company of Michigan (Farm Bureau) and United States Automobile Association (USAA)—the companies that insured vehicles involved in the fatal crash—seeking to recover no-fault and survivor's loss benefits under the no-fault act, MCL 500.3101 *et seq*., for her and the three children. Specifically, Rachel sought payment to her for Robert's monthly after-tax income and for lost fringe benefits, including medical and dental insurance, for herself and all the children; the insurers did not immediately pay Rachel any benefits. Caroline Slocum, Robert's mother, petitioned the Eaton County Probate Court for and received temporary guardianship of Drayke and Dayja; the probate court awarded Floyd sole legal and physical custody of Drayke and Dayja on October 21, 2016, more than 30 days after Rachel had submitted her first request for benefits. Although the probate court granted Floyd custody of the children, Floyd did not enter an appearance in the case, and in July 2017, the probate court appointed Caroline as Drayke's and Dayja's conservator. Farm Bureau filed an action for declaratory relief in the Eaton Circuit Court against Rachel, individually and as next friend of Noah, and against Caroline as next friend and conservator of Drayke and Dayja, seeking a determination of the proper payees of the survivor's loss benefits and requesting direction regarding how to distribute the benefits among

Robert's dependents; Farm Bureau admitted that it was responsible for paying survivor's loss benefits under MCL 500.3108 but asserted that Rachel had not provided all the documentation necessary to determine the amounts payable. Rachel filed a separate action in the Eaton Circuit Court against Farm Bureau and USAA, seeking to recover the survivor's loss benefits the insurers had allegedly refused to pay Robert's dependents and requesting penalty interest and attorney fees related to that refusal under MCL 500.3142 and MCL 500.3148; the circuit court consolidated the two actions. Subsequently, after the insurers asserted that they were still unsure how to apportion and calculate the survivor's loss benefits, Rachel and Caroline moved for partial summary disposition. In December 2017, the circuit court, John Douglas Maurer, J., apportioned among Rachel and the children the replacement-services benefits and lost after-tax wages that were not disputed. In January 2018, the circuit court limited the award of penalty interest to the survivor's loss benefits that Rachel had first requested in August 2016, reasoning that while the child custody dispute related to Drayke and Daja complicated how the benefits should be apportioned and to whom the payments should be paid, the dispute had not arisen until after Rachel's original claim had been filed; the court also ordered Farm Bureau to pay Rachel for the reasonable attorney fees she had incurred in connection with the initial delayed payment. With regard to the medical and dental benefits Rachel and the children had been provided by Robert's employer before his death, the court concluded that under MCL 500.3108(1), the insurers were liable to each dependent for the replacement cost or expense of substantially similar medical and dental benefits to those they had received before Robert's death. In Docket No. 343333, Rachel appealed and the insurers cross-appealed the circuit court's orders. In Docket No. 343409, Rachel and Caroline appealed and Farm Bureau cross-appealed the circuit court's orders. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 500.3112(b) provides that personal protection insurance benefits (PIP benefits) are payable to or for the benefit of an injured person or, in the case of his or her death, to or for the benefit of his or her dependents; in the absence of a court order directing otherwise, the insurer may pay to the surviving spouse the PIP benefits due any dependent children living with the spouse. The no-fault act does not require the recipient of such benefits to be the children's biological parent; rather, the benefit

is payable to the surviving spouse of the deceased's spouse if the deceased's dependents are living with the spouse. In turn, MCL 500.3108(1), the so-called survivor's loss provision, provides that survivor's loss benefits payable to a deceased insured's dependents include contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of deceased's death would have received for support from the deceased during their dependency if the deceased had not suffered the accidental bodily injury causing death and include expenses, not exceeding $20 a day, reasonably incurred by the dependents during their dependency. Accordingly, survivor's loss benefits include (1) economic loss, which is the loss of contributions of tangible things of economic value, not including services, and (2) replacement-services costs, which are the expenses, not exceeding $20 a day, reasonably incurred in replacing ordinary and necessary expenses. For purposes of MCL 500.3108(1), the phrase "tangible things of economic value" refers to something that is capable of being valued or having its worth ascertained. The dollar value of benefits derived from other and different sources beyond wages and salary—for example, employer-provided health insurance coverage, pensions, and disability benefits—must be taken into account; medical and dental insurance and after-tax wages constitute "tangible things of economic value" under the statutory provision. The goal of MCL 500.3108(1) is to maintain the level of support the survivor received from the deceased, not to maintain the finances sustaining that support; when an insured's death splits custody for dependents previously covered under a single medical or dental insurance policy, the dependents are entitled to the cost of replacing the coverage they enjoyed before the deceased's death, not merely the monetary value of the prior premiums. In this case, the tangible thing of economic value was the dependents' medical and dental insurance, not the premiums paid for the insurance by Robert's employer for all the dependents. Therefore, because the monetary value of the precrash premium would have been insufficient to maintain the dependents' level of support after Robert's death, the circuit court correctly concluded that the insurers were liable for the cost of coverage substantially similar to what Robert's dependents received before Robert's death.

2. Under MCL 500.3142, PIP benefits are payable as loss accrues; the benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is over-

due if not paid within 30 days after the proof is received by the insurer; any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, regardless of whether the insurer acted in good faith when not promptly paying the benefits. Relatedly, MCL 500.3148(1) provides that an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for PIP benefits that are overdue; the attorney's fee is a charge against the insurer in addition to the benefits recovered if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making a proper payment. In other words, attorney fees are not warranted when the benefits were reasonably in dispute or the benefits were not yet overdue. A delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. In this case, Farm Bureau's explanation for denying Rachel's initial claim—that it could not reasonably determine to whom to pay the benefit because the children were too close in age to all be Rachel's biological children—was not a sufficient reason, on its own, to deny her payment of the benefit; instead, the question was whether the children were living with Rachel during the period relevant to the request. Because the custody dispute did not arise until more than 30 days after Rachel submitted her first request for benefits on August 18, 2016, and there was no dispute that all the children were living with her during the relevant period, Rachel was entitled to statutory interest for Farm Bureau's failure to timely pay that benefit and to attorney fees in relation to that first refusal. Rachel was not entitled to statutory interest or attorney fees related to the remainder of the benefits owed because the insurers did not receive reasonable proof of the proper payees, the amount owed to each dependent, and sufficient information to reasonably determine how to apportion the wage-loss benefit between Rachel and the three children. Accordingly, the circuit court correctly awarded statutory interest and attorney fees for the initial delayed payment and correctly denied such interest and attorney fees for the remainder of the requested payments.

Affirmed.

INSURANCE — NO-FAULT — SURVIVOR'S LOSS BENEFITS — "TANGIBLE THINGS OF ECONOMIC VALUE" — MEDICAL AND DENTAL INSURANCE.

MCL 500.3108(1) provides that survivor's loss benefits payable to a deceased insured's dependents include contributions of tangible

things of economic value, not including services, that dependents of the deceased at the time of deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death, and expenses, not exceeding $20 a day, reasonably incurred by the dependents during their dependency; the phrase "tangible things of economic value" refers to something that is capable of being valued or having its worth ascertained; medical and dental insurance and after-tax wages constitute "tangible things of economic value" under the statutory provision; when an insured's death splits custody for dependents previously covered under a single medical or dental insurance policy, the dependents are entitled to the cost of replacing the coverage they enjoyed before the deceased's death, not merely the monetary value of the prior premiums.

Sinas, Dramis, Larkin, Graves & Waldman, PC (by *George T. Sinas*, *Joel T. Finnell*, and *Catherine E. Tucker*) for Rachel Slocum and Caroline Slocum.

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

Garan Lucow Miller, PC (by *Caryn A. Ford*) for United Services Automobile Association.

Before: METER, P.J., and JANSEN and M. J. KELLY, JJ.

METER, P.J. In these consolidated cases, the parties challenge the circuit court's orders requiring the insurers to pay certain survivor's loss benefits under the no-fault act, MCL 500.3101 *et seq.*, as well as penalty interest and attorney fees. In pertinent part, we are called upon to decide whether a deceased's dependents are entitled to the replacement cost of obtaining medical and dental benefits similar to those provided by the deceased's former employer or to the monetary value of the premiums paid by the former employer. Recognizing that the survivor's loss provisions of the no-fault

act are designed to maintain the deceased's support of his dependents following his death, we conclude that the dependents are entitled to the cost of obtaining substantially similar policies to those provided them by the deceased's former employer. Finding no errors, we affirm the circuit court's orders.

I. BACKGROUND

Robert Slocum was killed in a motorcycle crash on August 4, 2016. At the time of the crash, Robert[1] was married to Rachel Slocum. Rachel is the biological mother of one minor child, Noah, whom Robert had adopted. Robert also had two minor children—Drayke and Dayja—from his previous marriage to Amber Floyd. At the time of the crash, all three of Robert's children lived with him and Rachel. Rachel and the children depended on Robert for financial support and medical and dental insurance—among other support—which Robert received through his employer. Caroline Slocum is Robert's mother and the children's paternal grandmother; David Slocum is the children's paternal grandfather. Farm Bureau General Insurance Company and United States Automobile Association (USAA) insured vehicles involved in the fatal crash.

One week after the crash, Caroline petitioned for guardianship over Drayke and Dayja. On August 18, 2016, Rachel submitted a claim to Farm Bureau and USAA for no-fault and survivor's loss benefits for her and all three children. Rachel requested that the insurers pay all benefits to her, indicating that all three children were living with her at the time and submitting documentation supporting her request for

[1] Given that many parties in this case share a common surname, we will use first names in this opinion where helpful to avoid any confusion.

immediate payment of Robert's monthly after-tax income, $2,097.33. Rachel also claimed entitlement to lost fringe benefits, including medical and dental insurance. Farm Bureau requested that Rachel authorize the release of Robert's medical records, which she completed in late August. The insurers did not immediately pay Rachel any benefit.

On October 5, 2016, Rachel sent Farm Bureau a follow-up letter with additional documentation of Robert's wages and the medical and dental insurance previously provided by Robert's employer. Rachel also included some information regarding the cost of replacing this insurance for her and each child. The letter indicated that Rachel was not the biological mother of Drayke and Dayja, whose paternal grandparents had recently been appointed temporary guardians over them. On October 21, 2016, however, the probate court[2] granted Floyd sole legal and physical custody of Drayke and Dayja and awarded Caroline and David grandparenting time with the children.

Farm Bureau requested additional information regarding each dependent's Social Security benefits. In a November 16, 2016 letter, Rachel informed Farm Bureau that she was receiving Noah's $467 Social Security benefit, that she was not personally receiving any Social Security benefits, and that Floyd was receiving Drayke and Dayja's benefits. Rachel did not provide information regarding the amount of Drayke and Dayja's Social Security benefits.

In January 2017, Rachel's counsel e-mailed Farm Bureau additional documentation pertaining to Rachel's appointment as personal representative of

[2] The same judge presided over the custody dispute and the instant insurance dispute.

Robert's estate. The e-mails indicate that Drayke and Dayja were currently in Caroline and David's custody. Approximately three weeks later, on February 13, 2017, Farm Bureau filed a complaint for declaratory relief, asking the circuit court for a determination of the proper payees of the survivor's loss benefits and how to distribute the benefits among Robert's dependents. The complaint identified Floyd as Drayke and Dayja's next friend.

Farm Bureau acknowledged that it was responsible for paying survivor's loss benefits under MCL 500.3108 and agreed that Rachel provided sufficient proof to determine after-tax income and replacement-services benefits. Farm Bureau alleged, however, that Rachel did not provide proof of Robert's employer's contribution to the medical and dental insurance policies covering Robert and his four dependents or adequate proof of the amount of Social Security benefits Robert's dependents' received. Rachel later filed a complaint against Farm Bureau and USAA. Rachel alleged that Farm Bureau and USAA failed to pay each dependent the survivor's loss benefits and requested penalty interest and reasonable attorney fees connected to the refusal. The two actions were consolidated by the parties' agreement.

In June 2017, Floyd's attorney contacted counsel for Farm Bureau, indicating that Floyd had been granted custody of Drayke and Dayja that month. Floyd was encouraged to enter her appearance and participate in the case, but did not do so. In July 2017, the probate court appointed Caroline as Drayke's and Dayja's conservator. Eventually, a default judgment was entered against Floyd, and Caroline was appointed next friend for Drayke and Dayja in October 2017. That same month, by Farm Bureau and USAA's stipulation, the circuit court ordered that each insurer was in equal

priority to pay any survivor's loss benefits owed to Robert's four dependents.

As of late October 2017, however, the insurers claimed that they still did not know how to apportion the survivor's loss benefits or who to pay the benefit to because Caroline had not yet filed her appearance. The insurers asked the circuit court to allow them to pay the total amounts owed to the trial court until the proper payees and apportionment could be determined. In early November, Rachel's counsel entered his appearance as Caroline's attorney and filed a response proposing an apportionment of the wage-loss benefits between the four dependents and asking the trial court to order the insurers to pay the amount necessary for the dependents to obtain equivalent policies. The insurers disagreed, arguing that they were required to pay only the amount Robert's previous employer contributed to the medical and dental insurance policies, not the cost to replace the policies. The circuit court ordered the insurers to pay the amounts that were not disputed to the court pending final resolution of the dispute.

Subsequently, Rachel and Caroline moved for partial summary disposition, arguing that they were entitled to statutory penalty interest and attorney fees on the overdue wage-loss benefits. Farm Bureau responded that while it did not dispute its liability for survivor's loss benefits, it should not be liable for statutory interest or attorney fees because it did not know what benefits to pay to which parties, a question that remained unanswered to date. For its part, USAA argued that it should not be liable for statutory interest or attorney fees because Farm Bureau was the lead insurer and because questions still existed regarding what benefits to pay which parties.

In December 2017, the circuit court apportioned the money the insurers had previously paid to the trial court pursuant to its November 2017 order, with $4,000 in replacement-services benefits and $7,345.38 in lost after-tax wages going to Rachel and $793.38 of lost after-tax wages going to each of the three children. In January 2018, the circuit court addressed the parties' arguments regarding medical and dental insurance, penalty interest, and attorney fees.

The circuit court determined that the custody issue, which arose after Rachel submitted the initial claim for benefits, raised a question about who should have been paid benefits on behalf of Drayke and Dayja, so the trial court limited the award of penalty interest to the first undisputed payment owed in the amount of $2,097.33. The circuit court agreed with the insurers that "the custody matter complicated this case greatly" but commented that the custody issue did not arise until after the original claim was made. The circuit court concluded that Farm Bureau was liable for reasonable attorney fees incurred by Rachel in connection with the initial delayed payment only.

Regarding medical and dental benefits, the circuit court noted that the custody dispute and the procurement of separate policies were the result of the deceased's death and that only one medical and one dental policy would have been necessary had the crash not occurred. The circuit court concluded that the "contributions of tangible things of economic value" that each dependent received from Robert were the actual medical and dental benefits, not the premiums paid for those benefits. (Emphasis omitted.) Accordingly, the circuit court found that the insurers were liable to each dependent for the "replacement cost or expense" of "substantially similar" medical and dental benefits to those they received from Robert.

Farm Bureau, Rachel, and Caroline moved for reconsideration of the circuit court's orders. This appeal followed the circuit court's denial of those motions.

II. ANALYSIS

"The goal of the no-fault insurance system [is] to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). The no-fault act designates the beneficiaries of personal protection insurance:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:
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> * * *
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> (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse. [MCL 500.3112.][3]

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[3] The Legislature amended many provisions of the no-fault act through the adoption of 2019 PA 21, effective June 11, 2019. See MCL

Survivor's loss benefits payable to a deceased insured's dependents include

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

Accordingly, survivor's loss benefits have two components: "(1) economic loss . . . , which is the loss of contributions of tangible things of economic value, not including services, and (2) replacement services costs . . . , which are the expenses, not exceeding $20 a day, reasonably incurred in replacing ordinary and necessary services." *Wood v Auto-Owners Ins Co*, 469 Mich 401; 404; 668 NW2d 353 (2003). "[T]he phrase 'tangible things of economic value' refers to *something* that is capable of being valued or having its worth ascertained." *Scugoza v Metro Direct Prop & Cas Ins Co*, 316 Mich App 218, 224; 891 NW2d 274 (2016).

In this case, the parties agree that Robert's medical and dental insurance and after-tax wages constitute "tangible things of economic value" within the meaning of MCL 500.3108(1). The parties dispute, however, how the insurers were to compensate Robert's dependents for their loss of his medical and dental benefits and whether the insurers unjustifiably delayed in compen-

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500.3112, MCL 500.3142, and MCL 500.3148. Because the changes to the provisions discussed in this opinion do not affect our analysis, the statutory language quoted is that in effect before the 2019 changes.

sating the dependents for Robert's lost wages. We address each argument in turn.

A. MEDICAL AND DENTAL BENEFITS

The insurers in this case do not dispute that Robert's dependents were entitled to compensation for lost medical and dental benefits provided by Robert's former employer. The insurers argue, however, that the trial court erred by awarding the dependents the cost of procuring similar medical and dental policies, i.e., the replacement cost of those policies. According to the insurers, MCL 500.3108 entitled the dependents only to the amount Robert's employer actually contributed to the medical and dental policies, i.e., the prior financial outlay for those benefits.

"The primary rule of statutory construction is to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, it is generally applied as written." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 482; 673 NW2d 739 (2003). "Given the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (quotation marks and citations omitted).

As already noted, survivor's loss benefits payable to a deceased insured's dependents include "contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death . . . ." MCL 500.3108(1). The insurers argue that our Supreme Court's opinion in

Miller v State Farm Mut Auto Ins Co, 410 Mich 538; 302 NW2d 537 (1981), entitles dependents only to the monetary cost of the insurance policies, in the amount paid by the deceased's former employer. In the context of deciding whether a survivor's loss benefit included the deceased's gross or after-tax wages, the *Miller* court explained that "the 'tangible things of economic value' which many persons contribute to the support of their dependents include hospital and medical insurance benefits, disability coverage, pensions, investment income, annuity income and other benefits." *Id.* at 557. Our Supreme Court noted that by using the broader phrasing of "contributions of tangible things of economic value," the Legislature intended to include "benefits derived for family support from other and different sources" beyond wages and salary. *Id.* In other words, "[t]he dollar value of such items as employer-provided health insurance coverage, pensions, disability benefits, and other tangible things of economic value that are lost to the surviving dependents by reasons of the insured's death must be taken into account" when determining the survivor's loss benefit. *Id.* at 561.

The parties also discuss this Court's ruling in *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172; 617 NW2d 735 (2000). The *Gauntlett* plaintiff was a minor whose mother had died after a car crash. *Id.* at 174. While living, the plaintiff's mother derived her income solely as the beneficiary of a trust, and the plaintiff became the sole beneficiary of that trust after his mother died. *Id.* The insurer refused to pay the plaintiff a survivor's loss benefit, arguing that the plaintiff did not demonstrate a loss when he continued to receive payments from the trust. *Id.* The plaintiff argued that he suffered a loss in investment income when "the trust corpus was decreased because of estate

and inheritance taxes, funeral expenses, and bequests[.]" *Id*. The trial court ruled that "the measure of loss was the decrease in the income-producing assets and not the actual trust disbursements." *Id*. at 176. This Court disagreed because the "plaintiff would not have received these funds if his mother had lived because the trust would have continued in her name." *Id*. at 185. This Court ruled that the difference between the amount of "support" the plaintiff had received from the trust before and after his mother's death was the proper measure of the plaintiff's loss, not the change to the trust corpus. *Id*. at 186.

These cases do not directly address the issue at hand. While *Miller* establishes that MCL 500.3108 entitles survivors to fringe benefits, including the value of medical and dental benefits, it does not address how to determine the monetary value of these benefits. Rather, in *Miller*, the plaintiffs submitted no evidence beyond documentation of the deceased's wages, so our Supreme Court concluded that the trial court did not err by limiting the calculated benefit to wages. *Miller*, 410 Mich at 560-562. For its part, the factual situation in *Gauntlett* is unique; the difficulty in comparing a trust corpus to employer-provided insurance is facially apparent.

Yet although these cases do not directly address the issue here, they are helpful to the extent that they clarify that the central question in any MCL 500.3108 analysis is what the dependents would have received if the deceased had not died. The goal of the survivor's loss provision is to maintain the level of support the survivor received from the deceased, not to maintain the finances sustaining that support. It is noteworthy that the Legislature chose to provide compensation for "contributions of tangible *things* of economic value . . . that dependents . . . would have received for support during

their dependency . . . ." MCL 500.3108(1) (emphasis added). Had the Legislature intended to continue only the previous financial outlays through the survivor's loss benefit, rather than the resulting *thing*s those outlays contribute to the dependent's support, it would have stated as much.[4]

In this case, the tangible *thing* of economic value was the dependents' medical and dental insurance, not the premiums paid for the insurance by Robert's employer. If Robert had lived and continued working, his dependents would have continued to receive medical and dental insurance coverage through Robert's employer. It is particularly noteworthy that the increased cost of insurance was a result of Robert's death; had Robert not been involved in the crash, the children would have remained in his care and would have been supported by the same insurance policies. Because the monetary value of the precrash premium would have been insufficient to maintain Robert's dependents' level of support after his death, the circuit court properly concluded that the insurers were liable for the cost of coverage substantially similar to what Robert's dependents received before Robert died.[5]

B. PENALTY INTEREST AND ATTORNEY FEES

The parties do not dispute that Robert's dependents were entitled to compensation for lost after-tax income. Rather, they dispute whether and when Farm Bureau

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[4] That the maintenance of support is the central object of MCL 500.3108 is also made evident by the fact that the survivor's benefit is offset by the contribution made to the dependent's support by Social Security programs. See *Wood*, 469 Mich at 404-406. While the total amount of support remains the same, it is maintained by a conglomerate of contributors following the deceased's death.

[5] The insurers argue that this resolution doubly compensates Robert's dependents because Robert's contribution to their insurance coverage

received reasonable proof of the fact and the amount of the loss sustained. The dependents argue that they are entitled to statutory interest and attorney fees on the entirety of the refused payments; Farm Bureau avers that no award of statutory interest or attorney fees was warranted.[6] We agree with the circuit court that Rachel was entitled to statutory interest and attorney fees in relation to the first requested payment but that the dependents were not entitled to statutory interest and attorney fees in relation to the remainder of the unpaid benefits.

The no-fault act provides for interest on overdue benefits as follows:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. . . .
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> (3) An overdue payment bears simple interest at the rate of 12% per annum. [MCL 500.3142.]

The penalty-interest provision "is intended to penalize an insurer that is dilatory in paying a claim." *Williams*

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when he was alive came out of his wages, for which his dependents are also receiving compensation. Robert's earnings statements show, however, that his contribution to insurance came out of his pretax income. Because the wage-loss provided by the insurers only compensates Robert's dependents for the loss of Robert's after-tax wages, there is no double compensation.

[6] USAA did not address this issue in its appellate brief.

v AAA Mich, 250 Mich App 249, 265; 646 NW2d 476 (2002). "Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Id*. In addition to penalty interest, the no-fault act provides for payment of attorney fees for an unjustified refusal:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1).]

Attorney fees are not warranted when the benefits "were reasonably in dispute, or, stated slightly differently, benefits [were] not yet overdue." *Moore v Secura Ins*, 482 Mich 507, 519; 759 NW2d 833 (2008). "[A] delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999) (citation omitted). The determinative question "is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008).

The dependents argue that they are entitled to statutory interest and attorney fees on the entirety of the delayed payments. We disagree. In her initial

application for lost after-tax income, Rachel provided proof of the amount of lost wages, $2,097.33, and supported this amount with Robert's last two earnings statements and his tax returns. Rachel also indicated that all three children were living with her at the time. Farm Bureau does not argue that Rachel failed to provide adequate proof of the amount of loss; rather, Farm Bureau argues that it could not reasonably determine to whom it was to pay the benefit because, as indicated on the application, the children were too close in age to be Rachel's biological children. The no-fault act, however, does not require the recipient of insurance disbursements to be the children's biological parent. As noted previously, "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person or, in case of *his* death, to or for the benefit of *his* dependents." MCL 500.3112 (emphasis added). The benefit is payable to the surviving spouse of the deceased provided only that the deceased's "dependent children [are] living with the spouse." MCL 500.3112(b).

Accordingly, the fact that a question existed regarding which children were Rachel's biological children was not sufficient, on its own, to deny her payment of the benefit. The relevant question, rather, was whether the children were living with Rachel during the period relevant to the request. Regarding the first application for benefits, Farm Bureau has not cited any facts that would create a question whether the children were living with Rachel at that time. Indeed, the parties do not dispute that the children were actually living with Rachel on September 17, 2016, at which time the 30-day investigatory deadline expired and the first benefit became due. As recognized by the circuit court, the custody dispute did not arise until *after* the first benefit was due. Accordingly, we agree with the circuit

court that Rachel was entitled to statutory interest for Farm Bureau's failure to timely pay the first requested benefit and to attorney fees in relation to this first refusal.

As for the remainder of the benefit, however, we agree with Farm Bureau that the insurers did not receive reasonable proof of the proper payees and the amount owed to each dependent. Beginning with Rachel's October 5, 2016 acknowledgment that Drayke and Dayja were not her children and were not living with her and continuing throughout the custody dispute and the initiation of this case, substantial questions surrounded Drayke and Dayja's legal guardian and living arrangements. Indeed, the insurers were not informed that they should pay Drayke and Dayja's benefits to Caroline until after the commencement of this suit.

Moreover, the economic-loss component of survivor's loss benefits must be offset by Social Security benefits. *Wood*, 469 Mich at 404-406. Despite requesting benefit information for all three children, the insurers did not receive information regarding Drayke and Dayja's Social Security disbursements until discovery in this case. Therefore, the insurers could not reasonably determine how to apportion the wage-loss benefit between Rachel and the three children before the commencement of this suit.

Accordingly, because questions existed regarding who were the children's proper payees and how to apportion benefits between the dependents, we agree with the circuit court that the insurers were not required to pay penalty interest on the remaining requested payments. Additionally, because the insurers did not unjustifiably refuse the remaining requested payments, we conclude that the circuit court

did not err by limiting recovery of attorney fees to those expended by counsel in relation to payment of the first requested wage-loss benefit.[7]

III. CONCLUSION

The survivor's loss provisions of the no-fault act are designed to maintain the support an insured's dependents received before a fatal crash. When an insured's death splits custody for dependents previously covered under a single medical or dental insurance policy, the dependents are entitled to the cost of replacing the coverage they enjoyed before the deceased's death, not merely the monetary value of the prior premiums. For the reasons stated in this opinion, we affirm the circuit court's orders awarding Robert's dependents the cost of obtaining substantially similar medical and dental benefits to those that they had received from Robert's employer and awarding Rachel statutory interest and attorney fees in connection with the insurers' delay in paying the first requested wage-loss benefit.

JANSEN and M. J. KELLY, JJ., concurred with METER, P.J.

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[7] We disagree with Rachel that she is entitled to attorney fees on the entire case because separating fees would be "a logistical nightmare." Attorneys are required to keep regular, itemized records of the hours expended on a case. Rachel has not shown that it is impracticable to distinguish between services rendered to recover the first requested payment and those provided for other purposes or to apportion payment for services rendered for multiple purposes. We note that the initial unjustified delay makes up the minority of the delayed payments in this case and that granting Rachel attorney fees on the entire case would effectively give her a "windfall" when the majority of delays were not unjustified.

PEOPLE v MORRISON

Docket No. 344531. Submitted June 4, 2019, at Lansing. Decided June 18, 2019, at 9:10 a.m.

Stanton W. Morrison was charged in the Jackson Circuit Court with possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and possession of methamphetamine analogues, MCL 333.7403(2)(b)(*ii*). Defendant had overdosed on drugs in his mother's home, and his mother called the police. Police later executed a search warrant for defendant's bedroom and found 0.44 grams of MDMA (commonly known as ecstasy), 3.53 grams of a synthetic opioid called U-47700, and 369 pills of Xanax. Defendant was charged with possession of methamphetamine and methamphetamine analogues, but he was not charged with possession of U-47700 because it is not a controlled substance in Michigan. Defendant moved to dismiss the charges on the basis of the Good Samaritan law, MCL 333.7403(3)(a). The prosecution argued that MCL 333.7403(3)(a) did not apply because the amount of Xanax found in defendant's room far exceeded an amount "sufficient only for personal use." The trial court, Thomas D. Wilson, J., held a hearing on defendant's motion and entered an order dismissing the charges, reasoning that MCL 333.7403(3)(a) applied because it was sound public policy.

The Court of Appeals *held*:

When interpreting statutory language, a court may not look to the statute's purpose or its public-policy objectives unless the statutory language is ambiguous. MCL 333.7403(1) provides, in relevant part, that a person shall not knowingly or intentionally possess controlled substances or their analogues. However, under MCL 333.7403(3)(a), an individual is not in violation of MCL 333.7403(1) when that individual seeks medical assistance for himself or herself or requires medical assistance and is presented for assistance by another individual if he or she is incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation is obtained as a result of the individual's seeking or

being presented for medical assistance. In this case, the trial court failed to engage in any statutory interpretation; the sole basis for the trial court's decision was the public policy behind the Good Samaritan law, namely, the priority of saving lives over the criminal prosecution of illegal drug users. Accordingly, the trial court erred when it dismissed the charges against defendant without finding that the amount of Xanax he possessed was an amount sufficient only for his personal use. To determine whether defendant possessed Xanax in an "amount sufficient only for personal use" required a factual determination of what amount a specific person regularly takes. However, based on the trial court record at the time the motion was heard, the evidence was insufficient to make that determination. At that time, the record consisted only of the prosecution's opinion that defendant had more Xanax than was sufficient for personal use; the prosecution did not put forth any evidence about what "personal use" typically looks like for a Xanax user, and defendant did not put forth any evidence about his drug habits or his personal Xanax use. Therefore, even if the trial court had applied the statute properly, there was no evidence on which it could base its findings.

Reversed and remanded.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

The Zalewski Law Firm (by *Paul J. Zalewski*) for defendant.

Before: METER, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. The prosecution appeals as of right the trial court's order granting defendant's motion to dismiss charges of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and possession of methamphetamine analogues, MCL 333.7403(2)(b)(*ii*). We reverse and remand.

The prosecution argues that the trial court erred when it granted defendant's motion to dismiss the

charges pursuant to the "Good Samaritan law," MCL 333.7403(3)(a), because the court relied on public policy supporting the law, rather than statutory interpretation or findings of fact, and the amount of drugs that defendant possessed was in excess of an amount "sufficient only for personal use." Because the trial court failed to consider the statutory language, we agree that the trial court erred by dismissing the charges.

In January 2017, defendant's mother called the police because defendant overdosed on drugs. When law enforcement and emergency medical services arrived, defendant was unconscious and unresponsive. Defendant was transported to the hospital and tested positive for amphetamines, benzodiazepines, cannabinoids, and opiates. He had acute respiratory failure, and he required intubation and mechanical ventilation. He was discharged from the hospital four days later. When the police executed a search warrant for defendant's bedroom, they found 0.44 grams of MDMA (commonly known as ecstasy), 3.53 grams of a synthetic opioid called U-47700, and 369 pills of Xanax. Defendant was charged with possession of methamphetamine (MDMA) and methamphetamine analogues (Xanax) in January 2018. He was not charged with possession of U-47700 because it is not a controlled substance in Michigan. Defendant was arrested in February 2018.

In June 2018, defendant moved to dismiss the charges on the basis of the Good Samaritan law, MCL 333.7403(3)(a). The prosecution conceded the factual allegations underlying defendant's arrest but argued that the Good Samaritan law did not apply because the amount of Xanax found in defendant's room far exceeded an amount "sufficient only for personal use."

The prosecution did not support its response to defendant's motion with affidavits or other documentary evidence. The court held a hearing on defendant's motion and merely provided on the record:

> And if [defendant's] mother hadn't called then we'd have mom in here on charges. And, we do want to encourage people to call.

The trial court granted defendant's motion and entered an order dismissing the charges.

This Court reviews a trial court's decision on a motion to dismiss charges against a criminal defendant for an abuse of discretion. *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). An abuse of discretion occurs when the trial court's decision "falls outside the range of principled outcomes." *Id*. "Whether a defendant's conduct falls within the scope of a penal statute is a question of statutory interpretation that is reviewed de novo." *People v Rea*, 500 Mich 422, 427; 902 NW2d 362 (2017).

A person shall not knowingly or intentionally possess controlled substances or their analogues. MCL 333.7403(1). However, in certain circumstances, if an individual overdoses on a controlled substance, that individual may not be in violation of the statute. As provided in the Good Samaritan law:

> An individual who seeks medical assistance for himself or herself or who requires medical assistance and is presented for assistance by another individual if he or she is incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in *an amount sufficient only for personal use* and the evidence of his or her violation of this section is obtained as a result of the

> individual's seeking or being presented for medical assistance. [MCL 333.7403(3)(a) (emphasis added).]

When interpreting a statute, a court's goal is to give effect to the Legislature's intent by first looking to the plain language of the statute. *People v Lowe*, 484 Mich 718, 721-722; 733 NW2d 1 (2009). If the statutory language is unambiguous, the court must apply the language as written, and further analysis is neither required nor permitted. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). A court must presume that each word has some meaning and should avoid constructions that render a part of the statute "surplusage or nugatory." *Id*. at 285. A court may not look to the statute's purpose or its public-policy objectives unless the statutory language is ambiguous or unclear. *People v Pinkney*, 501 Mich 259, 272; 912 NW2d 535 (2018). When a court looks to public policy without first analyzing the plain language, the court " 'runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language.' " *Id*., quoting *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017).

There is no caselaw interpreting or applying the Good Samaritan law. Defendant relies on *People v Baham*, 321 Mich App 228; 909 NW2d 836 (2017), a case in which this Court interpreted a similar personal-use exception regarding the manufacture of methamphetamine. This Court considered a similar question in 1987, but in the context of an individual who was growing marijuana. *People v Pearson*, 157 Mich App 68, 72; 403 NW2d 498 (1987).[1] In both cases,

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[1] Although not binding authority, decisions of this Court before November 1, 1990, may be persuasive. MCR 7.215(J)(1); *People v Vandenberg*, 307 Mich App 57, 67 n 2; 859 NW2d 229 (2014).

the Court held that a personal-use exception applies only to the preparation and compounding of a controlled substance already in existence, not the growth or manufacture of new controlled substances. *Baham*, 321 Mich App at 242-243; *Pearson*, 157 Mich App at 72. The Court did not engage in a discussion of what an "amount sufficient only for personal use" might be in either case. Therefore, neither case is directly applicable to the question at hand.

To determine whether defendant possessed Xanax in an "amount sufficient only for personal use" pursuant to MCL 333.7403(3)(a), the court must first look at the plain language of the statute. *Black's Law Dictionary* (10th ed) defines "personal" as "**1.** Of or affecting a person . . . . **2.** Of or constituting personal property." The relevant *Black's Law Dictionary* definitions of "use" are "**6.** To take (an amount of something) from a supply . . . . **9.** To regularly take; to partake of (drugs, tobacco, etc.)." *Id*.

Considering these definitions, an "amount sufficient only for personal use" requires a factual determination of what amount a specific person regularly takes. This requires a case-by-case application of the language based on each individual defendant's personal-use habits. If a defendant possesses an amount of a controlled substance that he or she would regularly take, the Good Samaritan law offers the defendant protection from prosecution. However, if a defendant possesses an amount of a controlled substance larger than an amount he or she would regularly consume, the Good Samaritan law offers the defendant no protection. This is consistent with this Court's holding that a defendant's intent to deliver drugs may be inferred from the quantity of drugs in his or her possession and the way the drugs are packaged. *People v McGhee*, 268

Mich App 600, 611; 709 NW2d 595 (2005). See also *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992) (holding that intent to deliver may be inferred from the quantity of the narcotics, packaging, and other circumstantial evidence).

The burden is on defendant to establish as an affirmative defense that the exemption to a criminal statute provided in the Good Samaritan law applies by presenting prima facie evidence of the elements of the defense. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998); *People v Lemons*, 454 Mich 234, 248; 562 NW2d 447 (1997). Whether a defendant establishes an affirmative defense is typically a question for the jury. *People v Waltonen*, 272 Mich App 678, 690 n 5; 728 NW2d 881 (2006). However, if the defendant fails to establish an element of the defense, the trial court cannot present the defense to the jury for consideration and it becomes a question of law for the court. See *Crawford*, 232 Mich App at 619 ("A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense.").

In this case, the trial court did not refer to the relevant statute or engage in any statutory interpretation. The trial court did not refer to the language of the Good Samaritan law, nor did it make any findings of fact regarding whether defendant was in possession of an amount of Xanax "sufficient only for personal use." MCL 333.7403(3)(a). Admittedly, there was very little evidence before the trial court; however, the trial court failed to refer to any of the evidence before it. Rather, the trial court relied on the public policy behind the Good Samaritan law, namely, the priority of saving lives over the criminal prosecution of illegal

drug users. This was the sole basis for the trial court's decision. The court stated that it did not want to deter people from seeking medical assistance, as defendant's mother did. The court's actions are prohibited by *Pinkney* because the court allowed public policy, rather than plain statutory language, to guide its decision-making. *Pinkney*, 501 Mich at 272. Therefore, the trial court erred when it dismissed the charges against defendant without finding that the amount of Xanax he possessed was an amount sufficient only for his personal use. *Id*. It follows that on remand, the question whether defendant possessed an amount of Xanax "sufficient only for personal use" should be posed to the jury as a subjective question of fact if defendant presents a prima facie case of the affirmative defense. *Crawford*, 232 Mich App at 619. If defendant fails to meet this burden, the issue is a question of law for the court to decide.

Additionally, based on the record before the trial court at the time the motion was heard, the evidence was insufficient to determine whether defendant possessed an amount of Xanax "sufficient only for personal use." MCL 333.7403(3)(a). At that time, the record consisted only of the prosecution's opinion that defendant had more Xanax than was sufficient for personal use. The prosecution did not put forth any evidence about what "personal use" typically looks like for a Xanax user, and defendant did not put forth any evidence about his drug habits or his personal Xanax use. There was no record evidence available to determine whether the amount of Xanax recovered from defendant's bedroom was an amount of Xanax that defendant would use personally. Therefore, even if the trial court had applied the statute properly, there was no evidence on which it could base its findings.

The parties attached a number of exhibits and affidavits regarding this issue to pleadings before this Court. However, to consider evidence presented on appeal that the parties failed to present to the trial court would be an impermissible expansion of the lower-court record. See MCR 7.210(A) ("Appeals to the Court of Appeals are heard on the original record."); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) ("[I]t is impermissible to expand the record on appeal."). On remand, the trial court must determine whether defendant established the affirmative defense for the issue to go to the jury or whether the evidence establishes that no reasonable juror could conclude that 369 pills of Xanax were "sufficient only for personal use," in which case the issue is a question of law for the court. The court should allow the parties to present evidence on this issue to develop the record. Additionally, the court may consider on remand other evidence, direct and circumstantial, that indicates possession with intent to deliver, *McGhee*, 268 Mich App at 611; *Wolfe*, 440 Mich at 524, such as the quantity of drugs, plastic bags, or other packaging; large amounts of money; multiple cellular telephones; a scale, etc.

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

METER, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

CAN IV PACKARD SQUARE, LLC v PACKARD SQUARE, LLC

Docket No. 346218. Submitted June 5, 2019, at Lansing. Decided June 18, 2019, at 9:20 a.m. Leave to appeal denied 505 Mich 1001 (2020).

Can IV Packard Square, LLC (Can IV) brought an action in the Washtenaw Circuit Court against Packard Square, LLC (Packard Square), alleging that Packard Square was in default on a loan agreement it had with Can IV and seeking a judicial foreclosure on a mortgage securing the loan. The trial court appointed a receiver for the property. Can IV moved for summary disposition. The trial court, Archie C. Brown, J., granted the motion and entered a judgment of foreclosure authorizing the sale of the property at a sheriff's sale. The foreclosure sale was scheduled for November 15, 2018. Packard Square moved for reconsideration and moved to stay the foreclosure sale and the enforcement of the foreclosure judgment. The court denied both motions. Packard Square appealed. On November 14, 2018—one day before the property was to be sold at the sheriff's sale—Packard Square moved in the Court of Appeals to stay the judicial foreclosure sale. Packard Square did not move for immediate consideration, and the Court of Appeals, BECKERING, P.J., and MARKEY and BOONSTRA, JJ., denied the motion for a stay in an unpublished order entered on November 30, 2018. On December 18, 2018, Packard Square moved to stay the effect of MCL 600.3410 during the pendency of its appeal or, alternatively, to expedite its appeal. Packard Square also moved for immediate consideration. However, because Packard Square failed to cure defects with its December 18, 2018 motion, the Court of Appeals entered an unpublished order striking the motion on January 8, 2019. Packard Square then moved to expedite its appeal, and the Court of Appeals granted the motion. On May 10, 2019, Packard Square moved to stay transfer of the property. The Court of Appeals once again entered an unpublished order striking the motion because Packard Square failed to cure defects with it.

The Court of Appeals *held*:

MCL 600.3140(1), which sets forth a statutory redemption period for a mortgagor who has lost his or her property during a judicial foreclosure, provides, in pertinent part, that a mortgagor may redeem the entire premises sold as ordered under

MCL 600.3115 by paying, within six months after the sale, the amount that was bid with interest from the date of the sale at the interest rate provided for by the mortgage. MCL 600.3130(1), which is also relevant to judicial foreclosures, provides that if the property is not redeemed during the redemption period, the deed shall become operative as to all parcels not redeemed and shall vest in the grantee named in the deed, his heirs, or assigns all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage or at any time thereafter. With regard to foreclosures by advertisement, *Bryan v JPMorgan Chase Bank*, 304 Mich App 708 (2014), held that a mortgagor's failure to avail itself of the right of redemption provided in MCL 600.3236 extinguishes all the mortgagor's rights in and to the property. Both MCL 600.3130(1) and MCL 600.3236 provide that a mortgagor has a set period of time to redeem the property and that the failure to do so would result in the extinguishment of the mortgagor's rights in and to the property. Because identical language used in various provisions of the same act should be construed identically, the *Bryan* Court's holding applied in this case; the distinction between judicial foreclosures and foreclosures by advertisement was irrelevant. Accordingly, under MCL 600.3130(1) and MCL 600.3140(1), if a mortgagor fails to avail itself of the right of redemption, all the mortgagor's rights in and to the property are extinguished. In this case, because Packard Square did not redeem the property in the six-month redemption period set forth in MCL 600.3140(1), pursuant to MCL 600.3130(1), the deed Can IV received at the sheriff's sale became operative and all Packard Square's rights in and to the property were extinguished. Accordingly, Packard Square could not be granted any relief on appeal.

Dismissed as moot.

PROPERTY — MORTGAGES — JUDICIAL FORECLOSURE — FAILURE TO REDEEM PROPERTY.

MCL 600.3140(1) sets forth a statutory redemption period for a mortgagor who has lost property because of a judicial foreclosure; MCL 600.3130(1) addresses the consequences of a mortgagor's failure to redeem the property within the MCL 600.3140(1) redemption period; a mortgagor's failure to redeem a property within the time limit provided by MCL 600.3140(1) results in the extinguishment of all the mortgagor's rights in and to the foreclosed property.

Dickinson Wright PLLC (by *J. Benjamin Dolan*, *Phillip J. DeRosier*, and *Ariana D. Pellegrino*) for Can IV Packard Square, LLC.

Mark Granzotto, PC (by *Mark Granzotto*) for Packard Square, LLC.

Before: METER, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. Defendant-appellant, Packard Square, LLC (Packard Square), appeals as of right a judgment of foreclosure in this action filed by plaintiff, Can IV Packard Square, LLC (Can IV), to foreclose a mortgage on a mixed-use commercial development construction project with respect to which Packard Square was the borrower and Can IV was the lender. Although Packard Square challenges the merits of the trial court's decision, we are constrained to dismiss this appeal as moot because Packard Square failed to redeem the property as provided in MCL 600.3140.

I. PROCEDURAL HISTORY

In October 2016, Can IV filed suit against Packard Square, alleging that Packard Square was in default of a loan agreement it had with Can IV and seeking a judicial foreclosure on a mortgage securing the loan. Shortly after Can IV filed its claim, on a motion from Can IV, the trial court appointed a receiver for the property.[1] The case proceeded with discovery, and Can IV eventually moved for summary disposition, which the trial court granted on September 20, 2018. The court entered a judgment of foreclosure authorizing the sale of the property at a sheriff's sale.

The foreclosure sale was scheduled for November 15, 2018. On October 15, 2018, Packard Square filed a

[1] In a prior appeal, Packard Square challenged the trial court order appointing a receiver for the property. This Court affirmed the trial court's decision. See *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket No. 335512), p 11.

motion to stay the foreclosure sale and the enforcement of the foreclosure judgment entered against it. Packard Square asserted that there was good cause to grant a stay because the trial court erred by granting summary disposition in Can IV's favor and entering a judgment of foreclosure. Packard Square also contended that a stay was warranted because the trial court failed to make any specific ruling on Packard Square's affirmative defenses and its counterclaims. Finally, Packard Square asserted that the failure to stay the proceedings "pending reconsideration and appeal" would result in "irreparable harm which will be caused should the project be sold at a Sheriff's Sale prior [to] a final ruling . . . ." The trial court denied the motion on October 16, 2018.

Thereafter, on November 1, 2018, Packard Square filed a claim of appeal in this Court, raising challenges to the trial court's decision. On November 14, 2018—one day before the property was to be sold at the sheriff's sale—Packard Square filed a motion in this Court to stay the judicial foreclosure sale. Packard Square, however, did not file a motion for immediate consideration,[2] and the motion for a stay was denied on November 30, 2018.[3]

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[2] MCR 7.211(C)(6) provides:

> A party may file a motion for immediate consideration to expedite hearing on another motion. The motion must state facts showing why immediate consideration is required. If a copy of the motion for immediate consideration and a copy of the motion of which immediate consideration is sought are personally served under MCR 2.107(C)(1) or (2), the motions may be submitted to the court immediately on filing. If mail service is used, motions may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. The trial court or tribunal record need not be requested unless it is required as to the motion of which immediate consideration is sought.

[3] *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered November 30, 2018 (Docket No. 346218).

On December 18, 2018, Packard Square filed a motion in this Court to stay the effect of MCL 600.3140[4] during the pendency of its appeal or, alternatively, to expedite its appeal. Packard Square also filed a motion for immediate consideration. Packard Square, however, failed to cure defects with its December 18, 2018 motion, so this Court entered an order striking the motion.[5]

On January 15, 2019, Packard Square filed a motion to expedite its appeal, arguing that if a decision by this Court was not issued before May 15, 2019, the issues it was raising on appeal would "in essence, become moot." On January 22, 2019, this Court granted Packard Square's motion to expedite its appeal.[6]

On May 10, 2019, Packard Square filed a motion to stay transfer of the property. Packard Square noted that the statutory redemption period provided by MCL 600.3140(1) was set to expire on May 15, 2019, and it argued that after the redemption period expired Can IV would be free to transfer title of the property to any third party, which would result in material prejudice to Packard Square. The motion, however, was struck by this Court because Packard Square failed to cure defects with it.[7]

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[4] As will be discussed later in this opinion, MCL 600.3140(1) permits a mortgagor to redeem the property by paying the amount bid plus interest within six months of a foreclosure sale.

[5] *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered January 8, 2019 (Docket No. 346218).

[6] *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered January 22, 2019 (Docket No. 346218).

[7] *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered May 29, 2019 (Docket No. 346218).

II. EXPIRATION OF REDEMPTION PERIOD

A. STANDARD OF REVIEW

In a supplemental brief, Can IV argues that the issues raised by Packard Square on appeal are moot because the six-month redemption period in MCL 600.3140(1) expired on May 15, 2019. In response, Packard Square contends that it has standing to challenge the foreclosure proceedings. "The applicability of a legal doctrine, such as mootness, is a question of law which this Court reviews de novo." *TM v MZ*, 501 Mich 312, 315; 916 NW2d 473 (2018) (quotation marks, alterations, and citation omitted). And because "Michigan courts exist to decide actual cases and controversies," "[t]he question of mootness is a threshold issue that a court must address before it reaches the substantive issues of a case." *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019) (quotation marks and citation omitted). As a general rule, "[t]his Court does not decide moot issues." *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016). "Whether a party has standing is a question of law subject to review de novo." *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011). Issues of statutory interpretation are also reviewed de novo. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 168; 909 NW2d 38 (2017).

B. ANALYSIS

MCL 600.3140(1) sets forth a statutory redemption period for a mortgagor who has lost his or her property during a judicial foreclosure. It provides, in relevant part:

> The mortgagor . . . may redeem the entire premises sold as ordered under section 3115 by paying, within 6

> months after the sale, to the purchaser or the purchaser's personal representative or assigns, or to the register of deeds in whose office the deed of sale is deposited as provided in the court rules, for the benefit of the purchaser, the amount that was bid with interest from the date of the sale at the interest rate provided for by the mortgage. [MCL 600.3140(1).]

Also relevant to judicial foreclosures, MCL 600.3130(1) provides that if the property is not redeemed during the redemption period, "the deed shall become operative as to all parcels not redeemed, and shall vest in the grantee named in the deed, his heirs, or assigns all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage or at any time thereafter." This Court has not had occasion to determine whether a mortgagor's failure to redeem a property within the time limit provided by MCL 600.3140(1) results in the extinguishment of all the mortgagor's rights in and to the foreclosed property.

However, in *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014), this Court held that with regard to a foreclosure by advertisement, a mortgagor's failure to avail itself of the right of redemption provided in MCL 600.3236 extinguishes all the mortgagor's rights in and to the property. In *Bryan*, the defendant argued that the plaintiff lacked standing to bring an action challenging a foreclosure by advertisement because the redemption period in MCL 600.3240 had expired without plaintiff attempting to redeem the property. *Id*. This Court agreed, reasoning:

> Pursuant to MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit, which here was six months. "Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such

deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . ." MCL 600.3236. If a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942).

We have reached this conclusion in a number of unpublished cases and, while unpublished cases are not precedentially binding, MCR 7.215(C)(1), we find the analysis and reasoning in each of the following cases to be compelling. Accordingly, we adopt their reasoning as our own. See *Overton v Mtg Electronic Registration Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950), p 2 ("The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity. Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished.") (citation and quotation marks omitted); *Hardwick v HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191), p 2 ("Plaintiffs lost all interest in the subject property when the redemption period expired . . . . Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period. . . . Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished."); *BAC Home Loans Servicing, LP v Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048), p 4 ("[O]nce the redemption period expired, [plaintiff's] rights in and to the property were extinguished. . . . Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims chal-

> lenging the foreclosure sale."); *Awad v Gen Motors Acceptance Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692), pp 5-6 ("Although she filed suit before expiration of the redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of [plaintiff's] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing."). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim. [*Id*. at 713-715.]

On appeal, Packard Square asserts that, although *Bryan* expressly states that a mortgagor's failure to redeem the property within the redemption period results in the extinguishment of all the mortgagor's rights in and to the property, *Bryan* only addresses foreclosures by advertisement, whereas the foreclosure in this case is a judicial foreclosure. The distinction, however, is irrelevant under the circumstances. MCL 600.3240 sets forth the redemption period available to a mortgagor when a foreclosure by advertisement is conducted. MCL 600.3140(1) sets forth the redemption period available to a mortgagor when a judicial foreclosure is conducted. Significantly, both statutes allow a mortgagor to "redeem" the property by paying a requisite amount within the prescribed time limit. MCL 600.3240; MCL 600.3140(1). Furthermore, both statutes expressly address the consequences of a mortgagor's failure to redeem within the redemption period. With regard to foreclosures by advertisement, MCL 600.3236 provides, in relevant part, that "[u]nless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and

interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . .” And with regard to a judicial foreclosure, MCL 600.3130(1) provides, in relevant part, that “[u]nless the premises or any parcel of them are redeemed within the time limited for redemption the deed shall become operative as to all parcels not redeemed, and shall vest in the grantee named in the deed, his heirs, or assigns all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage or at any time thereafter.” Comparing the statutory language in MCL 600.3130(1) with the language in MCL 600.3236, it is plain that the Legislature intended that, in both circumstances, a mortgagor would have a set period of time to redeem the property and that the failure to do so would result in the extinguishment of the mortgagor’s rights in and to the property. See *Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009) (stating that identical language used in various provisions of the same act should be construed identically). Accordingly, we conclude that under MCL 600.3130(1), if a mortgagor fails to avail itself of the right of redemption, all the mortgagor’s rights in and to the property are extinguished. See *Bryan*, 304 Mich App at 713; *Piotrowski*, 302 Mich at 187.

Packard Square suggests that, because it held an interest in the property for over a decade, it clearly retains standing to challenge the foreclosure proceedings in this case. In support, it directs this Court to our Supreme Court’s decision in *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). We need not address, however, whether Packard Square has standing to challenge the trial court’s foreclosure decision. Although the *Bryan* Court determined that the plaintiff lacked standing to pursue her

claim because the statutory expiration period had expired *before* she filed her claim, see *Bryan*, 304 Mich App at 710-711, 715, it is undisputed that at the time that the action was initiated in this case, Packard Square had an interest in the property and standing to challenge the trial court's decision to enter a judgment of foreclosure. On appeal, Can IV does not argue that Packard Square does not have standing. It instead argues that because Packard Square did not redeem the property in the six-month redemption period set forth in MCL 600.3140(1), pursuant to MCL 600.3130(1), the deed Can IV received at the sheriff's sale "[became] operative as to all parcels not redeemed, and . . . vest[ed] in the grantee named in the deed, his heirs, or assigns all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage or at any time thereafter." In other words, Can IV argues that even if this Court were to conclude that Packard Square was entitled to relief, because all right, title, and interest Packard Square once held in the property has now vested in Can IV, there is no relief that this Court can grant Packard Square. We agree. Under MCL 600.3140(1) and MCL 600.3130(1), Packard Square's failure to redeem the property within the redemption period resulted in the extinguishment of all Packard Square's rights in and to the property. There remains no relief that this Court can grant it on appeal, so this appeal is moot. See *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 472; 761 NW2d 846 (2008) (stating that an issue becomes moot when an event occurs that renders it impossible for the reviewing court to grant relief).

Dismissed as moot. As the prevailing party, Can IV may tax costs under MCR 7.219(A).

METER, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

FARM BUREAU INSURANCE COMPANY v TNT EQUIPMENT, INC

Docket No. 343307. Submitted March 12, 2019, at Detroit. Decided June 20, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 1015 (2020).

Farm Bureau Insurance Company, Pioneer Mutual Insurance Company, and Hastings Mutual Insurance Company (collectively, plaintiffs) brought an action in the Sanilac Circuit Court against TNT Equipment, Inc. (TNT) and Employers Mutual Casualty Company (Employers) following a fire that occurred at a storage facility owned by TNT. At the time of the fire, Employers had issued an insurance policy to TNT. Plaintiffs' insureds owned farm equipment that was stored at the TNT facility at the time of the fire, and plaintiffs paid claims to their insureds for the damaged property. Plaintiffs sought reimbursement from Employers for the amounts they had paid to their insureds, contending that plaintiffs' insureds were entitled to coverage under Employers' policy with TNT and that plaintiffs, as subrogees, were therefore entitled to payment from Employers. Employers declined to pay plaintiffs, explaining that TNT had exercised an option under the policy directing Employers "to pay for [TNT's] customer's deductibles and verifiable uninsured losses only." Employers determined that because TNT had opted out of any other coverage, it was not obligated to pay any other amounts for damages to the farm equipment belonging to plaintiffs' insureds. Plaintiffs brought the instant lawsuit, alleging counts against TNT for breach of bailment contracts, breach of implied warranty, negligence, gross negligence, and warehouse liability. Plaintiffs also asserted claims against Employers, seeking first-party insurance benefits under Employers' policy with TNT and, alternatively, seeking benefits under the policy as third-party beneficiaries. The parties filed cross-motions for summary disposition regarding whether plaintiffs had a right to enforce the policy and claim benefits from Employers directly under the insurance policy. The trial court, Gerald M. Prill, J., granted plaintiffs summary disposition and denied Employers summary disposition, concluding that plaintiffs' insureds were entitled to the status of "additional insureds" under the policy and therefore were entitled to enforce the policy against Employers. The court thereafter denied Employers' motion for reconsideration. The

court also entered an order dismissing TNT from the case without prejudice. Employers appealed the trial court's final order dismissing TNT, challenging the earlier trial court orders granting plaintiffs summary disposition and denying Employers' motions for summary disposition and for reconsideration.

The Court of Appeals *held*:

1. An insurance policy is a contractual agreement between the insured and the insurer. Payment of benefits from one's own insurer generally is referred to as payment of first-party benefits. A first-party insured is the insured under a policy or an individual or entity directly entitled to benefits under the insured's insurance policy. In this case, TNT purchased a policy of commercial inland marine insurance from Employers. The parties did not dispute that plaintiffs' insureds were not parties to the policy between TNT and Employers or that plaintiffs' insureds were not named insureds under that policy. There was also no dispute that the policy did not expressly grant anyone other than the named insured enforcement rights. Accordingly, plaintiffs' insureds had no express contractual rights under the policy and were not entitled to first-party benefits.

2. An "additional insured" is generally defined as someone who is covered by an insurance policy but who is not the primary insured. An additional insured may or may not be specifically named in the policy. In this case, plaintiffs did not contend that the policy designated plaintiffs' insureds as "additional insureds," and plaintiffs pointed to no published Michigan authority supporting their position that they qualify as additional insureds. Accordingly, the trial court erred by finding plaintiffs, as subrogees of their insureds, to be additional insureds under the policy in question.

3. In Michigan, a person who is a nonparty to a contract may be entitled to sue to enforce the contract as a third-party beneficiary. A person is a third-party beneficiary of a contract only if the contract establishes that a promisor has undertaken a promise directly to or for that person. Only intended beneficiaries, not merely incidental beneficiaries, may sue for breach of a contract. In this case, the focus of the inquiry was whether Employers, by virtue of its agreement to insure TNT, undertook to give or to do, or to refrain from doing, something directly to or for plaintiffs' insureds within the meaning of the third-party beneficiary statute, MCL 600.1405. Although under the policy Employers promised to pay for direct physical loss of or damage to property of others, this promise was directed to TNT, not to plaintiffs' insureds. Accordingly, the policy contained no promise to directly benefit plaintiffs' insureds within the meaning of MCL 600.1405. Because the policy

did not directly promise to do or not do something for plaintiffs' insureds, plaintiffs' insureds did not rise to the status of third-party beneficiaries under the policy and therefore had no right to seek to enforce the policy between TNT and Employers.

Reversed and remanded.

Stertz & Weaver, PC (by *H. William Stertz, Jr.*) for plaintiffs.

Merry, Farnen & Ryan, PC (by *John J. Schutza* and *Michael T. Ryan*) for Employers Mutual Casualty Company.

Before: MURRAY, C.J., and GADOLA and TUKEL, JJ.

GADOLA, J. Defendant-appellant, Employers Mutual Casualty Company (Employers), appeals as of right the trial court order dismissing without prejudice defendant, TNT Equipment, Inc. (TNT), and challenges the earlier trial court orders granting plaintiffs' motion for summary disposition and denying Employers' motions for summary disposition and for reconsideration. We reverse the trial court order granting plaintiffs summary disposition and remand to the trial court for entry of summary disposition in favor of Employers.

I. FACTS

This case arises from a fire that occurred at a storage facility owned by TNT in Sandusky, Michigan, on April 5, 2016. Plaintiffs are insurance companies. The parties do not dispute that plaintiffs' insureds owned farm equipment that was stored at the TNT facility at the time of the fire and that plaintiffs, having paid claims to their insureds for the damaged farm equipment, are now subrogees of the rights of their insureds.

At the time of the fire, Employers had issued to TNT a "Commercial Inland Marine" policy of insurance that was then in effect. Plaintiffs sought reimbursement from Employers for the amounts they had paid to their insureds for the damaged farm equipment, contending that plaintiffs' insureds were entitled to coverage under Employers' policy with TNT and that plaintiffs were therefore entitled, as subrogees, to payment from Employers. Employers declined to pay plaintiffs. Employers explained that TNT had exercised an option under the policy directing Employers "to pay for their [TNT's] customer's deductibles and verifiable uninsured losses only." Employers determined that because TNT had opted out of any other coverage, it was not obligated to pay any other amounts for damages to the farm equipment belonging to plaintiffs' insureds.

Plaintiffs, as subrogees of their insureds, initiated this lawsuit, alleging counts against TNT for breach of bailment contracts, breach of implied warranty, negligence, gross negligence, and warehouse liability. Plaintiffs also asserted claims against Employers, seeking first-party insurance benefits under Employers' policy with TNT and, alternatively, seeking benefits under the policy as third-party beneficiaries. The parties filed cross-motions for summary disposition under MCR 2.116(C)(8), (9), and (10) regarding whether plaintiffs had a right to enforce the policy and claim benefits from Employers directly under the insurance policy. The trial court concluded that plaintiffs' insureds were entitled to the status of "additional insureds" under the policy and therefore were entitled to enforce the policy against Employers. The trial court then granted plaintiffs summary disposition under MCR 2.116(C)(10) while denying Employers summary disposition. The trial court thereafter denied Employers' motion for reconsideration.

The trial court also entered an order dismissing TNT from the case without prejudice.[1] Employers now appeals in this Court the trial court's final order dismissing TNT, challenging the earlier trial court orders granting plaintiffs summary disposition and denying Employers' motions for summary disposition and for reconsideration.

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). When reviewing an order granting summary disposition under MCR 2.116(C)(10), we consider all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016). Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. We also review de novo issues involving the proper interpreta-

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[1] Pursuant to the parties' stipulation, the trial court entered an order on July 13, 2017, dismissing TNT but providing that the suit against TNT would be reinstated under certain conditions. Employers appealed that order in this Court, and this Court dismissed the claim of appeal on the basis that the trial court's order was not a final order. *Farm Bureau Ins Co v TNT Equip Inc*, unpublished order of the Court of Appeals, entered August 9, 2017 (Docket No. 339457). Thereafter, the trial court vacated the July 13, 2017 order and entered a new order dismissing TNT without prejudice. Plaintiffs offer arguments relating to the propriety of the trial court's actions in vacating and entering these orders, but plaintiffs did not file a cross-appeal raising these challenges. See *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

tion of statutes and contracts. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). This Court reviews a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). A trial court abuses its discretion if it chooses an outcome outside the range of principled outcomes. *Id*.

B. FIRST-PARTY INSURED

Employers contends that the trial court erred by granting plaintiffs summary disposition because plaintiffs are not entitled to enforce the insurance policy between Employers and TNT. Employers first argues that plaintiffs' insureds were not insureds under the policy issued to TNT by Employers—and therefore lacked standing to pursue first-party benefits under the policy—and that plaintiffs, as subrogees of their insureds, likewise lack standing to seek first-party benefits under the policy. We agree.

An insurance policy, like other contracts, is an agreement between parties; a court's task is to determine what the agreement is and then give effect to the intent of the parties. *Waldan Gen Contractors, Inc v Mich Mut Ins Co*, 227 Mich App 683, 686; 577 NW2d 139 (1998). In doing so, we consider the contract as a whole and give meaning to all terms of the contract. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). We give the policy language its ordinary and plain meaning, and when policy language is clear, we are bound by the language of the policy. *Waldan*, 227 Mich App at 686.

An insurance policy is a contractual agreement between the insured and the insurer. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310;

583 NW2d 548 (1998). Payment of benefits from one's own insurer generally is referred to as payment of first-party benefits. See *Nickola v MIC Gen Ins Co*, 500 Mich 115, 127; 894 NW2d 552 (2017) ("The insured by definition is a party to the insurance contract, not a third party."). This Court has suggested that a "first-party" insured is the insured under a policy, or an individual or entity directly entitled to benefits under the insured's insurance policy. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 565; 741 NW2d 549 (2007).

In this case, TNT purchased from Employers a policy of commercial inland marine insurance.[2] The parties do not dispute that plaintiffs' insureds were not parties to the policy between TNT and Employers or that plaintiffs' insureds are not named insureds under that policy. There is also no dispute that the policy does not expressly grant anyone other than the named insured enforcement rights. Plaintiffs' insureds, therefore, had no express contractual rights under the policy and are not entitled to "first-party" benefits. The question, then, is whether plaintiffs' insureds, though not named insureds under the policy, are nonetheless entitled to seek to enforce the policy.

C. ADDITIONAL INSURED

Plaintiffs argue, and the trial court found, that plaintiffs' insureds were entitled to enforce the contract as "additional insureds" under TNT's policy with Employers. An "additional insured" is defined generally as "[s]omeone who is covered by an insurance policy but who is not the primary insured. An additional insured

[2] An inland marine insurance policy commonly is used to insure against damage to property caused during transport of the property. See *Waldan*, 227 Mich App at 686.

may, or may not, be specifically named in the policy." *Black's Law Dictionary* (11th ed), p 962. Plaintiffs in this case do not contend that the policy here designated plaintiffs' insureds as "additional insureds," and plaintiffs point to no published Michigan authority[3] supporting their position that they qualify as additional insureds absent a provision in the policy designating them as such. We therefore conclude that the trial court erred by finding plaintiffs, as subrogees of their insureds, to be additional insureds under the policy in question.

D. THIRD-PARTY BENEFICIARY

Michigan law does recognize, however, the rights of a third-party beneficiary to seek enforcement of an insurance policy. In Michigan, a person who is a nonparty to a contract may be entitled to sue to enforce the contract as a third-party beneficiary. MCL 600.1405; *Shay v Aldrich*, 487 Mich 648, 666; 790 NW2d 629 (2010). A person is a third-party beneficiary of a contract only if the contract establishes that a promisor has undertaken a promise directly to or for that person. *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999) (opinion by TAYLOR, J.). A third-party beneficiary of a contract may enforce a contract against the promisor because the

[3] In urging this designation for plaintiffs' insureds in this case, plaintiffs point to an unpublished opinion of this Court in which the plaintiff was found to be an "additional insured" in light of certain documents between the parties that designated the plaintiff as "Loss Payee and Additional Insured" under the specific policy in that case. *Mich Heritage Bank v Fed Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2004 (Docket No. 245832), pp 5-6. We note that this case is factually distinct from the unpublished case and, further, that although unpublished opinions of this Court may be viewed as instructive, they are not precedentially binding. MCR 7.215(C)(1); *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

third-party beneficiary "stands in the shoes" of the promisee. *White v Taylor Distrib Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010) (quotation marks and citation omitted). In that regard, the third-party beneficiary statute provides, in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person. [MCL 600.1405.]

To create a third-party beneficiary, a contract must "expressly contain a promise to act to benefit the third party." *White*, 289 Mich App at 734. "[T]he plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise . . . ." *Brunsell v Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002). Rather, only intended beneficiaries, not merely incidental beneficiaries, may sue for breach of a contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). We use an objective standard to determine from the language of the contract itself whether the promisor undertook to give or to do, or to refrain from doing, something directly to or for the person asserting status as a third-party beneficiary. *Brunsell*, 467 Mich at 298. In doing so, we do not focus on the subjective intent of the contracting parties but instead focus on the intent of the contracting parties as determined solely from the "form and meaning" of the contract. *Shay*, 487 Mich at 665.

Thus, the focus of the inquiry in this case is whether Employers, by virtue of its agreement to insure TNT,

undertook to give or to do, or to refrain from doing, something directly to or for plaintiffs' insureds within the meaning of the third-party beneficiary statute, MCL 600.1405. Plaintiffs argue that the coverage provisions of Employers' policy with TNT demonstrate that Employers undertook to provide plaintiffs' insureds with coverage, thereby making them intended beneficiaries:

> **A. Coverage**
>
> **1. Covered Property**, as used in this Coverage Form, means the type of property described in this Section A.1. . . .
>
> * * *
>
> **a. Coverage A — Stock, Furniture, Fixtures, Equipment and Tenants Improvements and Betterments — Business Personal Property Includes:**
>
> **(1)** Stock: We will pay for direct physical loss of or damage to stock of merchandise, including the value of your labor, materials or services furnished or arranged by you on personal property of others, consisting principally of agricultural, construction and materials handling equipment, and appliances, parts, accessories thereof, and other merchandise usual or incidental to your business of agricultural, construction and materials handling equipment dealers . . . .
>
> **(2)** Furniture, Fixtures, Equipment and Tenant's "Improvements and Betterments":
>
> We will pay for loss or damage to:
>
> **(a)** Furniture, fixtures and equipment used in your business and similar property held by you and belonging in whole or in part to others for not more than the amount for which you are liable . . . .
>
> * * *

b. Coverage B — Property of Others

We will pay for direct physical loss of or damage to property of others, which is similar to that described in **Coverage A** above, while such property is in your care, custody or control . . . .

* * *

M. Payment of Losses

Loss, if any, under this Coverage Form is payable to you for the account of all interests. You agree to make proper distribution of funds so received to other parties in interest and to hold us harmless from any and all claims for damages which may be made against us by other interests as a result of and to the extent of such payments.

The separate loss-payable endorsement defines "you" and "your" as referring to the named insured, and then states, "Any loss shall be adjusted with 'you' and shall be payable to 'you' and the loss payee described on the 'declarations' as 'your' and their interests appear." Although under the policy Employers promises to pay for direct physical loss of or damage to property of others, this promise is directed to TNT, not to plaintiffs' insureds. We also observe that Employers makes no promise to plaintiffs' insureds under the payment-of-loss provisions of the policy in this case, which include the following provisions, in pertinent part:

LOSS CONDITIONS

* * *

E. Loss Payment

* * *

3. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners,

such payments will satisfy your claim against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.

* * *

6. We will not be liable for any part of a loss that has been paid or made good by others.

F. Other Insurance

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.

2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

Plaintiffs argue that their insureds' damaged property falls under the provisions covering the property of others and that therefore their insureds are beneficiaries entitled to enforce the contract. But the coverage provisions do not articulate a promise to pay plaintiffs' insureds; rather, the provisions articulate a promise *to TNT* to pay TNT, or others on behalf of TNT, for damage to property owned by others that is in the care, custody, or control of TNT. Although the owners of damaged property may, in certain circumstances, realize a benefit from TNT having coverage for that damage, the policy contains no promise to directly benefit plaintiffs' insureds within the meaning of MCL 600.1405. "Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under [MCL

600.]1405." *Schmalfeldt*, 469 Mich at 429. Because the policy does not directly promise to do or not do something for plaintiffs' insureds, plaintiffs' insureds do not rise to the status of third-party beneficiaries under the policy and therefore have no right to seek to enforce the policy between TNT and Employers.[4]

In analyzing this question, a review of our Supreme Court's decision in *Schmalfeldt*, 469 Mich 422, is instructive. In that case, the plaintiff was injured in a bar fight and incurred extensive dental expenses. He sought payment for his dental expenses from the bar owner, who refused. The plaintiff then sought payment directly from the bar owner's insurer, which had issued a commercial liability insurance policy to the bar owner. The policy included a provision in which the insurer agreed to pay up to $5,000 for medical expenses for bodily injury incurred in the bar, regardless of fault. The bar owner, however, told the insurer that the bar did not want to invoke the medical-coverage provision of the policy in that case, and the insurer consequently denied the plaintiff's request for benefits.[5]

The plaintiff then sued the insurer directly,[6] claiming to be a third-party beneficiary under the insurance policy by virtue of the medical-benefits provision of the

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[4] In fact, the Loss Payment and Other Insurance provisions of the policy strongly suggest that Employers would not be liable to cover plaintiffs' losses in any event. The Loss Payment provision states that Employers will not be liable for any loss that has been made good by others, which has already occurred, while the Other Insurance provision states that Employers will only pay for the amount of loss or damage *in excess* of the amount due from that other insurance, whether TNT can collect on that insurance or not.

[5] In this case, as in *Schmalfeldt*, the insured party (here, TNT) chose not to invoke coverage under the policy for the damages sought by plaintiffs.

[6] The plaintiff in *Schmalfeldt* did not sue the bar owner, apparently conceding that the bar owner was not liable for any breach of duty.

policy, which the plaintiff argued enabled him to sue the insurer to enforce the terms of the contract. The trial court denied the plaintiff's motion for summary disposition, determining that the plaintiff was not a third-party beneficiary under the policy. On appeal in the civil division of that court, the trial court held, to the contrary, that the plaintiff was directly benefited under the policy and therefore was a third-party beneficiary empowered to seek to enforce the contract. This Court reversed, determining that the plaintiff was an incidental beneficiary only and thus not entitled to enforce the contract between the insurer and the bar owner. *Schmalfeldt v North Pointe Ins Co*, 252 Mich App 556; 652 NW2d 683 (2002), aff'd 469 Mich 422 (2003). Our Supreme Court affirmed, agreeing that the plaintiff was not a third-party beneficiary:

> A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise "directly" to or for that person. MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). By using the modifier "directly," the Legislature intended "to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id*. An objective standard is to be used to determine, "from the form and meaning of the contract itself," *Kammer Asphalt v East China Twp*, 443 Mich 176, 189; 504 NW2d 635 (1993) (citation omitted), whether the promisor undertook "to give or to do or to refrain from doing something directly to or for" the person claiming third-party beneficiary status, *Brunsell*, [467 Mich] at 298. [*Schmalfeldt*, 469 Mich at 428.]

Schmalfeldt, 469 Mich at 424 n 1. Likewise, in this case, plaintiffs initially stipulated to the dismissal without prejudice of TNT from the lawsuit, apparently declining, for the time being at least, to attempt to establish liability on the part of TNT.

Concluding that the plaintiff in that case was not entitled to claim third-party-beneficiary status, our Supreme Court further explained:

> Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under § 1405. *Koenig*, [460 Mich] at 680. Here, the contract primarily benefits the contracting parties because it defines and limits the circumstances under which the policy will cover medical expenses without a determination of fault. This agreement is between the contracting parties, and [the plaintiff] is only an incidental beneficiary without a right to sue for contract benefits. [*Schmalfeldt*, 469 Mich at 429.]

In this case, focusing on the form and meaning of the policy, we similarly conclude that the policy issued by Employers to TNT contains no promise by Employers to directly benefit plaintiffs' insureds within the meaning of MCL 600.1405. Plaintiffs' insureds, therefore, were not third-party beneficiaries under the policy. Because plaintiffs' insureds were neither insureds nor third-party beneficiaries under the policy, they had no right to seek to enforce the policy between TNT and Employers.

In so concluding, we emphasize that the inquiry here is not whether there was coverage under the policy for the damage to the property of plaintiffs' insureds; the question of coverage is a separate inquiry that a court need not reach unless it is determined that a claimant, in fact, has a right to seek enforcement of the policy. See *Shay*, 487 Mich at 665-667. Rather, the inquiry here is whether plaintiffs' insureds are members of a class (being either insureds or third-party beneficiaries) that empowers them to seek to enforce the policy. In this case, the clear and unambiguous language of the policy does not evidence an intent of

the parties to directly benefit plaintiffs' insureds.[7] We observe that "it is impossible to hold an insurance company liable for a risk it did not assume," *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014) (quotation marks, citation, and brackets omitted), and that the primary goal when interpreting an insurance policy is to honor the intent of the parties to that policy, *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008).

In this case, TNT and Employers entered into a contract for the purpose of insuring TNT, should TNT be found liable for payment of damages to the property of others that was under its care, custody, or control. The question whether coverage under the policy would be triggered if TNT were found liable for damage to the property of plaintiffs' insureds is not before us. Rather, plaintiffs seek to enforce the policy and trigger coverage under the policy between TNT and Employers regardless of whether TNT is liable and regardless of whether TNT wants the coverage. The issue thus before us is whether plaintiffs, by virtue of the subrogated rights of their insureds, have a right to enforce the contract between TNT and Employers.

We conclude that the policy in question does not establish plaintiffs' insureds as insureds under the policy, nor were plaintiffs' insureds third-party beneficiaries under the policy. As in *Schmalfeldt*, plaintiffs' insureds were, at best, members of a broad class whom the policy recognized as, in certain circumstances, potential recipients of incidental benefits from the policy. Accordingly, plaintiffs' insureds were incidental beneficiaries only, not qualifying for third-party status under MCL 600.1405. See *Schmalfeldt*, 469 Mich at

[7] In fact, the Loss Payment and Other Insurance provisions of the policy suggest an intent *not* to directly benefit plaintiffs' insureds.

429. Plaintiffs therefore have no right to seek to enforce the policy between TNT and Employers.

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

MURRAY, C.J., and TUKEL, J., concurred with GADOLA, J.

DELTA BUSINESS CENTER, LLC v DELTA CHARTER TOWNSHIP

Docket No. 343386. Submitted June 5, 2019, at Detroit. Decided June 20, 2019, at 9:05 a.m.

Delta Business Center, LLC (Delta Business Center) filed an action in the Oakland Circuit Court, seeking review of the State Tax Commission's denial of it application for an industrial facilities exemption certificate (IFEC) under the plant rehabilitation and industrial development districts act, MCL 207.551 *et seq*. Delta Business Center owned an industrial park in Delta Charter Township (the township) that it rented to tenants. The township agreed to approve Delta Business Center's request for an IFEC in exchange for Delta Business Center's agreement to invest money to improve the property. In accordance with MCL 207.557(1), the commission reviewed Delta Business Center's IFEC application. The commission ultimately denied the application, concluding that Delta Business Center did not qualify for the IFEC because although its tenants were engaged in one of the activities listed under the MCL 207.552(7) definition of "industrial property"—a necessary requirement, according to the commission, to be eligible for an IFEC—Delta Business Center was not engaged in those activities. Delta Business Center appealed the commission's decision, filing the Oakland Circuit Court action. The Department of Treasury intervened in the action, arguing that the commission's decision should be affirmed. The court, Denise Karen Langford-Morris, J., affirmed the commission's denial on different grounds, reasoning that for leased property to be considered industrial property for purposes of MCL 205.552(7), the lessee had to be liable for payment of the property taxes and furnish proof of that liability and concluding that because Delta Business Center provided no proof of its lessees' liability for property taxes, the commission correctly denied the application. Delta Business Center appealed.

The Court of Appeals *held*:

1. MCL 207.554(1) provides that local governmental units may establish plant rehabilitation districts and industrial development districts. After such districts are established, MCL 207.555(1) provides that the owner or lessee of a facility may file an application for an IFEC with the clerk of the local governmental unit that

established the plant rehabilitation district or industrial development district. Under MCL 207.557(1), the commission reviews a local governmental unit's grant of an IFEC; if the commission grants the application, the applicant receives a tax advantage. To qualify as a replacement facility under the act—a necessary requirement to qualify for an IFEC—an applicant's facility must, among other things, be used as an industrial property after it is renovated; thus, the commission must deny an IFEC application if an applicant's building does not constitute "industrial property" under the act. Under MCL 207.552(7), the definition of "industrial property" includes and lists numerous types of qualifying properties as well as the types that do not constitute industrial property; the definitional provision does not suggest that for property to be considered "industrial property" the applicant must engage in one of the listed activities. While industrial property may be owned or leased, the provision provides that in the case of leased property, the lessee must be liable for the payment of ad valorem property taxes and furnish proof of that liability for the leased property to be considered industrial property. As supported by the Legislature's purposeful amendment of the definition of "industrial property" to include language related to leased properties, the broad language of the provision indicates that the Legislature intended that in all cases in which an IFEC applicant seeks to have leased property classified as industrial property, the lessee must always be liable for the taxes. If the lessee must be liable for the property tax, then only the lessee may receive the exemption under the act; in other words, an individual or entity may claim the exemption under the act only if it is liable for the property tax. In this case, the commission correctly denied Delta Business Center's IFEC application because Delta was the lessor of the property—not the lessee—and it did not pay the ad valorem taxes on the property; accordingly, the property did not qualify as "industrial property" under the act and Delta Business Center was not eligible for the property-tax exemption.

2. Although MCL 207.555(1) allows Delta Business Center to file an IFEC application, the provision did not resolve whether it was entitled to the exemption; for that reason, MCL 207.555(1) was not dispositive of the case.

Affirmed.

1. TAXATION — PLANT REHABILITATION AND INDUSTRIAL DEVELOPMENT DISTRICTS ACT — INDUSTRIAL FACILITIES EXEMPTION CERTIFICATES — "INDUSTRIAL PROPERTY" — LESSEES OF PROPERTY.

MCL 207.555(1) provides that the owner or lessee of a facility may file an application for an industrial facilities exemption certificate

(IFEC); to qualify as a replacement facility under the act—a necessary requirement to qualify for an IFEC—an applicant's facility must, among other things, be used as an industrial property after it is renovated; under MCL 207.552(7), while the definition of "industrial property" provides that property may be owned or leased, in the case of leased property, the lessee must be liable for the payment of ad valorem property taxes and furnish proof of that liability for the leased property to be considered industrial property and for the lessee to be eligible for the exemption; only the lessee, not the lessor, is eligible for the IFEC when the lessee pays the property taxes (MCL 207.551 *et seq*.).

2. TAXATION — PLANT REHABILITATION AND INDUSTRIAL DEVELOPMENT DISTRICTS ACT — WORDS AND PHRASES — "INDUSTRIAL PROPERTY."

Under the plant rehabilitation and industrial development districts act, MCL 207.551 *et seq*., the definition of "industrial property" includes and lists numerous types of qualifying properties as well as the types that do not constitute industrial property; the definitional provision does not suggest that for property to be considered "industrial property" the applicant must engage in one of the listed activities (MCL 207.552(7)).

Foley & Lardner LLP (by *Jason Conti*) and *Law Offices of Aaron M. Fales, PC* (by *Aaron M. Fales*) for Delta Business Center, LLC.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Matthew B. Hodges*, Assistant Attorney General, for the Department of Treasury.

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

PER CURIAM. Petitioner, Delta Business Center, LLC (Delta), appeals as of right the trial court's opinion and order affirming a decision of the State Tax Commission (STC) denying Delta's application for a tax exemption under the plant rehabilitation and industrial development districts act (the PRIDDA), MCL 207.551 *et seq*. On appeal, we are asked to decide under what circumstances leased property can qualify as "industrial prop-

erty" under the PRIDDA. We conclude that for leased property to qualify as "industrial property" under the PRIDDA, a lessee must be liable for property taxes and must furnish proof of that liability. We further conclude that this means that a lessor cannot receive a tax exemption under the PRIDDA when the leased property must qualify as "industrial property." Because Delta is strictly a lessor of the property at issue and because that property must qualify as "industrial property" for Delta to receive its requested tax exemption, the STC correctly denied Delta's application. We affirm.

I. BACKGROUND

Under the PRIDDA, local governmental units may establish "plant rehabilitation districts" and "industrial development districts." MCL 207.554(1). After such a district is established, "the owner or lessee of a facility may file an application for an industrial facilities exemption certificate [IFEC] with the clerk of the local governmental unit that established the plant rehabilitation district or industrial development district." MCL 207.555(1). If the application is approved by the local governmental unit, the application is sent to the STC for review. MCL 207.557(1). If the STC grants the IFEC application, the applicant receives a tax advantage: in place of ad valorem taxes, an industrial facility tax is levied on the exempt property. MCL 207.561. If the STC had granted Delta's IFEC application, Delta's industrial facility tax for up to the next 12 years would have been calculated using the taxable value of the at-issue property in the year before the effective date of the IFEC, essentially freezing the taxable value of the property. MCL 207.564(1); MCL 207.566.

Delta is the owner of a 93,000-square-foot industrial park that it leases to tenants. The building on Delta's

property was originally intended for printing newspapers, but, by 2017, that use was no longer economically feasible. So in an agreement between respondent, Delta Charter Township (the Township), and Delta, the Township agreed to grant Delta a 10-year IFEC; in return, Delta agreed to invest $3,900,000 in the property.

After being approved by the Township, Delta's IFEC application was sent to the STC for review. For Delta to receive the IFEC that it requested, it had to establish, among other things, that its property would constitute "industrial property" under MCL 207.552(7) after it was renovated; the statutory provision provides a detailed explanation of all the activities that can be performed on a property for it to qualify as "industrial property." The STC interpreted MCL 207.552(7) as requiring that the IFEC applicant engage in one of the activities listed in that statute for the applicant to qualify for the exemption. Though Delta's tenants were allegedly engaging in listed activities, Delta itself was using the property for an unlisted activity—real estate development. The STC thus denied Delta's IFEC application, concluding that Delta "does not qualify for the exemption because it does not engage in any of the activities listed within the definition of industrial property as outlined in MCL 207.552."

Delta appealed in the circuit court.[1] The circuit court affirmed the STC's decision but on other grounds.[2] The

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[1] Under MCL 207.570, any party "aggrieved by the issuance or refusal to issue" an IFEC "may appeal from the finding and order of the" STC in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*. In cases like this, the APA allows an aggrieved party to appeal an agency's final decision in the circuit court. MCL 24.301.

[2] The Department of Treasury moved to intervene; the parties stipulated that the motion should be granted. The Township declined to file a brief in the circuit court and has likewise declined to file a brief on appeal.

trial court reasoned that for leased property to be considered "industrial property" under MCL 207.552(7), "the lessee must be liable for the payment of property taxes and must furnish proof of that liability."[3] The court concluded that because Delta "offered no proof of [its] lessees' liability for payment of property taxes," the STC was authorized by law to deny Delta's application.

Delta now appeals by right.

II. STANDARDS OF REVIEW

Delta appealed the STC's decision in accordance with the Administrative Procedures Act, MCL 24.201 *et seq*. Under that act, the circuit court was required to set aside the STC's decision if, among other reasons, it was in violation of a statute or was affected by a substantial and material error of law. MCL 24.306.

This Court reviews a circuit court's decision "to determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's findings." *Sterling Hts v Chrysler Group, LLC*, 309 Mich App 676, 681; 873 NW2d 342 (2015) (quotation marks and citation omitted). "This Court reviews de novo questions of statutory interpretation." *Id*.

III. ANALYSIS

On appeal, Delta argues that the STC's denial of Delta's IFEC application was a material error of law or otherwise violated the PRIDDA. We disagree.

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[3] MCL 207.552(7) states, in relevant part, "Industrial property may be owned or leased. However, in the case of leased property, the lessee is liable for payment of ad valorem property taxes and shall furnish proof of that liability."

"A court's primary task when interpreting a statute is to discern and give effect to the intent of the Legislature." *Tomra of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 299; 926 NW2d 259 (2018). This Court must "first consider the statutory language itself; if the language is unambiguous, we conclude that the Legislature must have intended the clearly expressed meaning and we enforce the statute as written." *Id*. Tax exemptions are disfavored, and they are, therefore, strictly construed against the taxpayer and in favor of the taxing unit. *Id*. at 296.

It is undisputed that for Delta to receive an IFEC, its building had to qualify as a "replacement facility" under the PRIDDA. A "replacement facility" must, among other things, be used as "industrial property" after it is renovated. See MCL 207.552(4)(a) and (b); see also *Orion Twp v State Tax Comm*, 195 Mich App 13, 16; 489 NW2d 120 (1992). Under MCL 207.559(2)(d), the STC "shall not grant" an IFEC application unless it relates to a "replacement facility within the meaning of this act," with exceptions not applicable here. Thus, the STC had to deny Delta's IFEC application if Delta's building would not constitute industrial property after it was renovated.

The STC concluded that Delta's building would not constitute industrial property—and therefore denied Delta's application—because Delta did "not engage in any of the activities listed within the definition of industrial property as outlined in MCL 207.552." The circuit court affirmed the STC's decision that Delta's building would not constitute "industrial property" but on other grounds. The circuit court believed that for leased property to qualify as industrial property, MCL 207.552(7) required that the lessee (1) be liable for the property tax and (2) furnish proof of that liability. And

because Delta had not provided proof that its lessees would be liable for the payment of property taxes, the circuit court concluded that Delta's leased property could not qualify as industrial property.

We will address the STC's and the circuit court's differing reasons for denying Delta's application, but we first address Delta's argument that MCL 207.555(1) dictates the outcome of this case. That statute provides, in relevant part, that "the owner or lessee of a facility may file an application for an [IFEC] . . . ." This statute establishes that as an owner of property, Delta was entitled to file an application requesting the IFEC. But the fact that Delta could file an IFEC application does not resolve whether Delta is *entitled* to an IFEC. MCL 207.555(1) is, therefore, not dispositive of the outcome of this case.

Turning to the STC's decision, MCL 207.552(7) defines "industrial property" as follows:

> "Industrial property" means land improvements, buildings, structures, and other real property, and machinery, equipment, furniture, and fixtures or any part or accessory whether completed or in the process of construction comprising an integrated whole, the primary purpose and use of which is the engaging in a high-technology activity, operation of a strategic response center, operation of a motorsports entertainment complex, operation of a logistical optimization center, operation of qualified commercial activity, operation of a major distribution and logistics facility, the manufacture of goods or materials, creation or synthesis of biodiesel fuel, or the processing of goods and materials by physical or chemical change; property acquired, constructed, altered, or installed due to the passage of proposal A in 1976; the operation of a hydro-electric dam by a private company other than a public utility; or agricultural processing facilities. Industrial property includes facilities related to a manufacturing operation under the same

ownership, including, but not limited to, office, engineering, research and development, warehousing, or parts distribution facilities. Industrial property also includes research and development laboratories of companies other than those companies that manufacture the products developed from their research activities and research development laboratories of a manufacturing company that are unrelated to the products of the company. For applications approved by the legislative body of a local governmental unit between June 30, 1999 and December 31, 2007, industrial property also includes an electric generating plant that is not owned by a local unit of government, including, but not limited to, an electric generating plant fueled by biomass. For an industrial development district created before July 1, 2010, industrial property also includes an electric generating plant that is fueled by biomass that is not owned by a unit of local government if the electric generating plant involves the reuse of a federal superfund site remediated by the United States environmental protection agency and an independent study has concluded that the electric generating plant would not have an adverse effect on wood supply of the area from which the wood supply of the electric generating plant would be derived. An electric generating plant described in the preceding sentence is presumed not to have an adverse impact on the wood supply of the area from which the wood supply of the electric generating plant would be derived if the company has a study funded by the United States department of energy and managed by the department of energy, labor, and economic growth that concludes that the electric generating plant will consume not more than 7.5% of the annual wood growth within a 60-mile radius of the electric generating plant. Industrial property also includes convention and trade centers in which construction begins not later than December 31, 2010 and is over 250,000 square feet in size or, if located in a county with a population of more than 750,000 and less than 1,100,000, is over 100,000 square feet in size or, if located in a county with a population of more than 26,000 and less than 28,000, is over 30,000 square feet in size.

> Industrial property also includes a federal reserve bank operating under 12 USC 341, located in a city with a population of 600,000 or more. Industrial property may be owned or leased. However, in the case of leased property, the lessee is liable for payment of ad valorem property taxes and shall furnish proof of that liability. For purposes of a local governmental unit that is a next Michigan development corporation, industrial property includes only property used in the operation of an eligible next Michigan business, as that term is defined in section 3 of the Michigan economic growth authority act, 1995 PA 24, MCL 207.803. Industrial property does not include any of the following:
>
> (a) Land.
>
> (b) Property of a public utility other than an electric generating plant that is not owned by a local unit of government as provided in this subsection.
>
> (c) Inventory.

Nowhere does this lengthy definition suggest that for property to be considered "industrial property," *the IFEC applicant* must engage in one of the activities listed. Thus, the STC's interpretation of MCL 207.552(7) improperly read a requirement into the statute that does not exist. See *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013) (explaining that it is inappropriate to "read into [a] statute a requirement that the Legislature has seen fit to omit").

But this does not necessarily entitle Delta to relief. The trial court upheld the STC's decision because it believed that MCL 207.552(7) places conditions on when leased property can be "industrial property" and that Delta's leased property did not satisfy those conditions.

In reaching its conclusion, the trial court relied on language in MCL 207.552(7) that states: "Industrial property may be owned or leased. However, in the case

of leased property, the lessee is liable for payment of ad valorem property taxes and shall furnish proof of that liability." Clearly, leased property can be industrial property. But the statute's unambiguous language places conditions on *when* leased property can be industrial property: for leased property to be considered "industrial property" under the PRIDDA, the lessee must be liable for the payment of ad valorem property taxes and must furnish proof of that liability. *Id*.

Delta contends that the requirements placed on lessees by MCL 207.552(7) are not relevant here because Delta, not its tenants, is seeking the exemption. Delta is correct that MCL 207.552(7) only imposes responsibilities on the lessee of industrial property. But this, in our opinion, is because the Legislature intended that only lessees receive an IFEC when the at-issue leased property must qualify as industrial property for the applicant to receive the exemption. MCL 207.552(7) uses the phrase "in the case of leased property." This language in no way restricts what follows. The Legislature's use of this broad language shows it intended that in *all* cases in which an IFEC applicant seeks to have leased property classified as "industrial property," the lessee must *always* be liable for property taxes. If a lessee must be liable for property tax, then only the lessee is able to receive the exemption under the PRIDDA;[4] the PRIDDA grants a property-tax exemption that an individual or entity can claim only if it is liable for property tax. See

[4] We recognize that there is no clear reason why the Legislature decided to allow only lessees of industrial property, not the lessor, to receive an IFEC. But whatever the reason, it is not this Court's role to question the Legislature's policy decision. See *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979) ("The responsibility for drawing lines in a society as complex as ours—of

Herman Brodsky Enterprises, Inc v State Tax Comm, 204 Mich App 376, 384; 522 NW2d 126 (1994) (holding that the owner of property "was not entitled to an exemption" under the PRIDDA because it had "placed responsibility for paying the ad valorem property taxes upon its tenants").

As Delta would have us read the phrase "in the case of leased property," the requirements that follow—that the lessee be liable for the property tax and furnish proof of that liability—are only applicable when the lessee seeks the exemption. In other words, Delta would have us read the phrase "in the case of leased property" to mean "in the case of leased property when the lessee seeks the IFEC" or something similar. If the Legislature had intended this latter result, it would have used language to make that intent clear. See *Kar v Nanda*, 291 Mich App 284, 291; 805 NW2d 609 (2011) (explaining that "it is well-settled that the Legislature is presumed to mean what it says in a statute").

Our interpretation of MCL 207.552(7) finds further support in the statute's history. When the PRIDDA was first enacted by 1974 PA 198, the definition of "industrial property" was found in MCL 207.552(6). The original definition was as follows:

> "Industrial property" means land improvements, buildings, structures, and other real property, whether leased or owned, and owned machinery, equipment, furniture, and fixtures or any part or accessory thereof whether completed or in the process of construction comprising an integrated whole, the primary purpose and use of which is the manufacture of goods or materials or the processing thereof by physical or chemical change. Industrial property shall not include any of the following:

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identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.").

(a) Land.

(b) Property of a public utility.

(c) Inventory. [MCL 207.552(6), as enacted by 1974 PA 198.]

This definition has undergone several changes throughout the years. Among other things, 1975 PA 302 removed the phrase "whether leased or owned" from the main paragraph. Thereafter, 1976 PA 224 added the following language in the last paragraph of the subsection:

> Industrial property may be owned or leased provided that, in the case of leased property, the lessee is liable for payment of ad valorem property taxes, and furnishes proof of that liability . . . . [MCL 207.552(6), as amended by 1976 PA 224.]

In 1981 PA 212, our Legislature deleted language from the provision that is not relevant to this appeal and slightly altered the relevant language to read as follows:

> Industrial property may be owned or leased if, in the case of leased property, the lessee is liable for payment of ad valorem property taxes and furnishes proof of that liability. [MCL 207.552(6), as amended by 1981 PA 212.]

With the exception of 1982 PA 417, in which the Legislature added a single comma after the word "if," the definition of "industrial property" was not altered again until 1999 PA 140, when the Legislature changed the language about leased property to its current form:

> Industrial property may be owned or leased. However, in the case of leased property, the lessee is liable for payment of ad valorem property taxes and shall furnish proof of that liability. [MCL 207.552(6), as amended by 1999 PA 140.]

Although the subsection under which "industrial property" is defined changes to MCL 207.552(7) with 2010 PA 273, these two sentences have remained unaltered in every subsequent amendment of the statute.[5]

Reviewing this history, the definition of "industrial property" as originally enacted did not differentiate between owned or leased property; industrial property was certain types of property that could be owned or leased. MCL 207.552(6), as enacted by 1974 PA 198. This changed one year later when the Legislature added requirements for when leased property could be deemed "industrial property": "Industrial property may be leased or owned provided that, in the case of leased property, the lessee is liable for payment of ad valorem property taxes, and furnishes proof of that liability . . . ." MCL 207.552(6), as amended by 1976 PA 224. It is presumed that these additions reflect a conscious decision by the Legislature to change the definition of "industrial property" when the at-issue property is leased. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("[A] change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."). That is, the Legislature purposefully changed the definition of "industrial property" to require that when a property is leased, the lessee must be liable for ad valorem property taxes and prove that liability to qualify for an IFEC. While the statute has undergone numerous amendments through the years, the requirements placed on leased property have been retained in every version of the statute since 1981. The

[5] See 2000 PA 247; 2002 PA 280; 2003 PA 5; 2004 PA 5; 2005 PA 118; 2005 PA 267; 2007 PA 12; 2007 PA 146; 2008 PA 170; 2008 PA 457; 2008 PA 581; 2009 PA 209; 2010 PA 273; 2011 PA 154.

Legislature's actions—changing the definition of "industrial property" and then retaining those changes—show that it intended leased property to qualify as "industrial property" only under certain circumstances: when the lessee is liable for ad valorem taxes and furnishes proof of that liability. And as explained, if the lessee must be liable for property taxes for leased property to qualify as "industrial property," then only the lessee of that property may receive an IFEC.[6] See *Herman Brodsky Enterprises*, 204 Mich App at 384.

In sum, we conclude that the Legislature intended for "industrial property" as used in the PRIDDA to include leased property only when "the lessee is liable for payment of ad valorem property taxes" and "furnish[es] proof of that liability." MCL 207.552(7). We further conclude that because the lessee must be liable for property taxes in order for the leased property to qualify as "industrial property," only the lessee of that property can receive the exemption under the PRIDDA.[7] Because (1) Delta's property must qualify as "industrial property" for Delta to receive the exemption, (2) Delta's

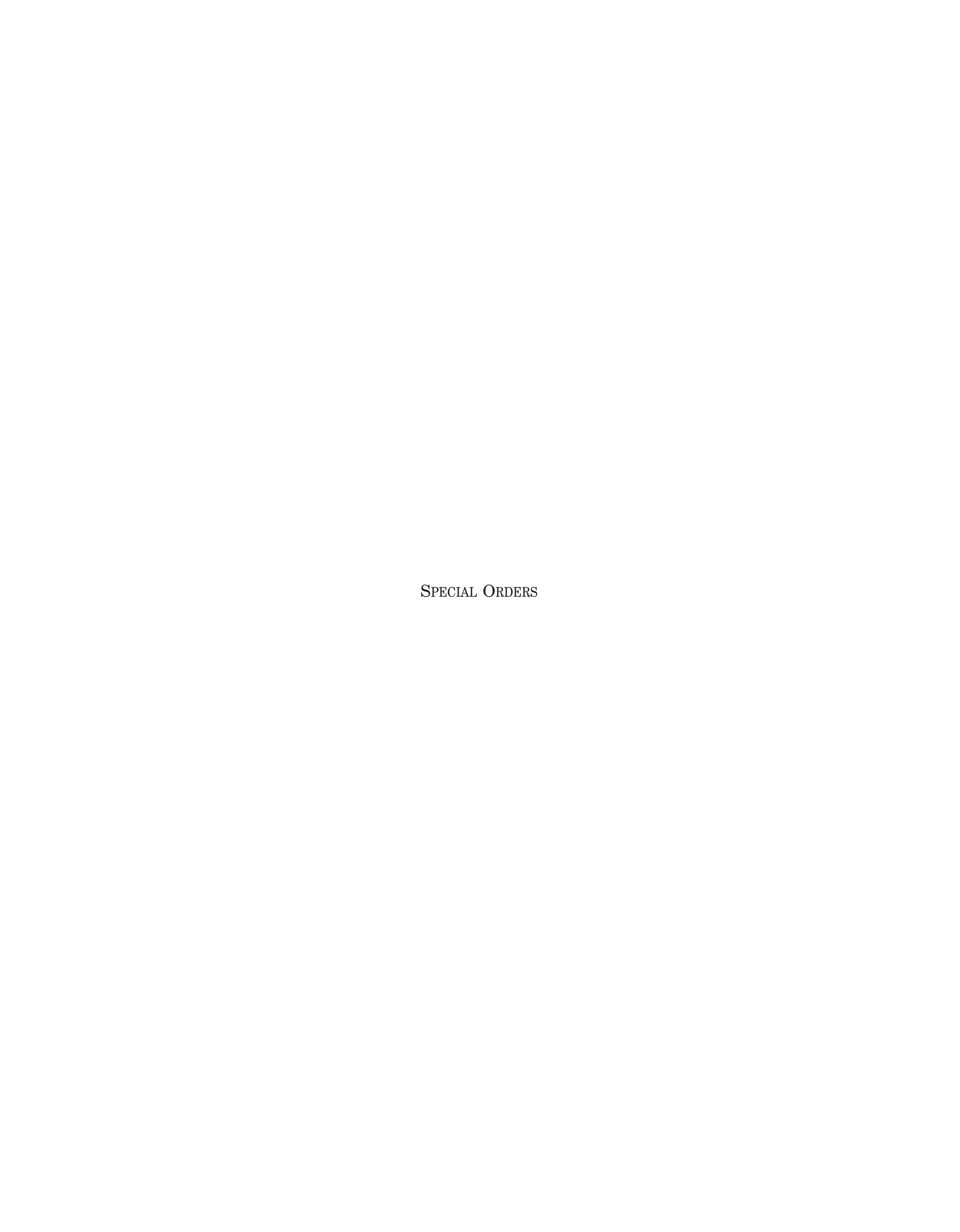
[6] Delta could argue that under MCL 207.555(1), it is still entitled to seek the exemption. Again, that statute provides the general proposition that an "owner or lessee of a facility may file an application" for an IFEC. MCL 207.555(1). That statute, however, says nothing about leased property, and we believe that our understanding of MCL 207.552(7) is entirely consistent with MCL 207.555(1). When property is not leased, the owner may seek the exemption. When property is leased, the lessee may seek the exemption. Thus, as MCL 207.555(1) contemplates, either an owner or lessee may apply for the exemption. But whether the exemption may be sought by an owner or a lessee in a particular case depends on whether the property is leased.

[7] It could be possible for an owner to lease part of its property and use the other part as "industrial property" under MCL 207.552(7). In such a situation, this opinion should not be construed as necessarily denying the owner—who is a lessor—the ability to receive an IFEC for the *unleased* portion of the property.

property is leased, and (3) Delta is strictly a lessor of its property, the STC properly denied Delta's IFEC application.

Affirmed.

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



Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered June 18, 2019:

PEOPLE v BROWN, Docket No. 339318. The Court orders that the published opinion issued in this matter on October 23, 2018 is hereby amended. The Court having found that defendant's counsel failed to send a copy of the opinion to defendant, as required by MCR 7.215(E)(2), the opinion is amended to indicate that the date of issuance of the opinion is June 18, 2019.

In all other respects, the opinion remains unchanged.

The clerk is directed to provide a copy of this order to the Supreme Court Reporter of Decisions for publication in the Michigan Appeals Reports.